

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEB 09 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMI LEIGH HAMILTON)
by and through her mother,)
HOLLY D. HAMILTON,)
Plaintiff,)

vs.)

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

Defendant.)

Case No. 99-CV-448-J ✓

ENTERED ON DOCKET

DATE FEB 10 2000

JUDGMENT

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

IT IS SO ORDERED.

Dated this 9th day of February, 2000.



Sam A. Joyner
United States Magistrate Judge

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

BETTY M. COX,

Plaintiff,

v.

INDEPENDENT SCHOOL DISTRICT
NO. I-001 OF TULSA COUNTY,

Defendant.

No. 99-CV-197-K ✓

ENTERED ON DOCKET
FEB 10 2000
DATE _____

FILED
FEB 09 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of Defendant's 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 Defendant and against the Plaintiff.

ORDERED this 8 day of February, 2000.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

BETTY M. COX,)
)
 Plaintiff,)
)
 vs.)
)
 INDEPENDENT SCHOOL DISTRICT)
 NO. I-001 OF TULSA COUNTY,)
)
 Defendant.)

FILED
FEB 09 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-197-K

ENTERED ON DOCKET-
FEB 10 2000
DATE _____

ORDER

Before the Court is the motion of the defendant for summary judgment. Plaintiff brought her complaint on February 24, 1999. Plaintiff alleged that at the relevant times she was a teacher employed by the Tulsa School District. She was first employed in 1976 and was assigned to Hawthorne Elementary School. In 1980, she was transferred from Hawthorne to Barnard Elementary School. In 1985, she was transferred from Barnard to Emerson Elementary School. In 1989, she was transferred from Emerson to Robertson Elementary School.

In 1995, plaintiff was informed she would be transferred from Robertson Elementary School to Madison Middle School. Plaintiff declined to report to Madison Middle School and sought and was granted a medical leave of absence for the 1995-96 school year. Plaintiff represented that she suffered from clinical depression. She sought and was granted medical leaves of absence for the 1996-97 and 1997-98 school years as well. Plaintiff was granted a third year's medical leave of absence notwithstanding the fact that the negotiated agreement between the Tulsa School District and the Tulsa Classroom Teachers Association specifically provided that a leave of absence for personal illness may be extended for only two school years.

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Prior to the beginning of the 1998-99 school year, plaintiff applied for a fourth year of medical leave. Her request was denied. She did not report to her assigned duty at the start of the 1998-99 school year. She filed the present action, alleging that she had been terminated without due process and in violation of the provisions of the Teacher Due Process Act of 1990. 70 O.S. §§ 6-101.20 et seq.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) F.R.Cv.P. In applying this standard, the Court views the evidence and draws reasonable inferences therefrom in a light most favorable to the non-moving party. See Kaul v. Stepan, 83 F.3d 1208, 1212 (10th Cir.1996).

All of plaintiff's federal law claims are brought pursuant to 42 U.S.C. §1983. Therefore, the two-year statute of limitation for personal injury actions, 12 O.S. §95(3), applies. See Beck v. City of Muskogee Police Dept., 195 F.3d 553, 557 (10th Cir.1999). Plaintiff contends that her 1980 transfer to Barnard and her 1989 transfer to Robertson were in retaliation for her exercise of First Amendment rights in protesting policy violations by administrators and participating in the teachers' union. These First Amendment claims are clearly barred by the two-year statute of limitation.

Plaintiff also contends that the proposed 1995 transfer from Robertson to Madison came about because she had identified herself as a person with a disability under the Americans with Disabilities Act ("ADA"). This claim is also barred by the state statute of limitation, borrowed because the ADA contains no limitation of its own. Further, plaintiff has not demonstrated that she has exhausted her administrative remedies. Such exhaustion is a prerequisite to bringing suit under

the ADA. See EEOC v. Wal-Mart Stores, Inc., 1999 WL 1244485 (10th Cir.).

Plaintiff also appears to base a "liberty" claim under the Fourteenth Amendment on the alleged slanderous remarks supposedly made about plaintiff at the August 9, 1995 meeting to address her grievance. This claim is also barred by the statute of limitations. To the extent the alleged slander is pleaded not as a constitutional "liberty" claim but as a state law tort claim, it is barred by plaintiff's failure to comply with the Governmental Tort Claims Act. 51 O.S. §§151 et seq. Plaintiff has not demonstrated that she ever gave the Tulsa School District the notice which the Act requires, and in such a case a plaintiff's right to sue expires after one year.

Plaintiff's principal claim is that she has been terminated from her employment without the requisite due process. Defendant's response is straightforward: plaintiff has not been terminated, but has rather never properly applied for reinstatement from her extended leave of absence. Plaintiff has not disputed that the Tulsa School District's Certified Employee Handbook, which includes agreements negotiated between the teachers' union and the School District, contains a provision which requires a physician's release stating the employee has sufficiently recovered to resume normal duties. Plaintiff has not disputed defendant's assertion that plaintiff never applied for reinstatement or submitted the requisite physician's release. Plaintiff has cited to no provision of state law which prohibits a School District in such circumstances from declining to grant another year's medical leave of absence. Such a decision is not equivalent to termination, for which notice and a hearing is required. Thus, plaintiff's claim on this ground fails as well.

In her response brief, plaintiff argues for the first time that a March 30, 1998 letter from Mary Howell (Director of Personnel for the School District), which mentioned plaintiff's option of requesting an extension of her medical leave, constituted an offer which was then accepted by

plaintiff, forming a contract. Defendant is correct that a breach of contract claim does not appear in the complaint and the time for amendment is long past. Further, the letter merely states that plaintiff may apply for an additional year of medical leave of absence. The letter does not preclude the defendant from denying the application, which it did. Plaintiff may not proceed on a breach of contract claim.

It is the Order of the Court that the motion of the defendant for summary judgment (#15) is hereby GRANTED.

SO ORDERED this 8 day of February, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

LEONARD A. PAGANO and)
DEBRA PAGANO,)

Plaintiffs,)

vs.)

THUMANN, INCORPORATED,)
a New Jersey corporation and)
GARY ROMANO,)

Defendants.)

ENTERED ON DOCKET
DATE FEB 10 2000

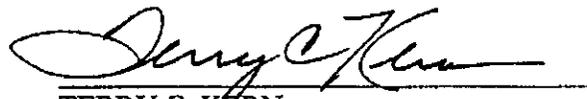
Case No.: 98 CV 0359K (M) ✓

FILED
FEB 09 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

On Joint Motion of all the parties pursuant to Rule 41(a)(1)(ii) and a confidential settlement agreement between the parties, it is hereby ordered that (i) all claims herein are dismissed with prejudice with each party to bear its own attorneys' fees and costs, and (ii) no party shall disclose the terms of the confidential settlement agreement to any third person except as expressly permitted by the confidential settlement agreement.

Dated this 8 day of February, 2000.


TERRY C. KERN
Chief United States District Judge

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

FILED
FEB 08 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BETTIE L. NEELY,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commission of)
Social Security Administration,)
)
Defendant.)

Case No. 99-CV-242-M ✓

ENTERED ON DOCKET
DATE FEB 10 2000

RULE 58 FINAL JUDGMENT

This action has come before the Court for consideration upon an unopposed Motion for Remand for Further Administrative Action. An Order remanding the case to the Commissioner has been entered.

The Court enters this Final Judgment under Fed. R. Civ. P. 58 remanding this case to the Commissioner for further administrative action.

THUS DONE AND SIGNED on this 8th day of Feb., 2000.

Frank H. McCarthy
Frank H. McCarthy
United States Magistrate Judge

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

FILED
FEB 08 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BETTIE L. NEELY,
Plaintiff,
v.
KENNETH S. APFEL, Commission of
Social Security Administration,
Defendant.

Case No. 99-CV-242-M ✓

ENTERED ON DOCKET
DATE FEB 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 obtain medical expert testimony from a board-certified cardiologist to assist in determining whether Plaintiff's cardiac impairment met or equaled any of the cardiac listings. The medical expert will also be asked to assist in determining the extent of any exertional or nonexertional restrictions imposed by Plaintiff's cardiac impairment. In addition, the ALJ will be asked to further evaluate Plaintiff's alleged mental impairment in accordance with the regulations, including completing a Psychiatric Review Technique Form.

THUS DONE AND SIGNED on this 8th day of Feb., 2000.

Frank H. McCarthy
Frank H. McCarthy
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 09 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEAN CUTTING,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL,)
 Commissioner, Social)
 Security Administration,)
)
 Defendant.)

Case No. 99-CV-373-J ✓

ENTERED ON DOCKET
DATE FEB 10 2000

ORDER

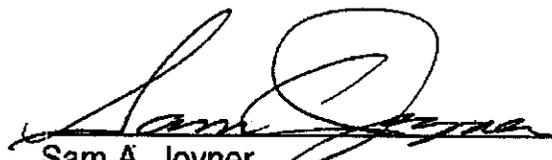
On December 28, 1999, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner for further action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on January 26, 2000, and the defendant's response filed on February 8, 2000 the parties have stipulated that an award in the amount of \$2,187.85 for attorney fees and \$9.16 in 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 \$2,187.85 and \$9.16 in costs. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social

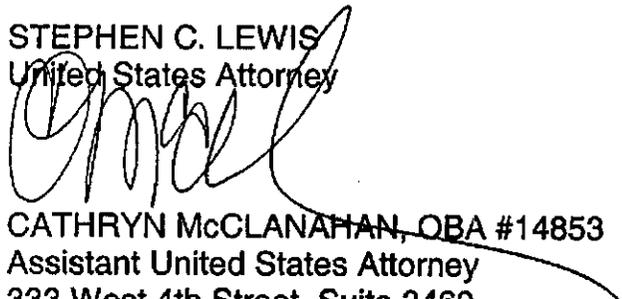
Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED this 9 day of February 2000.


Sam A. Joyner
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAMI LEIGH HAMILTON,
by and through her mother
and next friend,
HOLLY D. HAMILTON,

Plaintiff,

v.

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

Defendant.

FILED

FEB 09 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-448-J

ENTERED ON DOCKET
FEB 10 2000
DATE _____

ORDER

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

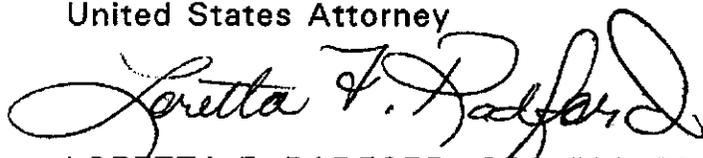
DATED this 9 day of February 2000.


SAM A. JOYNER
United States Magistrate Judge

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SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a large, looping initial "L".

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

21-00

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ONE 1992 CHEVROLET 3500)
 4-DOOR DUALY PICKUP TRUCK,)
 VIN #1GCHK34F0NE194813; et. al.)
)
 Defendants.)

ENTERED ON DOCKET
FEB 10 2000
DATE _____

CIVIL ACTION NO. 97-CV-507-K (J) ✓

FILED
FEB 09 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THIRD PARTIAL JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Third Partial Judgment of Forfeiture by Default as to this defendant vehicle ("default vehicle"):

One 1990 Chevrolet Z71 Silverado Pickup Truck,
VIN No 2GCFC24K2L1138799

and all entities and/or persons interested in the default vehicle, the Court finds as follows:

The verified Complaint for Forfeiture *In Rem* was filed in this action on the 27th day of May, 1997, alleging that the default vehicle were subject to forfeiture pursuant to 18 U.S.C. § 981, because they are proceeds or constitutes proceeds obtained directly or indirectly from a violation of 18 U.S.C. § 511 (altering or removing motor vehicle numbers); § 2321 (transporting stolen vehicles in interstate commerce); or § 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

Warrant of Arrest and Notice *In Rem* was issued on the 4th day of June 1997, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma

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for the seizure and arrest of the defendant vehicles and/or parts, trailer, and crusher and for publication in the Northern District of Oklahoma.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture *In Rem* and the Warrant of Arrest and Notice *In Rem* on the defendant vehicles on August 26, 1996.

On February 9, 1998, a Partial Judgment of Forfeiture was entered forfeiting the following described defendant vehicles to the United States of America for disposition according to law:

- a) One 1994 Chevrolet Silverado Suburban 1500, VIN 1GNEC16K4RJ426042:
- b) One 1990 Chevrolet C1500, Pickup Truck, VIN 1GCDC14K9LZ220862:
- c) One 1988 Chevrolet Silverado 1500 Pickup Truck, VIN 2GCFC29K4J1139085:
- d) One 1988 GMC Cab and Chassis Extended Cab Pickup Truck, VIN 1GTDC14K5JE534710:
- e) One 1996 Chevrolet Cab and Chassis Extended Cab Pickup Truck, VIN 1GCEC19R0VE101053:
- f) One White Z-71 Short Narrow Bed Pickup Truck Trailer, VIN Number Unknown:
- g) One Beckham Black Box Trailer, SN 1BTT2620XTAB12167;

On July 22, 1998, a Second Partial Judgment of Forfeiture was entered forfeiting the following described defendant vehicles to the United States of America for disposition according to law:

- a) One 1992 Chevrolet 3500 Dually Pickup Truck, VIN 1GCHK34F0NE194813;
- b) One 1993 Chevrolet C-10 Pickup Truck, VIN 1GCDCA4D6PZ134220;
- c) One 1989 Chevrolet One Ton Dually Pickup, VIN 2GCHK39N5K1148813;
- d) One 1984 Southwind Motorhome, outside manufacturer's identification number H037226S0805;

The following parties were determined to be the only individuals with possible standing to file a claim to the default vehicle, and, therefore the only individuals to be served with process in this action, and were served as follows:

- a) John Estes;
- c) State Farm Mutual Automobile Insurance Company.

State Farm Mutual Automobile Insurance Company filed its Claim on February 17, 1998, and subsequently filed its Answer on March 9, 1998, wherein State Farm claimed an interest in the following described vehicle:

One 1990 Chevrolet Z71 Silverado Pickup Truck,
VIN No 2GCFC24K2L1138799.

On November 2, 1999, State Farm Mutual Automobile Insurance Company, filed its Release of Claim, wherein it released its claim to the following described defendant vehicle, which is the vehicle which it had filed a claim and answer to:

One 1990 Chevrolet Z71 Silverado Pickup Truck,
VIN No 2GCFC24K2L1138799.

All persons and/or entities interested in the default vehicle were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and

Notice *In Rem*, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the default vehicle, and no persons or entities have plead or otherwise defended in this suit as to said default vehicle and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the default vehicle and all persons and/or entities interested therein, save and except State Farm Mutual Automobile Insurance Company, for which a Release of Claim was filed herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicles and/or parts, trailer, and crusher were located, on October 30, November 6 and 13, 1997, and in the Miami News-Record, Miami, Oklahoma, the county where the defendant vehicles were located, on October 30, November 6 and 13, 1997. Proof of Publication was filed December 30, 1997.

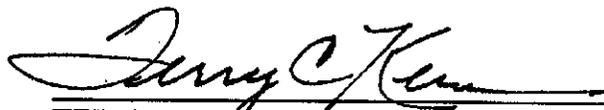
IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described default vehicle:

One 1990 Chevrolet Z71 Silverado Pickup Truck,
VIN No 2GCFC24K2L1138799

be, and it is hereby forfeited to the United States of America for disposition according to law.

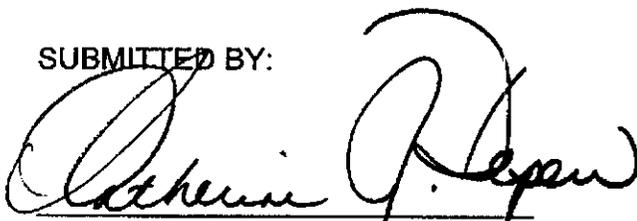
to law.

Entered this 9 day of February, 2000.



TERRY C. KERN
Chief Judge of the United States District Court for
the Northern District of Oklahoma

SUBMITTED BY:



CATHERINE J. DEPEW
Assistant United States Attorney

N:\udd\peaden\Forfeture\briscoe\3rd judgment - Judgment - Partial.wpd

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

MICROSOFT CORPORATION,
a Washington corporation,

Plaintiff,

v.

ALEX KARIMIAN, an individual, d/b/a DELTA
COMPUTER SYSTEMS; and ALEX
KARIMIAN, an individual,

Defendants.

ENTERED ON DOCKET

DATE FEB 10 2000

Case No. 99-CV-0751-K(E)

FILED

FEB 09 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**ORDER AND JUDGMENT GRANTING PLAINTIFF'S
APPLICATION FOR ENTRY OF DEFAULT JUDGMENT
AND PERMANENT INJUNCTION AGAINST DEFENDANTS**

Having considered Microsoft Corporation's ("Microsoft") Application for Entry of Default Judgment, Brief Support of Plaintiff Microsoft's Application for Entry of Default Judgment, the Declarations of William H. Hoch and Laurie Stein, the Original Complaint, and other papers in the Court's file in this matter,

THE COURT ENTERS THE FOLLOWING JUDGMENT:

1. Defendants Alex Karimian, an individual, d/b/a Delta Computer Systems ("Delta"), and Alex Karimian, an individual ("Karimian") (collectively "Defendants") are liable to Microsoft for willful copyright infringement of the following works:

- a. TX 4-687-920 ("Windows 98");
- b. TX 4-395-984 (Office Pro 97");
- c. TX 4-395-639 ("Access 97");
- d. TX 4-395-640 ("Excel 97");
- e. TX 4-395-686 ("Outlook 97")

- f. TX 4-395-685 ("PowerPoint 97");
- g. TX 4-395-687 ("Word 97").

2. Defendants are liable to Microsoft for willful trademark infringement under federal law, 15 U.S.C. § 1114 *et seq.*, resulting from their use in commerce of Microsoft's trade dress and use and imitation of the following Trademarks and/or Service Mark Registration Numbers:

- a. 1,200,236 ("MICROSOFT");
- b. 1,816,354 (WINDOWS FLAG LOGO);
- c. 1,872,264 ("WINDOWS");
- d. 1,815,350 (COLORED WINDOWS LOGO);
- e. 1,982,562 (PUZZLE PIECE LOGO) ; and
- f. 1,741,086 ("MICROSOFT ACCESS")

3. Defendants are liable to Microsoft for unfair competition under federal law, 15 U.S.C. § 1125, and under the laws of the State of Oklahoma, and under 78 Okla. Stat. 51 *et seq.*;

4. Microsoft is hereby awarded judgment against Defendants Delta and Karimian, jointly and severally, as follows:

a. Statutory Damages	\$740,000.00
b. Attorneys' Fees	\$ 937.50
c. Costs	\$ 297.40
Total Judgment	\$741,234.90

5. This judgment shall accrue interest, compounded annually, pursuant to 28 U.S.C. §1961.

6. Defendants shall be permanently enjoined from further infringing any of Microsoft's copyrights and trademarks. This Court contemporaneously issues a separate permanent injunction contemporaneously herewith.

IT IS SO ORDERED.

DATED: February 9, 2000


UNITED STATES DISTRICT COURT JUDGE

Approved:

William H. Hoch
WILLIAM G. PAUL, OBA # 6974
MACK J. MORGAN, III, OBA #6397
JOSEPH J. FERRETTI, OBA # 15231
WILLIAM H. HOCH, OBA # 15788
- Of the Firm -
CROWE & DUNLEVY
1800 Mid-America Tower
20 N. Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 272-5256 (FAX)

ATTORNEYS FOR PLAINTIFF
MICROSOFT CORPORATION

Lis Pendens), plus the costs of this action accrued and accruing, plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If Defendant, Drenda L. Jefferson, a single person, should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisal and to apply the proceeds to the payment of the costs of the sale and the Plaintiff's judgment. Any residue is to be paid to the Court Clerk to await further order of this Court.

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 9th day of February, 2000.

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

By 
Deputy

Order of Sale
Case No. Case No. 99-CV-0698-K (M) (Jefferson)
CDM:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 9 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)
)
Plaintiff,)
v.)

MICHELLE M. ARMSTEAD)
aka Michelle Armstead aka Michelle M. Malone;)
RONALD ARMSTEAD)
aka Ronald Dewayne Armstead;)
DONALD ARMSTEAD)
aka Donald Wayne Armstead, Jr.;)
TULSA DEVELOPMENT AUTHORITY)
OF TULSA;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS.)
Tulsa County, Oklahoma,)

Defendants.)

ENTERED ON DOCKET

~~DATE FEB 10 2000~~

CIVIL ACTION NO. 99-CV-0346-H (M)

ORDER OF SALE

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

On January 14, 2000, the United States of America recovered judgment in rem against the Defendant, Michelle M. Armstead aka Michelle Armstead aka Michelle M. Malone, in the above-styled action to enforce a mortgage lien upon the following described property:

Lot Five (5), Block Fifty-four (54), VALLEY VIEW ACRES
THIRD ADDITION to the City of Tulsa, Tulsa County, State
of Oklahoma according to the recorded plat thereof.

The amount of the in rem judgment is the sum of \$5,767.73, plus administrative charges in the amount of \$1,094.00, plus penalty charges in the amount of \$14.40, plus accrued interest in the amount of \$1,405.70 as of June 25,

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1998, plus interest accruing thereafter at the rate of 9 percent per annum until judgment, plus interest thereafter at the current legal rate of 4.545 percent per annum until fully paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If Defendant, Michelle M. Armstead aka Michelle Armstead aka Michelle M. Malone, should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisal and to apply the proceeds to the payment of the costs of the sale; the judgment of the Plaintiff, United States of America; and the judgment of the Defendant, Tulsa Development Authority of Tulsa. Any residue is to be paid to the Court Clerk to await further order of this Court.

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 9th day of February, 2000.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma
By Phil Lombardi
Deputy

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

F I L E D

FEB 09 2000 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GARY E. ELLIS,

Plaintiff,

v.

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

Defendant.

CASE NO. 99-CV-546-M

ENTERED ON DOCKET

DATE FEB 10 2000

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 9th day of Feb., 2000.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

MARK EDWARD CHMIEL,)
)
Petitioner,)
)
vs.)
)
REGINALD HINES, Warden,)
)
Respondent.)

FEB - 9 2000 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-481-K (M)

ENTERED ON DOCKET
DATE FEB 10 2000

JUDGMENT

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

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

SO ORDERED THIS 9 day of February, 2000.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

MARK EDWARD CHMIEL,)
)
 Petitioner,)
)
 vs.)
)
 REGINALD HINES, Warden,)
)
 Respondent.)

No. 99-CV-481-K (M)

FILED

FEB - 9 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE FEB 10 2000

ORDER

Before the Court in this habeas corpus action is Respondent's motion to dismiss petition for habeas corpus as time barred by the statute of limitations (#5). Petitioner has filed a response to the motion to dismiss (#8). Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition was not timely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

On November 8, 1993, Petitioner was convicted after entering a plea of guilty to Unlawful Delivery of Marijuana, After Former Conviction of a Felony, in Delaware County District Court, Case No. CF-93-287 (#6, "Judgment and Sentence on Plea of Guilty," attachment to Ex. A). He was sentenced to thirty (30) years, with fifteen (15) of those years to be served imprisoned and fifteen (15) years to be suspended. Petitioner did not move to withdraw his plea and did not otherwise perfect a direct appeal.

Respondent states that on January 11, 1999, Petitioner filed an application for post-

conviction relief in the state district court. See #6 at 1. On March 9, 1999, that court denied the requested relief (#6, attachment to Ex. A). Petitioner appealed to the Oklahoma Court of Criminal Appeals (id.) where the denial of post-conviction relief was affirmed on May 10, 1999 (#6, Ex. A).

The Court also notes that in his brief filed on post-conviction appeal (#6, attachment to Ex. A), Petitioner states that "he did in fact file a Petition for Habeas Corpus in the Hughes County District Court which was the County in which [Petitioner] was being held and residing at the time." Petitioner further states that his state petition was denied on November 30, 1998, and that the order denying relief was filed on December 9, 1998. Apparently, Petitioner did not appeal the denial of relief to the Oklahoma Court of Criminal Appeals. Neither Petitioner nor Respondent has provided any other information concerning Petitioner's state collateral action. Therefore, the Court cannot determine whether the claims asserted by Petitioner in his Hughes County action were related to the conviction and sentence challenged in the instant action. However, the Court takes judicial notice of the fact that Petitioner filed a petition for writ of mandamus in Hughes County District Court, Case No. CJ-98-125, on August 20, 1998, and that a journal entry of judgment was entered in that case on December 9, 1998.

On June 22, 1999, Petitioner filed the instant petition for writ of habeas corpus.

ANALYSIS

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

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

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

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

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

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

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

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

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

The Tenth Circuit Court of Appeals has also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies in § 2254 cases to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled during time spent pursuing state applications for post-conviction relief properly filed during the grace period.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Because Petitioner failed to perfect a direct appeal, his conviction became final ten (10) days after pronouncement of his Judgment and

Sentence, or on or about November 18, 1993. See Rule 4.2, *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw guilty plea within ten (10) days from the date of the pronouncement of the Judgment and Sentence in order to commence an appeal from any conviction of a plea of guilty). Therefore, Petitioner's conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Under Simmonds, 111 F.3d at 746, Petitioner had until April 23, 1997, to submit a timely petition for writ of habeas corpus.

Although the running of the limitations period would be tolled or suspended during the pendency of any post-conviction or other collateral proceeding with respect to the pertinent judgment or claim properly filed during the grace period, 28 U.S.C. § 2244(d)(2); Hoggro, 150 F.3d at 1226, Petitioner's post-conviction and collateral proceedings were filed in the state courts long after the grace period ended. A collateral petition filed in state court after the limitations period has expired no longer serves to toll the statute of limitations. Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y. 1998). As a result, the Court finds Petitioner's post-conviction and other collateral proceedings do not toll the limitations period in this case. Petitioner did not file his federal petition until June 22, 1999, more than two (2) years beyond the April 23, 1997 deadline. Therefore, absent a basis for either statutory or equitable tolling, this action is time-barred.

In his response to the motion to dismiss (#8), Petitioner argues that he is "a lay person and without full knowledge of the law . . . and that his rights were not at any time protected by his attorney of record at the time, as he never filed a Writ of Certiorari on behalf of the Petitioner." To the extent Petitioner attributes his untimeliness to deficient performance by his attorney, the record demonstrates that Petitioner did not assert a claim of ineffective assistance of counsel until January, 1999, more than five (5) years after his November, 1993 sentencing. The Court finds that Petitioner

could have asserted, through the exercise of due diligence, the claims he now pursues well before April of 1997 and the limitations period should not be extended. Furthermore, Petitioner's status as a "lay person and without full knowledge of the law" does not serve to excuse his untimeliness. See, e.g., Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir.1991) (cause and prejudice standard applies to pro se prisoner's lack of awareness and training on legal issues); Saahir v. Collins, 956 F.2d 115, 118 (5th Cir.1992) (actual knowledge of legal issues not required by *pro se* petitioner). Therefore, the Court declines to excuse Petitioner's untimely filing and concludes Respondent's motion to dismiss should be granted.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period, see Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998); United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss for failure to file within the limitations period should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus as time barred by the statute of limitations (#5) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 9 day of February, 2000.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

ENTERED ON DOCKET

DATE FEB 10 2000

STEPHENS PROPERTY COMPANY,)

Plaintiff,)

v.)

FLEET NATIONAL BANK,)

Defendant.)

No. 97-C-44-K /

FILED

FEB 09 2000 *AR*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of Defendant's 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 Defendant and against the Plaintiff.

ORDERED this 9 day of February, 2000.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

STEPHENS PROPERTY COMPANY,)
)
 Plaintiff,)
)
vs.)
)
FLEET NATIONAL BANK,)
)
)
 Defendant.)

ENTERED ON DOCKET
DATE FEB 10 2000

No. 97-C-44-K /

F I L E D

FEB 09 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court are the cross-motions of the parties for summary judgment. Plaintiff is the owner of \$46,000,000.00 in aggregate principal amount of certain bonds which were issued pursuant to a Trust Indenture under which the defendant served as Trustee. The bonds were issued as a part of an elaborate financing plan put in place with respect to the Mid-Continent Tower in Tulsa, Oklahoma. In this action, plaintiff seeks an accounting from the Trustee and also seeks to recover from the Trustee for various acts and omissions by which the Trustee allegedly violated the Trust Indenture.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) F.R.Cv.P. In applying this standard, the Court views the evidence and draws reasonable inferences therefrom in a light most favorable to the non-moving party.

See Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir.1996).

The defendant has raised two fundamental defenses, lack of standing on plaintiff's part and expiration of applicable statutes of limitation, which will be addressed first. If these arguments are found to be well-taken, a discussion of the merits is rendered unnecessary. Pursuant to the terms of the Indenture, two series of bonds were issued, Series A and Series B. (A principal argument of plaintiff is that defendant as Trustee improperly favored the Series A class of trust beneficiaries over the Series B class). A default under the Indenture occurred with respect to the series A bonds in December, 1987. From approximately December 1, 1987 through September 1, 1989 the defaulting party (Reading & Bates Corporation) conducted negotiations with its creditors. The Series A bondholders were represented by their own counsel. The underwriter of the bonds (Paine Webber Incorporated) retained a law firm to represent the interests of the holders of the Series B bonds.

On or about September 1, 1989, negotiations with Reading & Bates resulted in various formal agreements that restructured Reading & Bates, which agreements were consummated and effective as of January 1, 1988. According to a letter from the Indenture Trustee to Series B bondholders, dated August 9, 1991, distributions were made to the Series A bondholders under the Indenture and applied toward accrued but unpaid interest on the Series A bonds. The holders of the Series B bonds received no distribution from the proceeds of the Restructuring Agreement, a fact which the plaintiff admits it knew prior to its purchase of the bonds. No Series B bondholder made any attempt to stop the restructuring of Reading & Bates or to seek guidance from a court as to rights under the Indenture.

On August 1, 1996, plaintiff purchased Series B bonds, discounted because of their default status. In 1997, plaintiff filed suit in the United States District Court for the Northern District of Oklahoma against Paine Webber and Greater Southwestern Funding Corporation (the

obligor on the bonds), seeking recovery on the bonds. Judge Burrage of this Court granted summary judgment for the defendants, ruling that “SPC purchased its Series B bonds in 1996, nine years after their default. They were purchased for a fraction of their accreted value and were purchased with full knowledge of the default and the foreclosure in state court. SPC has failed to present evidence of unjust or unfair conduct.” (97-CV-45-BU, Defendant’s Exhibit T).

Defendant asserts that plaintiff lacks standing, rejecting plaintiff’s argument that its purchase of the bonds permits it to “step into the shoes” of its predecessors. The Court agrees. Under federal law, claims for violations of securities law do not automatically travel with the security upon its sale. In re Nucorp Energy Sec. Litig., 772 F.2d 1486, 1490 (9th Cir.1985); Lowry v. Baltimore & Ohio R.R. Co., 707 F.2d 721, 729 (3d Cir.1983). See also Bluebird Partner, L.P. v. First Fidelity Bank, 896 F.Supp. 152 (S.D.N.Y.1995).

In response, plaintiff contends that it is granted standing by Indenture Section 3.07, which deals with transfer of bonds, and the entitlement of a transferee to principal and interest . This argument was rejected by Judge Burrage in 97-CV-45, a ruling from which plaintiff did not appeal. Upon review, the Court agrees with Judge Burrage’s ruling. Indeed, the reasoning applies even more strongly in the case at bar. Defendant is not the obligor on the bonds; plaintiff is seeking damages for alleged breach of the Indenture. Nothing in Indenture Section 3.07 provides such rights. Plaintiff has also cited to various passages from treatises on the law of trusts. However, those treatises appear uniformly to exclude the employment of a trust as a security device, such as the Indenture here. In sum, the Court finds no basis for plaintiff’s standing.

Assuming arguendo that plaintiff has standing, the Court finds that all its claims (whether federal or state) are barred by the statute of limitations. The statute of limitations on contract

actions in Oklahoma is five years. 12 O.S. §95(1). The record reflects that the conduct complained of by plaintiff took place from 1988 to 1991. The present lawsuit was filed January 15, 1997. The limitations period for any alleged breach of the Indenture has expired. Similarly, the statutory period in Oklahoma for a negligence claim or a claim of breach of fiduciary duty is two years. 12 O.S. §95(3). Once again, the applicable period has expired. The record also reflects no basis for equitable tolling of the limitations period.

Because the issues of standing and statute of limitation are dispositive, the Court will not discuss the factually complex merits of the case.

It is the Order of the Court that the motion of the plaintiff for partial summary judgment (#45) is hereby DENIED. The motion of the defendant for summary judgment (#42) is hereby GRANTED. All other pending motions are declared moot.

IT IS SO ORDERED THIS 9 DAY OF FEBRUARY, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

WASATCH ENERGY CORPORATION,)
)
Plaintiff,)
)
v.)
)
NM&O OPERATING COMPANY,)
)
Defendant.)

No. 98-CV-0168-K(J)

ENTERED ON DOCKET
DATE FEB 10 2000

FILED

FEB 09 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

This matter comes before the Court on the Joint Motion for Dismissal with Prejudice filed by the parties in the captioned action. The Court finds that the Motion should be granted.

IT IS THEREFORE ORDERED that this action is dismissed with prejudice to its refiling, with each party to bear its own costs, expenses, and attorneys' fees.

It is so ordered this 8 day of February, 2000.


THE HONORABLE TERRY C. KERN
Chief United States District Judge

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

KEVIN TRAYLOR,)
)
)
Plaintiffs,)
)
)
vs.)
)
KWIKSET CORPORATION,)
)
)
)
Defendant.)

ENTERED ON DOCKET

DATE FEB 10 2000

No. 98-CV-469-K

FILED

FEB 09 2000 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

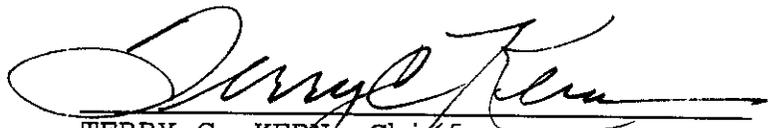
JUDGMENT

This action came on for consideration before the Court and jury, the Honorable Terry C. Kern, Chief District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS THEREFORE ORDERED that judgment is entered in favor of plaintiff on his promissory estoppel claim and that the Plaintiff Kevin Traylor recover of the Defendant Kwikset Corporation the sum of 8,500.00, with interest thereon at the rate provided by law.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant and against the plaintiff as to plaintiff's Title VII claims.

ORDERED this 8 day of February, 2000.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB -8 2000

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

**ARTHUR D. DAVIS,
SSN: 545-68-5511,**

Plaintiff,

v.

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

Defendant.

Case No. 97-CV-0986-EA

ENTERED ON DOCKET

DATE FEB 09 2000

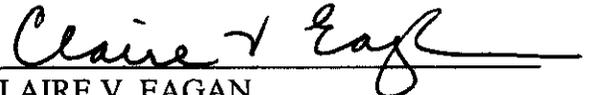
ORDER

The undersigned hereby orders that the Order dated December 29, 1999 (Docket #18) be amended/corrected at page two, paragraph one, as follows:

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.

The Order date is to remain unchanged. The Judgment (Docket #19) stands as entered.

IT IS SO ORDERED this 8th day of February, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

FILED
FEB 8 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SCOTT CROSSLAND,)
)
Plaintiff,)
)
vs.)
)
PROFESSIONAL INVESTMENTS, INC.,)
AND AMF BOWLING CENTERS,)
)
Defendants.)

Case No. 99-CV-626-BU ✓

ENTERED ON DOCKET
DATE **FEB 09 2000**

ORDER

On December 14, 1999, Plaintiff was directed to file proof of service on the remaining Defendant, Professional Investments, Inc.¹, and to file a motion for default judgment within ten (10) days. Plaintiff failed to comply with the Court's directive. Subsequently, on January 14, 2000, this Court entered an order directing Plaintiff to comply with Rule 55, Fed. R. Civ. P., in regard to Defendant, Professional Investments, Inc., by January 21, 2000. In the order, the Court advised Plaintiff that failure to comply with the order would result in a dismissal of the action without prejudice for failure to prosecute.

Upon review of the record, it now appears that Plaintiff has filed proof of service. Such proof of service was filed on January 20, 2000. However, Plaintiff has not complied with Rule 55, Fed. R. Civ. P., in regard to Defendant, Professional Investments, Inc.,

¹ The action against Defendant, AMF Bowling Centers, was previously dismissed pursuant to a stipulation of dismissal on October 22, 1999.

12

as ordered by the Court on January 14, 2000. Therefore, the Court finds that Plaintiff's action should be dismissed without prejudice for failure to prosecute the action against the remaining Defendant, Professional Investments, Inc.

Accordingly, Plaintiff's action against Defendant, Professional Investments, Inc., is **DISMISSED WITHOUT PREJUDICE**.

ENTERED THIS 8th day of February, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

F I L E D

FEB - 8 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

BILLIE GREEN,)

Plaintiff,)

vs.)

R. L. POLK COMPANY,)

Defendant.)

Case No. 99-C-24-B(E)

ENTERED ON DOCKET

DATE **FEB 09 2000**

ORDER

Comes on for consideration Defendant's Motion to Dismiss (Docket #4) and the Court finds the same shall be granted.

Defendant urges Plaintiff's Pro Se Complaint was not filed within 90 days as required by the right to sue letter issued by the EEOC. The letter is dated October 8, 1998 and the Complaint was filed January 8, 1999, two days out of time. Further, the Court notes January 6, 1999 was a Wednesday. No additional time could therefore be added for the deadline falling on a weekend or holiday. Additionally, Plaintiff did not serve summons within 120 days as required by Fed. R. Civ. Pro. 4(m).

Plaintiff, a pro se plaintiff, did not file a response to the Motion to Dismiss as required by N.D. LR 7.1 C. and the motion was technically deemed confessed at that time. Plaintiff appeared at case management conference on December 17, 1999 and the Court advised her at that time of the consequences of failing to respond to motions filed with the Court, allowed her 20 days within which to obtain counsel or file a pro se appearance and 10 additional days within which to file a response to the motion to dismiss. On December 17, 1999, Plaintiff was approximately

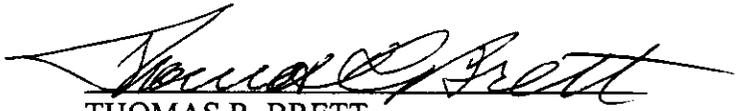
three months out of time with her response.

Plaintiff filed a response pro se on January 18, 2000 in which she asks the Court to forgive her ignorance of the law and allow her case to proceed because she was the victim of racial discrimination but does not otherwise provide any authority under which this Court might allow her case to proceed.

The Court has discretion to allow summons to be issued and served beyond the 120 day limitation for good cause shown but does not have discretion to extend the time within which the Complaint must be brought. Plaintiff's ignorance of the law does not provide a basis for this Court to proceed in light of the untimely-filed Complaint. The Complaint having been filed out of time, Plaintiff is barred from pursuing her claim. *Peete v. American Standard Graphic*, 885 F.2d 331 (6th Cir. 1989).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss (Docket #4) is granted.

DONE THIS 8th DAY OF FEBRUARY, 2000.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 07 2000

Phil Lombardi, Clérk
U.S. DISTRICT COURT

GAY SCOTT HEARN,

Plaintiff,

vs.

FURNITURE FACTORY OUTLET, INC. and
GARY MASNER,

Defendants.

Case No. 99-CV-891-K(J)

ENTERED ON DOCKET

DATE FEB 09 2000

REPORT AND RECOMMENDATION

The following motions are now before the Court:

1. Defendants' Motion to Dismiss, [Doc. No. 6]; and
2. Plaintiff's Motion to Strike Defendants' Motion to Dismiss, [Doc. No. 8].

These motions have been referred to the undersigned for a report and recommendation pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The undersigned offers this Report and for the reasons stated herein recommends that Plaintiff's motion to strike be **DENIED** and that Defendants' motion to dismiss be **GRANTED** in part and **DENIED** in part.

I. PLAINTIFF'S MOTION TO STRIKE

Plaintiff moves to strike Defendants' motion to dismiss because it was filed by Phillip J. Milligan, who she believes is not admitted to practice before this Court. Plaintiff is correct that at the time Defendants' motion to dismiss was filed, Mr. Milligan was not admitted to practice before this Court. Mr. Milligan filed his application for admission on the same date he filed Defendants' motion to dismiss (i.e., November 10, 1999). Mr. Milligan's application was granted and he was admitted to practice before this Court on November 18, 1999, two days after Plaintiff filed her motion to strike Defendants' motion to dismiss. Given that Mr. Milligan has now been admitted, the undersigned finds no reason to strike Defendants' motion to dismiss. Mr. Milligan should, however, had himself admitted prior to filing a dispositive motion in this case.

To date, Defendants have not complied with N.D. LR 83.3(K), which requires that resident counsel enter an appearance in all cases before the Court. Mr. Milligan, Defendants' counsel, is a resident of Arkansas, not Oklahoma. Defendants must insure that an attorney who is a resident of Oklahoma enters an appearance on their behalf. Resident counsel must file an entry of appearance within 15 days from the date this Report and Recommendation is filed. The undersigned finds no prejudice to Plaintiff in considering Defendants' motion to dismiss absent resident counsel. Thus, the undersigned finds no reason to strike Defendants' motion to dismiss for failure to comply with N.D. LR 83.3(K)'s resident counsel requirement.

II. DEFENDANTS' MOTION TO DISMISS

A. SUMMARY OF CLAIMS ASSERTED BY PLAINTIFF

During the relevant time period, Plaintiff was employed by Defendant Furniture Factory Outlet, Inc. ("FFO") as a salesperson at FFO's store in Bartlesville, Oklahoma. Defendant Gary Masner was also employed by FFO in Bartlesville, and he was Plaintiff's supervisor at the Bartlesville store.

Plaintiff asserts the following claims against FFO:

Federal Claim

1. First Claim for Relief -- sexual harassment by Defendant Masner in violation of Title VII for which Defendant FFO is vicariously liable;

State Claims

2. Third Claim for Relief -- Defendant FFO is vicariously liable for the intentional torts committed by its employee Defendant Masner against Plaintiff;
3. Fourth Claim for Relief -- wrongful discharge in violation of Oklahoma's expressed public policy; and
4. Fifth Claim for Relief -- FFO negligently supervised Defendant Masner and this negligence caused Plaintiff's harm.

Plaintiff asserts the following claims against Defendant Gary Masner:

Federal Claim

1. Sixth Claim for Relief -- Defendant Masner's conduct violates the Gender-Motivated Violence Act, which is that portion of the Violence Against Women Act which permits a civil cause of action against those who commit a crime of violence motivated by gender; and

State Claim

2. Second Claim for Relief -- assault and battery.

Defendants' motion to dismiss is directed primarily at the federal claims. Defendants argue that Plaintiff's Complaint fails to state federal claims upon which relief can be granted. Defendants argue that if the federal claims are dismissed, the pendent state claims must be dismissed so they can be re-filed in state court.

B. RULE 12(b)(6) STANDARDS

The purpose of a motion to dismiss is to test the sufficiency of the complaint, not decide the merits of a case. Dismissal of a cause of action for failure to state a claim is appropriate only where it appears beyond a doubt that the plaintiff can prove no set of facts in support of her theory of recovery or where an issue of law is dispositive. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Neitzke v. Williams, 490 U.S. 319, 326 (1989); Fuller v. Norton, 86 F.3d 1016, 1020 (10th Cir. 1996). All well-pled facts in the pleadings, as opposed to conclusory allegations, are to be accepted as true. The pleadings are to be liberally construed, and all reasonable inferences which can be drawn from the well-pled facts are to be viewed in favor of the plaintiff. Jojola v. Chavez, 55 F.3d 488, 494 n.8 (10th Cir. 1995). The issue is not whether the plaintiff will ultimately prevail, but whether she is entitled to offer evidence to support her claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

C. WELL-PLED ALLEGATIONS IN PLAINTIFF'S COMPLAINT

Plaintiff's Complaint contains the following well-pled allegations, which the Court must take as true for purposes of Defendants' motion to dismiss.

1. Plaintiff was hired by FFO in February 1998 to work in FFO's Bartlesville, Oklahoma store as a salesperson.
2. Plaintiff's direct supervisor at FFO's Bartlesville store was Defendant Masner.
3. Defendant Masner consumed drugs and alcohol while working at the Bartlesville store, and he permitted other employees to do so while they were working at the Bartlesville store.
4. Defendant Masner touched Plaintiff's breasts and body without her consent and Defendant Masner raped Plaintiff at the Bartlesville store (i.e., had non-consensual sexual intercourse with her) in May 1998.
5. Defendant Masner stole sales commissions from Plaintiff in part because Plaintiff would not have sex with Mr. Masner.
6. Defendant Masner instructed one of Plaintiff's co-employees to sexually harass Plaintiff.
7. Plaintiff complained to Defendant Masner, her supervisor, about his sexual harassment of her.
8. Defendant Masner's harassing conduct was intentionally designed to force Plaintiff to resign.
9. Defendant Masner's conduct created a hostile, abusive and intimidating work environment which caused Plaintiff severe emotional distress and affected her job performance.
10. Plaintiff resigned (i.e., was constructively discharged by FFO) on June 20, 1998.

**D. THE WELL-PLED ALLEGATIONS IN PLAINTIFF'S COMPLAINT STATE
A TITLE VII SEXUAL HARASSMENT CLAIM AGAINST FURNITURE
FACTORY OUTLET, INC.**

FFO argues that Plaintiff's Complaint fails to state a Title VII sexual harassment claim against it because the Complaint "makes no factual statement or allegations that [FFO] was given notice of the alleged conduct of its employee and Plaintiff's immediate supervisor, Gary Masner." Doc. No. 7, p. 2. FFO also argues that "[f]or an employer to be [vicariously] liable under Title 7, the employer must be guilty of its own negligence as a cause of the harassment." Id. at pp. 4-5. FFO cites the United States Supreme Court's decision in Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998). The undersigned finds neither of FFO's arguments persuasive. FFO misunderstands and misinterprets the Supreme Court's decisions in Ellerth and Faragher v. City of Boca Raton, 118 S. Ct. 2275 775 (1998) regarding vicarious liability of employers for sexual harassment by supervisory personnel.

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex" 42 U.S.C. § 2000e-2(a)(1). The term employer is defined by the Act to include the employer and its agents. 42 U.S.C. § 2000e(b). The Supreme Court has, therefore, historically used agency principles to interpret the scope of employer liability for violations of Title VII. Ellerth, 118 S. Ct. 2265.

Title VII is violated when an employee is subjected to sexual harassment which is so severe or pervasive as to alter the conditions of the employee's employment and create an abusive working environment. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). To be actionable under Title VII, a sexually objectionable work environment must be objectively and subjectively objectionable. That is, the work environment must be such that a reasonable person would find it to be hostile or abusive, and the victim must have in fact perceived the environment as hostile or abusive. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993). The Supreme Court has directed district courts to determine whether an environment is actionably hostile or abusive by looking at all of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 23. Simple teasing, offhand comments and isolated incidents will not generally amount to discriminatory changes in the terms and conditions of employment. Faragher, 118 S. Ct. at 2283. This standard is designed to insure that Title VII does not become a "general civility code." Id. (citing Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998, 1002 (1998)).

FFO does not argue that Plaintiff has failed to allege a sufficiently abusive or hostile work environment to state an actionable Title VII claim. Plaintiff has clearly alleged facts, which if established, would be sufficient to satisfy the Harris test. The conduct alleged by Plaintiff to have been committed by Defendant Masner (i.e., sexual assault, battery and rape) is certainly more than an offhand comment or mere teasing.

A jury could certainly find that the environment created by Mr. Masner's alleged conduct was both objectively and subjectively hostile and abusive. What FFO argues is that even if Defendant Masner did all that Plaintiff alleges he did, FFO cannot be liable for his conduct, and that is the precise issue addressed by the Supreme Court in Ellerth and Faragher.

In Ellerth and Faragher the Supreme Court had to decide under what circumstances an employer like FFO could be held liable when a supervisor creates an actionable hostile work environment. The Court had to determine whether employers could be held vicariously liable for the supervisor's conduct or whether the victim would have to show the employer was independently culpable (i.e., negligent). In Ellerth, the Supreme Court stated its purpose as follows:

We decide whether, under Title VII of the Civil Rights Act of 1964 . . . an employee who refuses the unwelcome advances and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions.

Ellerth, 118 S. Ct. at 2262. The Supreme Court answered this question affirmatively.

In Ellerth and Faragher, the Supreme Court held that an employer is vicariously liable for a supervisor's sexually harassing conduct. To recover from her employer for sexual harassment by a supervisor, an employee is not required to demonstrate that the employer was itself culpable. Under agency principles, the supervisor's acts are deemed to be the employer's acts and the employer is vicariously liable for the supervisor's acts. Ellerth, 118 S. Ct. at 2270; and Faragher, 118 S. Ct. at 2292-93.

The employer does, however, have an affirmative defense based on the actions it took to prevent the harassment and the reasonableness of the victim's efforts to take advantage of the employer's preventative or corrective actions. The Supreme Court stated its holding in Ellerth and Faragher as follows:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 118 S. Ct. at 2270; and Faragher, 118 S. Ct. at 2292-93.

FFO is clearly wrong when it argues that Plaintiff must allege that FFO was itself negligent before she can recover from FFO under Title VII. Pursuant to Ellerth and Faragher, FFO is vicariously liable for Defendant Masner's conduct as Plaintiff's supervisor. Plaintiff need not, therefore, allege any culpable conduct by FFO separate and apart from Defendant Masner's conduct. Masner's conduct as Plaintiff's supervisor is FFO's conduct for purposes of Title VII. FFO would, of course be liable if in fact it was negligent in connection with Defendant Masner, and the Supreme Court has recognized negligence as an independent basis for holding an employer liable under Title VII. Vicarious liability for a supervisor's conduct is, however, an

independent basis upon which to hold an employer liable. Negligence is sufficient to confer liability, but not required. Faragher, 118 S. Ct. at 2284.

FFO is also clearly wrong when it argues that liability under Title VII hinges on whether it had prior notice of Defendant's Masner's conduct. Again, notice is not required because Masner's conduct is, for purposes of Title VII, FFO's conduct. As part of her *prima facie* Title VII sexual harassment claim against FFO, Plaintiff is not required to allege prior notice by FFO. Notice may be relevant to FFO's affirmative defense, but Plaintiff is not required to negate the elements of an affirmative defense as part of her *prima facie* case.

The undersigned is compelled to admonish Defendant's counsel for his citation and reliance on Harrison v. Eddy, 112 F.3d 1437 (10th Cir. 1997). Harrison was decided before the Supreme Court's pronouncements in Ellerth and Faragher. Harrison's holdings are, therefore, of questionable value absent an attempt by counsel to square them with Ellerth and Faragher. More importantly, however, Harrison was specifically reversed by the Supreme Court and remanded in light of Ellerth and Faragher. The Tenth Circuit considered the issues in Harrison in light of Ellerth and Faragher and issued a new opinion on remand which is entirely consistent with the above discussion. See Harrison II, 158 F.3d 1371 (10th Cir. 1998). Counsel for Defendant cites Harrison I without informing the Court about any of the case's subsequent history. Counsel has come dangerously close to running afoul of N.D. LR 83.2(A) and Oklahoma Rule of Professional Conduct 3.3(a)(3), 5 Okla. Stat., Ch. 1, App. 3A.

Plaintiff's reliance on this Court's opinion by Judge Sven Erik Holmes in Henderson v. Whirlpool Corp., 17 F. Supp. 2d 1238 (N.D. Okla. 1998) is also misplaced. Henderson involved an action for sexual harassment by the plaintiff's co-worker, not the plaintiff's supervisor. Employers are not vicariously liable for the actions of co-workers, as opposed to supervisors. Employers are liable for sexual harassment by a plaintiff's co-worker only if the employer was in some way culpable in the way it dealt with the situation (i.e., negligent). This case involves alleged sexual harassment by Plaintiff's supervisor, not one of her co-employees. Henderson is, therefore, not applicable.

Defendants also rely on Seymore v. Shawver & Sons, Inc., 111 F.3d 794 (10th Cir. 1997) and Adler v. Wal-Mart Stores, Inc., 144 F.3d 644 (10th Cir. 1998). Both of these cases were decided prior to Ellerth and Faragher. To the extent the holdings in these cases are in conflict with the above discussion, the undersigned finds them to no longer be controlling precedent in light of the Supreme Court's decision in Ellerth and Faragher.

The undersigned finds that the well-pled allegations in Plaintiff's Complaint state a Title VII sexual harassment claim against Furniture Factory Outlet, Inc. Consequently, the undersigned recommends that FFO's motion to dismiss be denied.

E. THE WELL-PLED ALLEGATIONS IN PLAINTIFF'S COMPLAINT DO NOT STATE A GMVA CLAIM AGAINST DEFENDANT MASNER.

The Gender-Motivated Violence Act ("GMVA"), which is the civil liability portion of the Violence Against Women Act ("VAWA"), provides as follows:

- (a) **Purpose** -- Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.
- (b) **Right to be free from crimes of violence** -- All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).
- (c) **Cause of action** -- A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.
- (d) **Definitions** -- For purposes of this section--
 - (1) the term "**crime of violence motivated by gender**" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and
 - (2) the term "**crime of violence**" means --
 - (A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18,^{1/} whether or not those acts have actually

^{1/} Section 16 of Title 18 of the United States Code provides as follows:

The term "crime of violence" means --

(continued...)

resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

(e) **Limitation and procedures**

(1) **Limitation** -- Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d) of this section).

(2) **No prior criminal action** -- Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section.

(3) **Concurrent jurisdiction** -- The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this part.

(4) **Supplemental jurisdiction** -- Neither section 1367 of Title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.

42 U.S.C. § 13981.

^{1/} (...continued)

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

As the Tenth Circuit did in McCann v. Rosquist, 185 F.3d 1113, 1121 (10th Cir. 1999), the undersigned notes that the constitutionality of Congress' exercise of power in enacting the GMVA has been seriously challenged. To date, the Fourth Circuit is the only Court of Appeals to have addressed the constitutionality of § 13981(c), and it has declared the statute to be an unconstitutional exercise of Congress' commerce and Fourteenth Amendment powers. The Supreme Court granted *certiorari* on September 28, 1999 to review the Fourth Circuit's decision, but no opinion has yet been rendered by the Supreme Court. See Brzonkala v. Virginia Polytechnic Institute and State University, 169 F.3d 820 (4th Cir. 1999) (*en banc*), cert. granted sub nom., U.S. v. Morrison, 120 S. Ct. 11 (1999).^{2/} The following district courts have, however, upheld the constitutionality of the GMVA as a valid exercise of Congress' commerce power. See Liu v. Striuli, 36 F. Supp.2d 452 (D.R.I. 1999); Mattison v. Click Corp. of America, Inc., 1998 WL 32597 (E.D. Pa. Jan. 27, 1998); Ziegler v. Ziegler, 28 F. Supp. 2d 601 (E.D. Wash. 1998); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), rev'd on other grounds, 134 F.3d 1339 (8th Cir. 1998) (reversing for failure to state a claim under the GMVA and avoiding constitutional issue); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997); Crisonino v. New York City Housing

^{2/} See also, Lisa A. Carroll, Women's Powerless Tool: How Congress Overreached the Constitution with the Civil Rights Remedy of the Violence Against Women Act, 30 John Marshall L.R. 803 (1997); Johanna R. Shargel, In Defense of the Civil Rights Remedy of the Violence Against Women Act, 106 Yale L.J. 1849 (1997); and Danielle M. Houck, VAWA after Lopez: Reconsidering Congressional Power under the Fourteenth Amendment in Light of Brzonkala v. Virginia Polytechnic and State University, 31 U.C. Davis L. Rev. 625 (1998).

Authority, 985 F. Supp. 385 (S.D.N.Y. 1997); and Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996). In their motion to dismiss, Defendants do not attack the constitutionality of the GMVA. Consequently, the undersigned will not address the constitutionality of the GMVA in this Report and Recommendation.

From the text of the GMVA, the following three elements can be established as the *prima facie* elements Plaintiff must allege to state a civil rights cause of action under § 13981(c):

Defendant:

1. Must have committed a felony under state or federal law;
2. The felony must qualify as a crime of violence under 18 U.S.C. § 16. That is, the felony must either
 - a. have as an element the use, attempted use or threatened use of physical force against the victim; or
 - b. by its nature include a substantial risk that physical force would be used against the victim by the perpetrator in the course of committing the felony; and
3. The perpetrator must have committed the felonious conduct because of the victim's gender or on the basis of the victim's gender, and at least in part because he had an animus based on the victim's gender.

See, e.g., Rosquist, 185 F.3d at 1115.

Defendant Masner argues that Plaintiff's Complaint fails to allege facts which would satisfy any of the elements of a GMVA claim under § 13981(c). In particular, Mr. Masner argues that Plaintiff does not identify a specific felony which she believes

to have been committed here. Plaintiff does allege rape in her Complaint, but because she does not cite to a specific federal or state felony statute, Mr. Masner argues that she has not met elements one or two. Mr. Masner also argues that even if Plaintiff can identify a felony statute that satisfies the first two elements of § 13981(c), Plaintiff has pled no facts which would establish the third element -- that Defendant Masner's conduct was based on Plaintiff's gender and motivated in part by an animus based on Plaintiff's gender.

1. Rape Is A Felony Under Oklahoma Law Which Can Satisfy the First Two Elements of A Civil Rights Action Under § 13981(c).

Plaintiff does not cite to the specific statute upon which she relies to establish her GMVA civil rights claim. Plaintiff does, however, allege in her Complaint that she was raped (i.e., forced to have non-consensual sexual intercourse) by Defendant Masner. The undersigned recommends that Plaintiff be required to amend her Complaint to allege specifically upon which felony statute she is relying. Defendant Masner is entitled to know on what felony statute Plaintiff is attempting to bottom her GMVA civil rights claim. See Fed. R. Civ. P. 8(a), and Braden v. Piggly Wiggly, 4 F. Supp. 2d 1357, 1360-61 (M.D. Ala. 1998).

For purposes of this Report and Recommendation only, the undersigned will assume that Plaintiff will amend her Complaint and base her GMVA civil rights claim on a violation of 21 Okla. Stat. § 1111, which defines rape in Oklahoma. In Oklahoma, rape is a felony. See 21 Okla. Stat. §§ 1115 and 1116. Element one of

§ 13981 would, therefore, be established if Plaintiff amends her Complaint to allege a violation of § 1111.

Oklahoma defines rape as "an act of sexual intercourse involving vaginal or anal penetration accomplished with a . . . female who is not the spouse of the perpetrator . . . where force or violence is used or threatened, accompanied by apparent power of execution to the victim" 21 Okla. Stat. § 1111. In her amended complaint, Plaintiff must allege facts which establish a violation of § 1111. That is, Plaintiff will have to allege that (1) she is not the spouse of Defendant Masner, (2) there was an act of sexual intercourse between her and Defendant Masner that resulted in either vaginal or anal penetration, and (3) that Defendant Masner used or threatened to use force or violence against Plaintiff and that Defendant Masner had the apparent power to use force.

The definition of rape in § 1111 has as an element the use or threatened use of physical force against the victim. Given this fact, § 1111 qualifies as a "crime of violence" under 18 U.S.C. § 16(a). Element two of § 13981 would, therefore, be established if Plaintiff amends her Complaint to allege a violation of § 1111. See 42 U.S.C. § 13981(d)(2)(A) and 18 U.S.C. § 16(a).

Pursuant to the Tenth Circuit's holding in Rosquist, § 1111 also qualifies as a "crime of violence" under 18 U.S.C. § 16(b). In Rosquist, the Tenth Circuit was asked to determine whether a sexual abuse statute, which the plaintiff was using as the predicate for her GMVA claim, constituted a crime of violence within the meaning of 18 U.S.C. § 16. Unlike § 1111, the sexual abuse statute at issue in Rosquist did not

have as an element the use or threatened use of force. The Court was required to determine, therefore, whether the offense outlined in the sexual abuse statute by its nature involved a substantial risk that physical force would be used in the commission of the offense (i.e., whether the offense qualified under 18 U.S.C. § 16(b)). The court concluded that "nonconsensual physical sexual abuse implicates substantial risk of physical force, even when unaccompanied by rape, bodily injury, or extreme forms of coercion." Rosquist, 185 F.3d at 1121. One can conclude from this holding that even absent a specific "use of force element" that would satisfy 18 U.S.C. § 16(a), the Tenth Circuit would find that a rape offense by its nature implicates a substantial risk of physical force sufficient to satisfy 18 U.S.C. § 16(b). Thus, even if § 1111 did not satisfy § 16(a), it would clearly satisfy § 16(b) applying the analysis in Rosquist.

If Plaintiff amends her Complaint to allege a violation of 21 Okla. Stat. § 1111, she will have alleged a felony that qualifies as a crime of violence under 18 U.S.C. § 16. Alleging a violation of § 1111 would, therefore, establish the first two elements of a *prima facie* case under the GMVA.

2. Rape Is a Felony Under Oklahoma Law Which Can Satisfy the Third Element of A Civil Rights Action Under § 13981(c).

The GMVA does not cover "random acts of violence unrelated to gender" or "acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender" 42 U.S.C. § 13981(e)(1). Congress specifically limited GMVA claims to "crime[s] of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender"

Id. at § 13981(d)(1). Plaintiff's Complaint must, therefore, contain allegations sufficient to establish that Defendant Masner raped her because of her gender, and that Mr. Masner carried out the rape, at least in part, because of his animus against Plaintiff's gender.

Defendant Masner argues that Plaintiff's Complaint contains no allegation that he committed the alleged rape because of Plaintiff's gender and that he committed the rape in part because he had an animus based on Plaintiff's gender. In her response brief, Plaintiff does not address Defendant's argument. Instead, she relies exclusively on the Tenth Circuit's decision in Rosquist. The third element of § 13981(c) -- gender motivation and animus -- was not, however, at issue in Rosquist. Rosquist addressed itself only to the second element of a claim under § 13981(c) -- whether the felony at issue qualified under 18 U.S.C. § 16.

In Rosquist, the defendant did not appeal the district court's conclusion that his conduct was motivated by the plaintiff's gender. The Tenth Circuit found, therefore, that it was undisputed that the defendant's conduct was motivated by gender. The court then proceeded to a discussion of 18 U.S.C. § 16. Rosquist, 185 F.3d at 1115. Thus, the Tenth Circuit's opinion in Rosquist provides no support for Plaintiff regarding the sufficiency of her allegations in connection with the third element of a GMVA civil rights claim.

Congress expressed its rationale for specifically addressing violence based on gender as follows:

Whether the [crime of violence] is motivated by racial bias, ethnic bias, or gender bias, the results are often the same. The victims of such violence are reduced to symbols of hatred; they are chosen not because of who they are as individuals but because of their class status. The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated.

S. Rep. No. 103-138, at 49 (1993). Gender bias is to be determined from the totality of the circumstances surrounding an event, and it can be proven from circumstantial as well as direct evidence. Id. at 52. Courts may look to the "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; absence of other apparent motive (battery without robbery, for example); [and] common sense." Id. at 52 n. 61.

The undersigned acknowledges that it can be particularly difficult to separate crimes of violence from crimes of violence motivated by gender. Here, the felony offense upon which Plaintiff predicates her GMVA claim is rape. Congress did not designate rape as a *per se* crime of violence motivated by gender. The undersigned finds, however, that the cases where the crime of rape would not be motivated by will be rare. Anisimov v. Lake, 982 F. Supp. 531, 541 (N.D. Ill. 1997). The undersigned finds that the allegations in Plaintiff's Complaint that Defendant Masner touched her breasts and body without consent, stole sales commissions from her because she would not have sex with him and ultimately raped her are sufficient to

meet the minimal requirements of pleading gender animus. Id. See also Doe v. Hartz, 970 F. Supp. 1375, 1405-1409 (N.D. Iowa 1997), rev'd on other grounds, 134 F.3d 1339 (8th Cir. 1998) (discussing GMVA's legislative history and finding that allegations of sexual assault and sexual exploitation are crimes motivated by gender).

To satisfy the third requirement of a GMVA claim, the defendant's conduct need only be due in part to gender animus. Allegations of unwanted or unwelcome sexual advances are sufficient to meet the requirement that a plaintiff allege that a defendant targeted her because of her gender.

[B]ecause unwanted or unwelcome sexual advances may be demeaning and belittling, and may reasonably be inferred to be intended to have that purpose or to relegate another to an inferior status, even if the advances were also intended to satisfy the actor's sexual desires, the allegations of the "animus" element here are sufficient.

Doe, 970 F. Supp. at 1408.

If Plaintiff amends her Complaint to allege a violation of 21 Okla. Stat. § 1111, she will have alleged a crime of violence motivated at least in part by gender animus. Alleging a violation of § 1111 would, therefore, establish all of the elements of a *prima facie* GMVA claim under 42 U.S.C. § 13981(c).

F. PLAINTIFF'S STATE LAW CLAIMS

Defendant argues that if the Court dismisses the federal claims in this case, it must dismiss the state claims as well. The undersigned has recommended dismissal without prejudice of only one of the federal claims in this case.

The undersigned finds that Court has jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367, which provides in relevant part as follows;

- (a) Except as provided in subsections (b) [relating to diversity cases] and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

- (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-
 - (1) the claim raises a novel or complex issue of State law,
 - (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
 - (3) the district court has dismissed all claims over which it has original jurisdiction, or
 - (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367.

The Court has original jurisdiction over the Title VII claim which is adequately pled by Plaintiff. The undersigned finds that Plaintiff's state law claims are so related to the Title VII claim that they form part of the same case or controversy under Article

Ill of the United States Constitution. Thus, the Court has supplemental jurisdiction over Plaintiff's state law claims pursuant to § 1367(a).

Defendant's major premise – that if the Court dismissed the federal claims in this case it must also dismiss the state claims – is incorrect. The Court is never required to dismiss a claim over which it has supplemental jurisdiction. Rather, the Court may exercise its discretion under § 1367(c) and dismiss claims over which it has supplemental jurisdiction. Other than dismissal of all federal claims, which has not occurred, Defendant has not offered any reason why the Court should exercise its discretion to dismiss the state claims under § 1367(c). Consequently, the undersigned finds no basis upon which to dismiss Plaintiff's state claims.

RECOMMENDATION

The undersigned recommends that Plaintiff's motion to strike Defendant's motion to dismiss be **DENIED**. [Doc. No. 8]. Defendants must, however, obtain local counsel within 15 days from the date this Report and Recommendation is filed.

The undersigned recommends that Defendants' motion to dismiss Plaintiff's Title VII claim be **DENIED**. [Doc. No. 8]. Plaintiff has stated a valid Title VII claim for vicarious liability against Defendant FFO based on the hostile work environment allegedly created by Plaintiff's supervisor, Defendant Masner.

The undersigned recommends that Defendants' motion to dismiss Plaintiff's GMVA claim be **GRANTED**. [Doc. No. 8]. The undersigned also recommends that Plaintiff be given leave to amend her Complaint to allege the particular felony statute

upon which she predicates her GMVA claim. If Plaintiff amends her Complaint to allege a violation of 21 Okla. Stat. § 1111, Plaintiff will have alleged a crime of violence motivated by gender animus sufficient to state a claim under 42 U.S.C. § 13981(c).

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 his/her 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 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 any of the factual or legal findings in this Report and Recommendation that are 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 7 day of February 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

9 Day of Feb, 2000. 24 --

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

GRISHAM FARM PRODUCTS, INC.,)
a Missouri corporation,)

Plaintiff,)

vs.)

AMERICAN DAIRY AND FOOD)
CONSULTING LABORATORIES, INC.,)
a Colorado corporation, d/b/a IMAC)
INTERNATIONAL MEDIA AND)
CULTURES and MALI REDDY,)
an individual,)

Defendants.)

ENTERED ON DOCKET
DATE FEB 09 2000

Case No. 98 CV 875 H (M)

FILED

FEB 7 2000

CLERK OF DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Now on this 4TH day of FEBRUARY, 2000, this matter came on before this Honorable Court, the parties having filed their Joint Stipulation of Dismissal With Prejudice. This Honorable Court finds that the above-captioned case should be dismissed with prejudice.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the above-captioned case is dismissed with prejudice.


SVEN ERIK HOLMES,
UNITED STATES DISTRICT JUDGE

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

JANET McKINNEY,)
)
Plaintiff,)
)
vs.)
)
)
UNITED STATES POSTAL SERVICE;)
TWILA NOLAN, OWCP Specialist,)
)
Defendants.)

ENTERED ON DOCKET

DATE FEB 09 2000

99-CV-289-H(M)

FEB 7 2000 SA

ORDER

This matter is before the Court on the Court's September 21, 1999 order for a joint case management plan. The Court held a status hearing on this matter on January 21, 2000. Plaintiff has failed to submit a case management plan, and, though given proper notice, she also failed to appear at the status hearing. Accordingly, the Court hereby dismisses her case, without prejudice, for failure to prosecute.

IT IS SO ORDERED.

This 4TH day of February, 2000.


Syer Erik Holmes
United States District Judge

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

FILED

FEB 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PHILLIP W. KNAPP,
Plaintiff,

v.

Case No.98 CV 0642H(D) ✓

TULSA COUNTY RURAL WATER
DISTRICT #3, an Oklahoma
Corporation,

Defendant.

FILED ON DOCKET
DATE FEB 08 2000

STIPULATION OF DISMISSAL WITH PREJUDICE

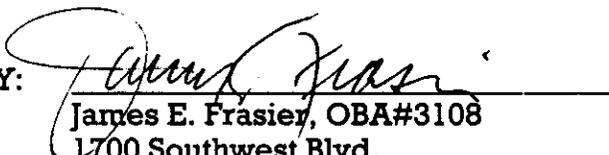
COME NOW Plaintiff and Defendant, heretofore having reached a settlement agreement in this cause of action, and pursuant to Federal Rules of Civil Procedure 41(a)(1), stipulate to the dismissal with prejudice of the above styled and numbered cause.

BY:



Mark A. Mitchell, OBA#17321
Robert Rode Law Firm
324 South Main, Suite 600
Tulsa, OK 74103
918/599-8880
FAX No.: 918/599-8316
Attorney for Plaintiff

BY:



James E. Frasier, OBA#3108
1700 Southwest Blvd.
P. O. Box 799
Tulsa, Oklahoma 74101
918/584-4724
FAX No.: 918/583-5637
Attorney for Defendant

015

41

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

FILED

FEB 8 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LOUISE CRAIG)

Plaintiff,)

v.)

TULSA AUTO COLLECTION)

Defendant.)

ENTERED ON DOCKET

DATE FEB 08 2000

Case No. 99-CV-0867-B(M)

JOINT STIPULATION OF DISMISSAL

DATE
ENTERED ON DOCKET

The Plaintiff and the Defendant jointly stipulate to dismiss Plaintiff's Fair Labor Standards Act claim with prejudice and to dismiss Plaintiff's Breach of Contract/Promissory Estoppel claim without prejudice



R. SCOTT SCROGGS
THE SCROGGS LAW FIRM
403 S. Cheyenne, Suite 1100
Tulsa, Oklahoma 74103
(918) 582-9339

ATTORNEY FOR PLAINTIFF



W. KIRK TURNER
NEWTON, O'CONNOR, TURNER &
AUER
2700 NationsBank Center
15 West 6th Street
Tulsa, Oklahoma 74119
(918) 587-0101

ATTORNEY FOR DEFENDANT

Handwritten mark

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Handwritten mark

CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 1st day of February, 2000, a true and correct copy of the above and foregoing document was mailed via U. S. Mail, with proper postage prepaid thereon to:

J. Ronald Petrikin
Nancy E. Vaughn
Conner & Winters
15 East Fifth Street
Suite 3700
Tulsa, Oklahoma 74103-4344

Wanda Harden

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

LEONARD A. PAGANO and)
DEBRA PAGANO,)
)
Plaintiffs,)
)
vs.)
)
THUMANN, INCORPORATED,)
a New Jersey corporation and)
GARY ROMANO,)
)
Defendants.)

Case No.: 98 CV 0359K (M)

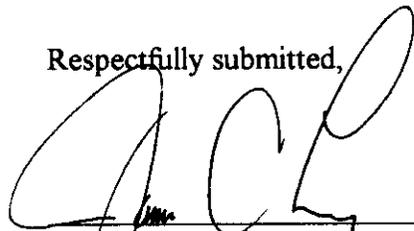
FILED
FEB 4 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
FEB 04 2000
DATE _____

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1)(ii) and a confidential settlement entered into by the parties, all parties hereto hereby stipulate that the attached Order of Dismissal may be entered in this action.

Respectfully submitted,



James C. Lang, OBA #3218
Brian S. Gaskill, OBA #3278
D. Michael McBride III, OBA #15431
Speed Lang, P.C.
2300 Williams Center Tower II
Two West Second Street
Tulsa, OK 74103-3136
(918) 583-3145
(918) 582-0410 (fax)

ATTORNEYS FOR PLAINTIFFS

mt

117

05

John Henry Rule

Oliver S. Howard, OBA #4403
John Henry Rule, OBA #7824
Gene C. Buzzard, OBA #1396

Gable & Gotwals
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103-4217
(918) 595-4800
(918) 595-4990 (fax)

-and-

William Uscher
Uscher, Quiat, Uscher & Russo
401 Hackensack Avenue
Hackensack, New Jersey 07601
(201) 342-7100
(201) 342-1810 (fax)

**ATTORNEYS FOR DEFENDANT
THUMANN, INCORPORATED**



CARADIO (GARY) ROMANO

DEFENDANT

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

LEONARD A. PAGANO and)
DEBRA PAGANO,)
)
Plaintiffs,)
)
vs.)
)
THUMANN, INCORPORATED,)
a New Jersey corporation and)
GARY ROMANO,)
)
Defendants.)

Case No.: 98 CV 0359K (M)

ORDER OF DISMISSAL

On Joint Motion of all the parties pursuant to Rule 41(a)(1)(ii) and a confidential settlement agreement between the parties, it is hereby ordered that (i) all claims herein are dismissed with prejudice with each party to bear its own attorneys' fees and costs, and (ii) no party shall disclose the terms of the confidential settlement agreement to any third person except as expressly permitted by the confidential settlement agreement.

Dated this _____ day of January, 2000.

TERRY C. KERN
Chief United States District Judge

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

FILED

FEB 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TOM'S FOODS, INC.,)

Plaintiff,)

vs.)

No. 99-CV-706-E (M) ✓

SILVERADO FOODS, INC., an Oklahoma)

Corporation, and Lawrence D. Field,)

Defendants.)

ENTERED ON DOCKET
DATE **FEB 04 2000**

ADMINISTRATIVE CLOSING ORDER

Now before the Court is the Ninth Unopposed Application for Extension of Time to Answer of the Defendants Silverado Foods, Inc., and Lawrence D. Field.

The Court has been advised by counsel that this action is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 45 days that settlement has not been completed and further litigation is necessary. In light of the administrative closing, the Ninth Unopposed Applications for Extension of Time to Answer are Denied as Moot.

ORDERED this 3RD day of February, 2000.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

42

FILED

FEB - 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

GEORGE REEDY and CAMILLA REEDY,)

Plaintiffs,)

vs)

JOHN MARION BRUCE, JR., and)

B & C TRANSPORTATION,)

Defendants.)

CASE NO. 99CV0708B (M)

ENTERED ON DOCKET
DATE **FEB 04 2000**

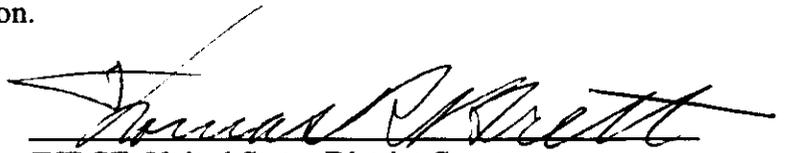
**ORDER GRANTING PETITION FOR VOLUNTARY DISMISSAL
AS TO CAMILLA REEDY ONLY**

Comes now Plaintiff Camilla Reedy and files here Petition for Voluntary Dismissal as to Camilla Reedy Only, which Petition states she voluntarily dismisses her action against the Defendants herein for the reason that she and the Plaintiff George Reedy were not man and wife at the time of the accident which is the subject matter of this litigation.

And the Court, having examined said Petition and being duly advised, NOW GRANTS the same.

IT IS THEREFORE ORDERED that Plaintiff Camilla Reedy ONLY be, and hereby is, dismissed from the captioned cause of action.

Dated 2-3-00


JUDGE, United States District Court
Northern District of Oklahoma

Distribution:

John H. Caress
323 North Delaware St.
Indianapolis, IN 46204

Chris Harper
Post Office Box 12908
Oklahoma City, OK 73157

Amy E. Kempfert
Thomas A. LeBlanc
100 W. 5th St., #808
Tulsa, OK 74103-4225

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB -3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD HOPKINS,
SSN: 369-56-8194,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 99-CV-0308-EA

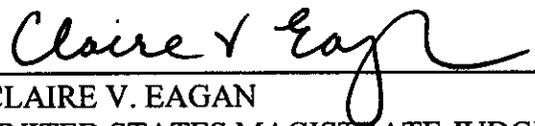
FILED ON DOCKET

FEB 04 2000

JUDGMENT

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

It is so ORDERED this 3rd day of February, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

FILED

FEB -3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD HOPKINS,

Plaintiff,

vs.

KENNETH S. APFEL,
COMMISSIONER, SOCIAL
SECURITY ADMINISTRATION,

Defendant.

CASE NO. 99-CV-0308

-EA
K(PL)

ENTERED ON DOCKET

DATE FEB 04 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 Commissioner will assign the case to an ALJ for a supplemental hearing. The Commissioner acknowledges that Plaintiff filed two subsequent applications for Title II and Title XVI disability benefits, both of which are currently pending in the administrative process. Therefore, on remand, the ALJ will consolidate the present case with Plaintiff's other applications and will determine Plaintiff's residual functional capacity for the entire period at issue in these claims. A vocational expert's testimony will be obtained, if necessary.

THUS DONE AND SIGNED on this 3rd day of February, 2000.

Claire V. Egan
United States District Court Judge
MAGISTRATE

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

RONALD PATTERSON and BETTY
PATTERSON,

Plaintiffs,

v.

AMERICAN SUMMIT INSURANCE
COMPANY,

Defendant.

ENTERED ON DOCKET
DATE FEB 04 2000

Case No. 99-CV-528-K (M) ✓

F I L E D

FEB 03 2000 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised by Settlement Judge Bob Redemann on January 31, 2000, 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 31 DAY OF JANUARY, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

12

14

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GRISHAM FARM PRODUCTS, INC.,)
A Missouri corporation,)

Plaintiff,)

vs.)

AMERICAN DAIRY AND FOOD)
CONSULTING LABORATORIES, INC.)

A Colorado corporation, d/b/a IMAC)
INTERNATIONAL MEDIA AND)
CULTURES and MALI REDDY,)
An individual,)

Defendants.)

FILED

FEB 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98 CV 875 H (M)

FILED ON DOCKET
DATE FEB 03 2000

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Come now the parties, by and through their attorneys of record, and stipulate to the dismissal with prejudice of the above-referenced case.

Respectfully submitted,



BRUCE N. POWERS, OBA # 12822
4867 South Sheridan Road, Suite 701
Tulsa, Oklahoma 74145-5721
(918) 663-8300
ATTORNEY FOR DEFENDANTS



Daniel R. Ketchum, II, OBA #17883
15 West 6th St., #2700
Tulsa, Ok 74119-5423
(918) 587-0101
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing was mailed to the following attorney of record, with sufficient postage thereon, on the 3rd day of February, ~~1999~~:
2000

Daniel R. Ketchum, II
15 West 6th St., #2700
Tulsa, Ok 74119-5423

Bruce N. Powers
4867 S. Sheridan, #701
Tulsa, OK 74145

Daniel R. Ketchum, II

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

STACEY MYERS and TAMMY MARQUEZ,)
)
)
 Plaintiffs,)
)
 v.)
)
 BRIDGESTONE-FIRESTONE, INC.,)
 f/k/a The Firestone Tire and Rubber Co.,)
)
 Defendant.)

ENTERED ON DOCKET

DATE FEB 08 2000

Case No. 99-C-1041-H ✓

FILED
FEB 7 2000
Clerk of District Court

ORDER

This matter comes before the Court on the notice of removal of Defendant Bridgestone-Firestone, Inc. ("Firestone"), filed December 13, 1999 (Docket # 1). Plaintiffs originally brought this action in the District Court of Tulsa County. Plaintiffs' Amended Petition alleges that Defendant negligently designed and manufactured a tire which came apart suddenly, causing a vehicle driven by Plaintiff Stacey Myers to overturn three times. In their Amended Petition, Plaintiffs each seek damages in excess of \$10,000.¹

Defendant removed this action to this Court on the basis of diversity jurisdiction. Defendants contend that diversity jurisdiction is properly invoked here because Firestone is a foreign corporation incorporated in Ohio with its principal place of business in Tennessee and because Plaintiffs are citizens of Oklahoma. Defendants further contend the federal jurisdictional

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

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

Okla. Stat. tit. 12, § 2008(2).

6

amount in controversy is met, alleging that, upon information and belief, the amounts in controversy, exceed \$75,000, exclusive of interest and costs.

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

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

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

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

In the instant case, in their Amended Petition, Plaintiffs have asserted only two claims for relief that exceed \$10,000. Therefore, the amount in controversy is not met by the face of the Petition. In its notice of removal, Defendants failed to set forth any specific facts that demonstrate the federal amount in controversy has been met. To the contrary, with reference to the amount in controversy, Defendant's notice of removal states in its entirety as follows:

Plaintiffs' Petition seeks a variety of damages from Firestone, including compensatory damages, economic and intangible damages. Plaintiffs' Petition also seeks interest, attorneys' fees and costs. Upon information and belief, Firestone alleges that the amounts in controversy exceed \$75,000, exclusive of interest and costs.

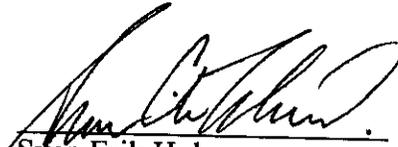
Def. Notice of Removal, ¶ 5 (Docket # 1).

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

Based upon a review of the record, the Court holds that Defendants have not met their burden, as defined by the court in Laughlin. Thus, the Court is without subject matter jurisdiction and lacks the power to hear this matter. As a result, the Court must remand this action to the District Court of Tulsa County. Accordingly, the Court hereby orders the Court Clerk to remand the case to the District Court in and for Tulsa County.

IT IS SO ORDERED.

This 2ND day of February, 2000.


Sven Erik Holmes
United States District Judge

CSM
1-27-00

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

FILED
FEB 2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 EDWARD D. QUALLS,)
)
 Defendant.)

CASE NO. 99CV1049CE ✓

ENTERED ON DOCKET
FEB 03 2000
DATE _____

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.
2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.
3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$4,821.51, plus accrued interest of \$174.22 , plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate 6.287% until paid, plus costs of this action, until paid in full.
4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and

the further representation of the defendant that Edward D. Qualls will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 15th day of February, 2000, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of 150.00, and a like sum on or before the 15th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103-3809, such payments are to be made payable to the U.S. Department of Justice.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

(d) The defendant shall keep the United States currently informed in writing of any material change in his financial situation or ability to pay, and of any change in his employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth above.

(e) The defendant shall provide the United States with current, accurate evidence of his assets, income and expenditures (including, but not limited to his Federal income tax returns) within fifteen (15) days for the date of a request for such evidence by the United States Attorney.

5. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

6. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or, should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.

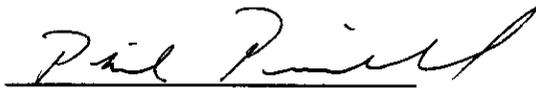
7. The defendant has the right of prepayment of this debt without penalty.

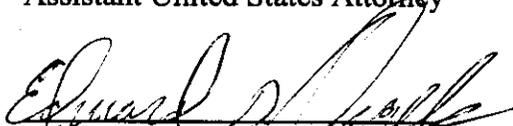
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Edward D. Qualls, in the principal amount of \$4,821.51, plus accrued interest in the amount of \$174.22, plus interest at the rate of 8 until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 6.287% percent per annum until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


PHIL PINNELL, OBA #7169
Assistant United States Attorney


EDWARD D. QUALLS

PEP/alh

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

STACEY MYERS and TAMMY
MARQUEZ,

Plaintiffs,

v.

BRIDGESTONE-FIRESTONE, INC.,
f/k/a The Firestone Tire and Rubber Co.,

Defendant.

ENTERED ON DOCKET

DATE FEB 08 2000

Case No. 99-C-1041-H

FILED

FEB 8 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the notice of removal of Defendant Bridgestone-Firestone, Inc. ("Firestone"), filed December 13, 1999 (Docket # 1). Plaintiffs originally brought this action in the District Court of Tulsa County. Plaintiffs' Amended Petition alleges that Defendant negligently designed and manufactured a tire which came apart suddenly, causing a vehicle driven by Plaintiff Stacey Myers to overturn three times. In their Amended Petition, Plaintiffs each seek damages in excess of \$10,000.¹

Defendant removed this action to this Court on the basis of diversity jurisdiction. Defendants contend that diversity jurisdiction is properly invoked here because Firestone is a foreign corporation incorporated in Ohio with its principal place of business in Tennessee and because Plaintiffs are citizens of Oklahoma. Defendants further contend the federal jurisdictional

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

Okla. Stat. tit. 12, § 2008(2).

6

amount in controversy is met, alleging that, upon information and belief, the amounts in controversy, exceed \$75,000, exclusive of interest and costs.

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

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

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

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

Inc., 953 F. Supp. 351 (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (same).

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

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

In the instant case, in their Amended Petition, Plaintiffs have asserted only two claims for relief that exceed \$10,000. Therefore, the amount in controversy is not met by the face of the Petition. In its notice of removal, Defendants failed to set forth any specific facts that demonstrate the federal amount in controversy has been met. To the contrary, with reference to the amount in controversy, Defendant's notice of removal states in its entirety as follows:

Plaintiffs' Petition seeks a variety of damages from Firestone, including compensatory damages, economic and intangible damages. Plaintiffs' Petition also seeks interest, attorneys' fees and costs. Upon information and belief, Firestone alleges that the amounts in controversy exceed \$75,000, exclusive of interest and costs.

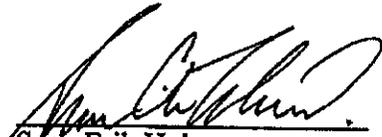
Def. Notice of Removal, ¶ 5 (Docket # 1).

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

Based upon a review of the record, the Court holds that Defendants have not met their burden, as defined by the court in Laughlin. Thus, the Court is without subject matter jurisdiction and lacks the power to hear this matter. As a result, the Court must remand this action to the District Court of Tulsa County. Accordingly, the Court hereby orders the Court Clerk to remand the case to the District Court in and for Tulsa County.

IT IS SO ORDERED.

This 2ND day of February, 2000.


Sven Erik Holmes
United States District Judge

DSF/tsr

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

FILED

RICHARD MARCANTEL, an individual, and)
DEBRA MARCANTEL, an individual,)

FEB 1 2000

Plaintiffs,)

PHI Lombardi, Clerk
U.S. DISTRICT COURT

vs.)

Case No. 98-CV-527-H (E) ✓

FORD MOTOR COMPANY, AUTOZONE, INC.,)
CHAMPION LABORATORIES, INC., AND)
FUEL FILTER TECHNOLOGIES, INC.,)

ENTERED ON DOCKET

FEB 03 2000

Defendants.)

DATE

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 31st day of January, 2000, the Court considers Plaintiffs' Application for Dismissal With Prejudice. For good cause shown, the Court hereby enters its Order dismissing this case with prejudice to future refileing as to Defendants, AutoZone, Inc.; Champion Laboratories, Inc.; and Fuel Filter Technologies, Inc.



THE HONORABLE SVEN HOLMES

Cna/98083/p/Order of Dismissal

118

WTT

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

F I L E D

FEB 1 2000

Liberty Mutual Insurance Company, *et al.*,)
)
Plaintiffs,)
)
vs.)
)
William R. Bartmann, Kathryn A. Bartmann,)
Gertrude A. Brady, Jay L. Jones, Michael C.)
Temple and Charles D. Welsh,)
)
Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-0889C (J)

Judge H. Dale Cook

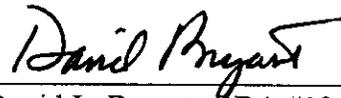
ENTERED ON DOCKET

DATE FEB 02 2000

NOTICE OF PARTIAL DISMISSAL WITHOUT PREJUDICE

Plaintiffs, by and through their counsel of record, David L. Bryant of Bryant Law Firm, and Jeffrey T. Gilbert of Sachnoff & Weaver, Ltd., give notice of dismissal without prejudice as to Defendant, Charles S. Welsh.

Respectfully submitted,



David L. Bryant, OBA #1262
BRYANT LAW FIRM
400 Beacon Building
406 S. Boulder Avenue
Tulsa, Oklahoma 74103
Tel.: 918-587-4200
Fax: 918-587-4217

and

Jeffrey T. Gilbert
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

CF

CERTIFICATE OF SERVICE

This is to certify that on the 1st day of February, 2000, a true and correct copy of the above and foregoing was served by first class U.S. Mail or by such other method indicated below to:

James M. Reed
Hall, Estill, Hardwick, Gable,
Golden & Nelson
320 S. Boston Ave., Suite 400
Tulsa, OK 74103

Terry W. Tippens
Fellers, Snider, Blankenship,
Bailey & Tippens
Bank One Tower
100 North Broadway, Suite 1700
Oklahoma City, OK 73102-8820

Tony M. Graham
Feldman, Franden, Woodard & Farris
1000 Park Centre
525 South Main
Tulsa, OK 74103

P. David Newsome, Jr.
Conner & Winters, P.C.
3700 First Place Tower
15 East 5th Street
Tulsa, OK 74103

R. Thomas Seymour
550 Oneok Plaza
Tulsa, OK 74103-4228

Vickie J. Strain, CLAS

WTT

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

FILED

FEB 1 2000

AUSA Life Insurance Company, Inc., *et al.*,)

Plaintiffs,)

vs.)

William R. Bartmann, Kathryn A. Bartmann,)

Gertrude A. Brady, Jay L. Jones, Michael C.)

Temple, Charles D. Welsh and Chase Securities, Inc.,)

Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-0825C (J)

Judge H. Dale Cook

ENTERED ON DOCKET

DATE _____

NOTICE OF PARTIAL DISMISSAL WITHOUT PREJUDICE

Plaintiffs, by and through their counsel of record, David L. Bryant of Bryant Law Firm, and Jeffrey T. Gilbert of Sachnoff & Weaver, Ltd., give notice of dismissal without prejudice as to Defendant, Charles S. Welsh.

Respectfully submitted,

David Bryant

David L. Bryant, OBA #1262
BRYANT LAW FIRM
400 Beacon Building
406 S. Boulder Avenue
Tulsa, Oklahoma 74103
Tel.: 918-587-4200
Fax: 918-587-4217

and

Jeffrey T. Gilbert
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
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CLJ

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Tulsa, OK 74103

P. David Newsome, Jr.
Conner & Winters, P.C.
3700 First Place Tower
15 East 5th Street
Tulsa, OK 74103

James L. Kincaid
Michael J. Gibbens
CROWE & DUNLEVY
321 South Boston Ave.
500 Kennedy Building
Tulsa, OK 74103

R. Thomas Seymour
550 Oneok Plaza
Tulsa, OK 74103-4228

Vickie J. Erwin, CLAS

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

AAA Investment Company, *et al.*,)
)
Plaintiffs,)
)
vs.) Case No. 99-CV-0874C (J)
)
William R. Bartmann, Kathryn A. Bartmann,) Judge H. Dale Cook
Gertrude A. Brady, Jay L. Jones, Michael C.)
Temple and Charles D. Welsh,)
)
Defendants.)

FEB 1 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT
ENTERED ON DOCKET
DATE FEB 02 2000

NOTICE OF PARTIAL DISMISSAL WITHOUT PREJUDICE

Plaintiffs, by and through their counsel of record, David L. Bryant of Bryant Law Firm, and Jeffrey T. Gilbert of Sachnoff & Weaver, Ltd., give notice of dismissal without prejudice as to Defendant, Charles S. Welsh.

Respectfully submitted,



David L. Bryant, OBA #1262
BRYANT LAW FIRM
400 Beacon Building
406 S. Boulder Avenue
Tulsa, Oklahoma 74103
Tel.: 918-587-4200
Fax: 918-587-4217

and

Jeffrey T. Gilbert
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

etj

CERTIFICATE OF SERVICE

This is to certify that on the 1st day of February, 2000, a true and correct copy of the above and foregoing was served by first class U.S. Mail or by such other method indicated below to:

James M. Reed
Hall, Estill, Hardwick, Gable,
Golden & Nelson
320 S. Boston Ave., Suite 400
Tulsa, OK 74103

Terry W. Tippens
Fellers, Snider, Blankenship,
Bailey & Tippens
Bank One Tower
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Oklahoma City, OK 73102-8820

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15 East 5th Street
Tulsa, OK 74103

R. Thomas Seymour
550 Oneok Plaza
Tulsa, OK 74103-4228

Vickie J. Eskin, CLAS

11

FILED

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

FEB 1 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HILTI, INC.,

Plaintiff,

vs.

COMPUSA, INC.

Defendant.

Case No. 98 CV-0858 BU(J) ✓

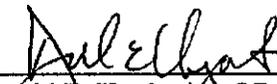
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FEB 2 2000

DATE _____

STIPULATION OF DISMISSAL

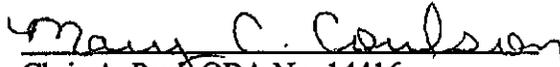
The parties to this action pursuant to Fed.R.Civ.P 41(a)(1) hereby stipulate to a dismissal of the claims and counterclaims with prejudice to the refiling of the same.

Respectfully submitted,



David H. Keglovits, OBA No. 14259
GABLE & GOTWALS
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103-4219
(918) 595-4800

ATTORNEY FOR HILTI, INC.



Chris A. Paul, OBA No. 14416
Mary C. Coulson, OBA No. 14701
Gardere & Wynne, L.L.P.
200 West Fifth Street
Tulsa, Oklahoma 74103
(918) 699-2900

ATTORNEY FOR COMPUSA, INC.

18

CT

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

JOE E. KIGHT,
442-50-9833

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-751-H (M)

FILED

FEB 01 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE FEB 2 2000

REPORT AND RECOMMENDATION

Plaintiff's Motion for Remand [Dkt. 6] is before the undersigned United States Magistrate Judge for report and recommendation. Plaintiff, Joe E. Kight, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.¹

I. Background

Plaintiff was born September 3, 1948, and was 49 years old at the time of the hearing. He has a high school education and formerly worked as an overhead lineman and pipefitter. He claims to have been unable to work since September 19, 1995, as a result of fatigue, shortness of breath, chest pain, and left leg swelling.

¹ Plaintiff's April 15, 1996, application for Supplemental Security Income and his application for Disability Insurance Benefits were denied. The denials were affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held October 2, 1997. By decision dated October 24, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on August 19, 1998. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

In October 1993 (before date of alleged onset of disability) at the age of 43, Plaintiff suffered a brain stem infarction (stroke). Progress notes following Plaintiff's stroke recorded only "minimal weakness." [R. 176].

Although records from St. John Medical Center are not in the record, other records refer to the fact that Plaintiff suffered a myocardial infarction (heart attack) in September 1995 with angioplasty performed at St. John Medical Center. [R. 100; 261]. Plaintiff began receiving care from cardiologist, Michael Carney, D.O., on October 12, 1995. On initial exam Dr. Carney found Plaintiff had recurrent angina pectoris; previous brain stem infarction with residual right-sided weakness with inability to treadmill or walk more than one block. [R. 261].

On November 9, 1995, Plaintiff presented to Tulsa Regional Medical Center with severe chest pain and shortness of breath which was diagnosed as an acute myocardial infarction. [R. 102]. On the history and physical for that admission, the examining physician noted no evidence of atrophy or decreased muscle tone, but found that Plaintiff had neurological deficits subsequent to his cerebrovascular accident (stroke). *Id.* On November 10, 1995, Plaintiff underwent surgery for four coronary bypasses. [R. 106].

On February 19, 1996, Plaintiff presented to Tulsa Regional Medical Center again for angina pain. Dr. Carney recorded that it is not common to have such significant angina following bypass and recommended that angiography be performed. Plaintiff opted for continued medical therapy and was dismissed on February 20, 1996. [R. 145-149].

After his bypass surgery, Plaintiff's care was followed by Sharon E. Noel, D.O., whom he saw regularly from December 1995 to February 1997.² Dr. Noel recorded Plaintiff's frequent complaints of fatigue, shortness of breath, chest pain occurring with and without exertion, and frequent use of nitroglycerin to relieve chest pain. On practically every visit Dr. Noel records that Plaintiff had no edema in his extremities. On January 31, 1996, Dr. Noel finds Plaintiff unable to abduct arms more than 100 degrees due to pain [R. 156]. Again on June 7, 1996, she observed reduced range of motion in the arms due to chest wall pain. [R. 199].

The record contains a Medical Status Report form which Dr. Noel completed on March 11, 1996, on which Dr. Noel indicated that Plaintiff would never be able to return to work. [R. 201]. On November 11, 1996, Dr. Noel completed the Social Security Administration's Description of Chest Pain Discomfort form wherein she related that Plaintiff complains of chest pain episodes three times weekly which occur on exertion and at rest and which last for 5-10 minutes but are relieved by sublingual nitroglycerin tablets. [R. 195]. Dr. Carney completed the same form on February 19, 1996, and reported similar information. [R. 142]. On March 19, 1997, Dr. Noel completed a Physical Capacities Evaluation form where she indicated that Plaintiff had the ability to sit up to 6 hours and stand or walk up to 4 hours of an 8-hour day; he had use of his hands and arms but cannot use his right hand for fine manipulation. In

² Office visits to Dr. Noel were recorded on: 12/7/95; 1/31/96; 3/4/96; 5/15/96; 6/7/96; 7/27/96; 8/1/96; 11/4/96; 11/13/96; 2/6/97; 2/7/97; 2/17/97; and 9/11/97. [R. 155-58; 195-200; 291-296; 306-309].

addition, Dr. Noel notes that Plaintiff has right fine motor coordination impairment; that his overall coordination is impaired; and he is easily fatigued with a marked decrease in stamina. [R. 306-07].

In February 1997, Plaintiff returned to Dr. Carney for increased complaints of angina and a syncopal episode where he lost consciousness for an unknown amount of time. [R. 243-44]. On February 25, 1997, Dr. Carney completed a Physical Capacities Evaluation form where he indicated that Plaintiff has the ability to sit a total of 4 hours and stand or walk one hour of an 8-hour day. He also indicated that Plaintiff suffers from fatigue which would prevent him from working full-time. [R. 270-71].

The last entry in the record before the ALJ is dated September 11, 1997, when Plaintiff saw Dr. Noel for complaints of chest pain at rest; inability to walk more than 2-3 blocks without shortness of breath; an inability to do fine motor skills; and difficulty with repetitive motion for even short sustained periods of time. Objectively, Dr. Noel reported right hand and leg weakness. [R. 309].

II. Allegations of Error

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that: (1) the ALJ failed to consider Plaintiff's loss of right sided dexterity subsequent to his 1993 stroke; (2) the ALJ improperly rejected the opinions of Plaintiff's treating physicians without giving specific legitimate reasons; and (3) good cause exists for remand because medical evidence developed after the Commissioner's decision might have effected the agency's decision.

III. Discussion

A. Standard of Review

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).

B. Consideration of Plaintiff's Right Sided Weakness

The court agrees that the ALJ's decision should be reversed and remanded because the ALJ failed to discuss Plaintiff's right sided weakness and loss of manual dexterity resulting from his 1993 stroke. These limitations are likely to have an affect on Plaintiff's ability to work and the ALJ's failure to include these limitations in his

hypothetical questioning the vocational expert was error. *Hargis v. Sullivan*, 945 F.2d 1482, 1292 (10th Cir. 1991)("testimony elicited by hypothetical questions that do not relate with precision all the claimant's impairments cannot constitute substantial evidence to support the Secretary's decision"). Contrary to the government's assertion that the record "does not substantiate Plaintiff's claim that he was significantly limited during the adjudicated period from residual problems from his stroke in 1993," the court finds that the record contains objective evidence to suggest that such an impairment exists.

In October 1995, 6 months before Plaintiff's application for benefits and one month after the date of his alleged onset of disability, Dr. Carney recorded his finding that Plaintiff had a "previous brain stem infarction with residual right-sided weakness." [R. 261]. On November 9, 1995, on admission for coronary bypass surgery, Plaintiff's physician conducted what appears to be a thorough examination and noted that Plaintiff had neurological deficits subsequent to his cerebrovascular accident. [R. 102]. In noting Plaintiff's physical capabilities, on March 19, 1997, Dr. Noel indicated that Plaintiff could not use his right hand for fine manipulation. [R. 306-07]. On September 17, 1997, Dr. Noel recorded objective findings of right hand and leg weakness. [R. 309]. Plaintiff testified to right sided weakness and difficulty with his right hand [R. 323-24], and at the hearing Plaintiff's representative raised the issue of his loss of manual dexterity. [R. 329].

Since the ALJ failed to recognize any manual dexterity impairment affecting Plaintiff's ability to work, his conclusion that Plaintiff is not disabled is not supported

by substantial evidence and therefore the decision must be reversed. *Hargis*, 945 F.2d at 1492.

C. Treating Physicians' Opinions

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). The court finds that the ALJ failed to give any rationale for rejecting the treating physicians' opinions that the manual dexterity of Plaintiff's right hand is impaired, or that Plaintiff suffers from debilitating fatigue.

D. Additional Evidence Submitted on Appeal

Medical evidence developed after the Appeals Council's decision was submitted to the court with Plaintiff's brief. The government asserts that the court may not consider the new evidence to determine whether the ALJ's October 24, 1997, decision is supported by substantial evidence. However sentence six of 42 U.S.C. § 405(g) provides that the court "may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new

evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding. . . ." In this circuit, evidence is considered to be material if the Commissioner's decision might reasonably have been different had the new evidence been before him when his decision was rendered. *Cagle v. Califano*, 638 F.2d 219, 221 (10th Cir. 1981).

The medical records at issue document that on August 24, 1998, 5 days after the Appeals Council's affirmance of the denial and 10 months after the ALJ's decision, Plaintiff was admitted to the hospital with complaints of chest pain with radiation to his left arm and jaw. A cardiac catheterization was performed and Plaintiff was found to have 99% obstruction in the left main coronary artery with complete 100% obstruction in the left anterior descending coronary artery and 99% obstruction in the proximal circumflex coronary artery. Angioplasty was recommended. [Dkt. 7, attachment, p. 7].

The court finds that the additional evidence is material. The finding that Plaintiff's coronary arteries had occluded lends credibility to his complaints of continued fatigue, shortness of breath, and recurring chest pain. Had this evidence been before the ALJ, he might reasonably have reached a different decision. The court finds that since the evidence was not in existence at the time of the ALJ decision, Plaintiff has established cause exists for his failure to incorporate the evidence into the record before the Commissioner. Had the court not already determined that the Commissioner's decision is not supported by substantial evidence, a remand pursuant to sentence six of 42 U.S.C. § 405(g) would be appropriate, but since the court has

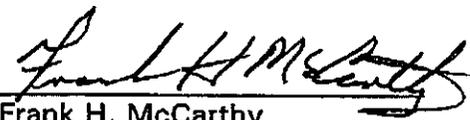
determined that the decision is not supported by substantial evidence, remand is appropriate under sentence 4. On remand the Commissioner is directed to consider the new evidence and to update the medical record.

IV. Conclusion

For the reasons expressed the undersigned United States Magistrate Judge finds that the Commissioner's denial of benefits is not supported by substantial evidence and therefore recommends that the case be REVERSED and REMANDED pursuant to sentence four of 42 U.S.C. § 405(g).

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 31ST Day of January, 2000.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

9 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 2nd Day of February, 2000.
C. Potulley, a Deputy Clerk

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

FILED

FEB 01 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES W. O'DELL,)
)
) Plaintiff,)
)
) v.)
)
) KENNETH S. APFEL,)
) Commissioner of the Social Security)
) Administration,)
)
) Defendant.)

CASE NO. 98-CV-909-M ✓

ENTERED ON DOCKET
DATE FEB 2 2000

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 31st day of JAN, 2000.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

12

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

F I L E D

IN THE MATTER OF
EAJA APPLICATIONS

)
) G.O. 2000-2 ✓

FEB 2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GENERAL ORDER

Applications submitted pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, are hereby exempted from the requirements of N.D. LR 54.1 and 54.2. A party may seek costs, attorney fees and other expenses in one EAJA application. A party filing an EAJA application shall follow the following procedure:

1. File the EAJA application within 30 days of final judgment. See 28 U.S.C. § 2412(d)(1)(B).
2. If attorney's fees and other expenses are sought pursuant to § 2412(b), the EAJA application must provide the information required by § 2412(d)(1)(B).
3. If costs are sought pursuant to § 2412(a), the EAJA application must (a) itemize and describe each item of cost, (b) set forth the statutory basis permitting the item to be recovered as costs, and (c) include an invoice, receipt or disbursement instrument for each item of cost. See, e.g., 28 U.S.C. § 1920.
4. The EAJA application must contain the verification required by 28 U.S.C. § 1924.

The Clerk shall forward all EAJA applications to the appropriate judicial officer for disposition.

IT IS SO ORDERED this 2nd day of FEBRUARY 2000.


TERRY C. KERN, Chief
United States District Judge


MICHAEL BURRAGE
United States District Judge


SVEN ERIK HOLMES
United States District Judge

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

FILED

FEB 2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KENNETH L. BAKER,)
)
Plaintiff,)
)
vs.)
)
CUSTO-FAB, INC.,)
)
Defendant.)

Case No. 99-CV-1001B (E) ✓

ENTERED ON DOCKET

DATE ~~FEB 2 2000~~

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, KENNETH L. BAKER, pursuant to Rule 41 (a)(1) of the Federal Rules of Civil Procedure, hereby stipulates that this action be dismissed with prejudice with each party to bear her/their own attorneys' fees, costs and expenses.

Respectfully submitted,

ARMSTRONG & LOWE, P.A.

By: Terry A. Hall

Terry A. Hall, OBA #10668
Patterson Bond, OBA #942
1401 South Cheyenne
Tulsa, Oklahoma 74119
(918) 582-2500
(918) 583-1755 - Facsimile

ATTORNEYS FOR PLAINTIFF

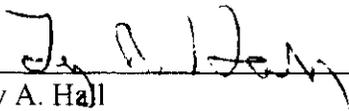
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CERTIFICATE OF SERVICE

This is to certify that on this 28 day of January, 2000, the foregoing Stipulation of Dismissal With Prejudice was hand delivered to:

Ron B. Barber, Esq.
BARBER & BARTZ, P.C.
525 S. Main Street, Suite 800
Tulsa, Oklahoma 74103-4511



Terry A. Hall

UNITED STATES DISTRICT COURT
NORTHER DISTRICT OF OKLAHOMA

FILED

FEB 1 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BANK AUSTRIA AG and)
BANK OF SCOTLAND,)

Plaintiffs,)

vs.)

Case No. 99-CV-0873 C (J)

WILLIAM R. BARTMANN, KATHRYN)

A. BARTMANN, JAY L. JONES,)

GERTRUDE BRADY, MIKE C. TEMPLE)

CHARLES D. WELSH, DIMAT)

CORPORATION, and JAMES D. SILLS,)

Defendants.)

ENTERED ON DOCKET
DATE FEB 01 2000

NOTICE OF PARTIAL DISMISSAL WITHOUT PREJUDICE

COME NOW the Plaintiffs, Bank Austria AG and Bank of Scotland, by and through their attorneys of record, Jack G. Stern of Barrett Gravante Carpinello & Stern, and Bradley K. Beasley of Boesche, McDermott & Eskridge, L.L.P., and give notice of dismissal without prejudice as to Defendant Charles D. Welsh.

Respectfully submitted,



BRADLEY K. BEASLEY, OBA # 628
BOESCHE, McDERMOTT & ESKRIDGE, L.L.P.
100 West Fifth Street, Suite 800
Tulsa, Oklahoma 74103-4216
(918) 583-1777 Telephone
(918) 592-5809 Facsimile

And

24

C15

Jack G. Stern, Esq.
Barrett Gravante Carpinello & Stern, LLP
570 Lexington Ave.
New York, New York 10022

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of February 2000, a true and correct copy of the foregoing document was deposited in the United States mail in Tulsa, Oklahoma, with first class postage fully prepaid thereon, addressed to the following:

James M. Reed, Esq.
Hall Estill Hardwick Gable Golden & Nelson PC
320 South Boston Ave, Suite 400
Tulsa, OK 74103

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A handwritten signature in black ink, appearing to be "Terry W. Tippens", written over a horizontal line.

FILED

JAN 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ROGER MURRAY AND HOPE)
MURRAY, husband and wife,)
)
Plaintiffs,)
)
vs.)
)
FIRST MARINE INSURANCE)
COMPANY,)
)
Defendant.)

No. 99-CV-128-B(M)

ENTERED ON DOCKET

DATE FEB 01 2000

ORDER

Comes on for hearing Defendant's Motion for Summary Judgment and/or Partial Summary Judgment (Docket # 33), Plaintiffs' Motion to Bifurcate (Docket # 45) and Unopposed Application of Plaintiffs for Additional Time to Submit Requested Jury Instructions and Voir Dire (Docket # 75) and the Court finds as follows:

Litigation History

Plaintiffs seek actual and punitive damages from Defendant for breach of an insurance contract arising from the denial of coverage by Defendants of a claim submitted by Plaintiffs for a damaged boat motor. Defendant filed the instant motion for summary judgment on November 5, 1999 and Plaintiffs filed response on November 19, 1999. However, the response did not comply with N.D. LR 56.1 and the Court entered an Order requiring compliance within 10 days on December 1, 1999. Although a supplemental response was filed by Plaintiffs, it also fails to comply with N.D. LR 56.1. The Court has nevertheless reviewed the evidentiary material

submitted by both parties and drawn from those the material facts which are before the Court for purposes of this motion.¹

Summary Judgment Standard

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

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

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

The Tenth Circuit Court of Appeals stated:

¹While a sanction of dismissal is appropriate given the history of this case, the law abhors a default and the Court finds resolution on the merits is preferable for all parties. The Court notes however that resolution on the merits is more difficult and time consuming on the part of opposing counsel and the Court itself where there is non-compliance with N.D. LR 56.1.

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

1. Plaintiffs allege that on June 14, 1998, while operating their 1995 Champion Bass boat on Ft. Gibson Lake in Oklahoma, the 1995 200 horsepower Mercury engine motor sustained serious mechanical damage. Plaintiffs state the motor stopped when (or shortly after) their boat was unavoidably forced to hit the large wake of another boat, sending their boat airborne. First Marine does not dispute the Plaintiffs' recitation of the incident.
2. The boat and motor were covered under a policy of insurance with First Marine Insurance Company, Policy No. MB1041731 ("policy").
3. Plaintiffs made a claim under the policy for the damaged motor and it was denied. Plaintiffs sued First Marine Insurance Company ("First Marine") in Creek County, Oklahoma, alleging First Marine breached the insurance contract and acted in bad faith. Plaintiffs seek actual

and punitive damages. Although the damages sought for breach of contract are less than \$6000, First Marine properly removed to this Court based upon Plaintiffs' claim for damages in excess of the jurisdictional amount on their bad faith claim.

4. After the motor was damaged, Plaintiffs delivered the boat and engine to Nichols Marine, where mechanic Robert Carlberg ("Carlberg") rendered his opinion that the engine failure resulted from an "over rev" of the engine while the engine was airborne.

5. "Over revving" has been defined in this litigation as a situation where the revolutions per minute ("RPM's") exceed the maximum RPM design limits of an engine.

6. Jerry Simon ("Simon"), Vice President of Claims for First Marine, was responsible for investigating, inspecting and evaluating Plaintiffs' claim. Simon has been schooled and is experienced in mechanical analysis. From 1989-1994 and in 1996, he received certified technician service training from Outboard Marine Corporation and Mercury Marine.

7. First Marine has a policy of inspecting every claim and evaluating it on its own merits.²

8. In July, 1998, Simon delegated the field inspection of the damaged engine components to Thomas Benton ("Benton"), an independent field inspector with extensive experience with marine motors and insurance claims regarding them.

9. Benton was asked by Simon to inspect and photograph the damage and report back to First Marine.

10. Benton inspected and photographed the damage and initially determined that the Mercury engine may have failed as a result of "hydrolock". "Hydrolock" has been defined in this

²Plaintiffs dispute this fact but have provided no admissible evidence to the contrary.

litigation as the reverse flow of water into the engine, a situation where water enters the cylinder, and as a result, causes catastrophic failure. Benton opined this could have happened when the airborne boat reentered the water.

11. In July of 1998, Benton submitted his written report, along with photographs of damage, to Simon for First Marine. Benton concluded that the failure was the result of "hydrolock" but could not rule out "over rev" and suggested the components be sent to a lab for further evaluation.

12. Simon examined the photographs and, based upon them and the discussions he had with Benton, determined he could not conclusively agree that the failure resulted from "hydrolock" or "over rev."

13. It is First Marine's policy that if there is any question regarding an evaluation/inspection, the component part in question is sent to an independent forensic laboratory for conclusive evaluation.

14. In keeping with the policy, First Marine sent the engine component parts to S.E.A.L. Laboratory, an independent forensic testing laboratory, for an expert cause and origin analysis to obtain a conclusive opinion as to the cause of the engine failure.

15. In a July 23, 1998 Reservation of Rights letter, First Marine advised Plaintiffs that the investigation was incomplete and continuing because physical evidence from the failed components was inconclusive to support Plaintiff's theory of "over rev" and, the component parts had been sent to an independent forensic laboratory for inspection and determination as to the cause of the failure. First Marine advised Plaintiffs it could therefore not yet accept or deny the claim.

16. Based upon the scientific inspection of the physical evidence of the component parts sent to it, S.E.A.L. Laboratory determined that the engine failure did not result from an “over rev” or “hydrolock.” Specifically, S.E.A.L. determined that “Reverse flow of water into the engine [hydrolock] is not a possibility in this situation as the force of the water would have to overcome the force of the exhaust gases and the boat would have to be traveling backwards at high speed to create adequate head pressure to accomplish such an incredible event. Over revving cannot be considered the causation because of [sic] the localized damage of cylinder number six indicates all the failure took place in that particular cylinder. Excessive over revving would have caused more damage to the complete system.” Rather, S.E.A.L. Laboratory determined that the engine failure “was caused by a number six cylinder rod cap bolt becoming loose, letting the journal bearing come apart while the motor was running and introducing debris into the cylinder and head of the outboard.” S.E.A.L. concluded the rod cap bolt becoming loose was an independent event which only coincidentally occurred following the boat becoming airborne and that the boat becoming airborne did not cause the loosening of the rod cap..

17. The policy exclusions provide, in pertinent part:

“EXCLUSIONS WHICH APPLY TO COVERAGE A

We will not pay for damage or loss to water craft and equipment, the trailer or miscellaneous boating equipment for:

1. Loss, damage, or expense caused by wear and tear, mechanical breakdown . . .
2. Mechanical or electrical breakdown or overheating unless such damage is the result of other loss covered by this policy . . .
- . . . 8. Loss representing the cost of repairing or replacing any hidden defect, mechanical, electrical or structural breakdown or failure.”

18. Following receipt of the final engineering report from S.E.A.L., First Marine determined that the claim was not compensable, under the provisions of the policy excluding coverage for loss resulting from mechanical breakdown.

19. By letter dated August 10, 1998, less than two months following the incident, First Marine advised Plaintiffs that the claim was not compensable, citing the relevant policy language, the reasons why First Marine found the claim to be non-compensable, and enclosed the full S.E.A.L. Laboratory Engineering Report.

20. Plaintiffs' Petition alleges that First Marine acted in bad faith because it chose to ignore or deny the veracity of the mechanic at Nichols Marine.

21. Plaintiff Roger Murray stated in his deposition that he understood the insurance company was sending the engine to a laboratory for testing and that this was normal procedure over which he had no choice.

22. Murray further stated that he agreed that First Marine had a right to further investigate the engine failure.

23. In their Petition, Plaintiffs allege that First Marine acted in bad faith, in that the adjuster initially authorized payment of Plaintiffs' claim and then other representatives of First Marine chose not to honor Plaintiffs' claim. However, at the deposition of Plaintiff Roger Murray, he stated he was never told that the claim would be paid before the laboratory analysis was completed.

24. Plaintiffs also allege bad faith based upon a history by First Marine of claims handling practices designed to deny coverage. However, the witnesses produced in support of

this proposition do not support this conclusion.³

Arguments and Authority

First Marine moves for summary judgment and/or partial summary judgment only on Plaintiffs' bad faith claim. The rather narrow issue before the Court is whether sufficient evidence has been presented by Plaintiffs to allow a jury to conclude that their claim, which was denied within two months of its submission, and on which at least three different opinions were rendered regarding the cause of the engine failure prior to denial, was denied in bad faith. The Court must answer this in the negative. The evidence, viewed in a light most favorable to Plaintiffs, establishes that a legitimate dispute existed and still exists as to the cause of Plaintiff's loss. Pursuant to the holding of *Christian v. American Home Assur. Co.*, 577 P.2d 899 (Okl. 1977), which established the tort of bad faith in Oklahoma, a finding that a legitimate dispute exists as to the cause of loss precludes the tort of bad faith.

In the case at bar, there also exists a question of whether the claimed loss is covered by the policy or falls within the exclusions. If it does not fall within the exclusions, and there is no legitimate argument for First Marine's position that it does, that in itself might be the basis for a bad faith claim where properly plead. Although not so plead in this case, the Court's inquiry must nevertheless begin with a determination of coverage.

On page 1 of the policy, under Coverage A, Physical Damage, the policy provides:

³See Magistrate Judge Frank McCarthy's Order dated January 10, 2000 in which he addresses the testimony of two of the bad faith witnesses for Plaintiff whose testimony is submitted for summary judgment purposes and others whose testimony has not been brought before the Court. Judge McCarthy finds that there is an insufficient factual predicate to allow the witnesses to voice an opinion as to the claims practices of First Marine. At least as to the testimony of Plaintiff's summary judgment witnesses, this Court concurs. Plaintiff has apparently abandoned Kathy Easterling as a witness in light of her deposition testimony which appears to support a finding of favorable claims handling.

“Coverage Provided-We will pay for direct and accidental loss to the following property while it is afloat, . . . within the navigational limits specified on the Declarations Page. . .

2. The Motor(s) described on the Declarations Page. . .”

“Direct and accidental loss” is defined by the policy, on page 1, as a “continuous and unbroken chain of events from a single, sudden, unanticipated and unforeseen incident or occurrence.”

The exclusions at page three, cited above as undisputed material fact number 17, excludes coverage for damage loss to water craft and equipment for damage caused by mechanical breakdown unless such damage is the result of other loss covered by the policy.

First Marine asserts that all three proffered reasons for the motor’s failure are mechanical failures which would trigger the policy exclusions. Plaintiffs assert that all three proffered reasons provide a basis for coverage because the exclusions do not apply to the motor. Plaintiffs base this conclusion on the fact that the motor is not specifically listed as excluded whereas it is specifically listed in the coverage section. Plaintiffs alternatively assert that if the motor is covered by the exclusion provisions, the exclusion provisions do not apply where the mechanical failure is the result of direct and accidental loss as Plaintiffs allege occurred here.⁴

The Court finds the exclusions were intended to apply to the motor. The most compelling evidence of this is that there would be no reason to list “damage caused by fuel additives, improper fuel mixture” if the motor were not included as only the motor can be damaged as a result of these listed items.⁵ Further support is found in that the declarations page lists the boat

⁴Plaintiffs also assert that “over rev” and “hydrolock” are not mechanical breakdowns. As that term is not defined in the policy, this appears to be a jury question based upon which expert is ultimately believed.

⁵“Mechanical breakdown” is not defined in the policy, however, there are mechanical parts which can break down in other excluded items, making the inclusion of this term of no aide to the

and motor separately for the purpose of stating their insured value, however, only one premium is charged for both. The coverage section groups the boat and motor together in reference to coverage for electronic equipment. Also under the coverage section, in calculating the deductible the boat and motor “shall be treated as one unit.” The coverage section precedes the section on exclusions so that the references lumping the boat and motor as one lead into the exclusions. Also, although as Plaintiffs urge, the items listed in the coverage section differ from the items listed under the exclusions, the omission of the word “motor” is not the only difference. The items shown as excluded are not identical or in the same order as the covered items.

Having found that the exclusions apply, the Court turns to the Plaintiffs’ alternative theory that the exclusions do not apply where the mechanical failure is the result of direct and accidental loss. Plaintiffs appear to lump the conclusions of the first two people to evaluate the cause of the motor failure together as if they reached the same conclusion. They did not. While both the mechanic, Carlberg, and Benton, First Marine’s agent, concluded that the failure occurred as a result of the boat becoming airborne, there is a difference in “over revving” and hydrolock. Further, Simon has sufficient background and knowledge of marine motors that he could form an independent conclusion as to the cause of the failure. Even Benton agreed that sending it to a testing lab for evaluation was a good idea. This was done within a reasonable period of time. Given that there is disagreement between the experts on the cause of the failure and that at least one, S.E.A.L., will testify this mechanical failure was the result of a rod cap bolt becoming loose, a cause unrelated to and independent of the boat becoming airborne, that is a fact question which will have to be determined by the ultimate fact finder.

Court in deciding this issue.

Plaintiffs state they were never interviewed regarding what occurred and further urge there were other persons who had looked at the motor and concluded its demise was caused by “over rev” and/or “hydrolock” who were never contacted by Simon. These are irrelevant to the determination of the bad faith claim as First Marine did not question the boat becoming airborne, but only whether the failure of the motor was caused by that event. This is not as Plaintiffs urge, similar to the situation in *Capstick v. Allstate Ins. Co.*, 998 F.2d 810 (10th Cir. 1993), in which there was a failure to investigate by the insurance company. In *Capstick*, the investigator treated the loss as suspicious (arson) from the inception even though there were no factors present which indicated that conclusion. In this case, there were professional differences of opinion as to the cause of the motor failure and there is no indication that there was a preconceived determination to deny the claim.

Plaintiffs argue that Simon did not send the entire motor, in particular the block, to S.E.A.L., however, they present no admissible evidence that this would have caused S.E.A.L. to reach a different conclusion. Plaintiffs also state that S.E.A.L.’s credentials are questionable but do not provide any evidence to support this assertion other than their disagreement with the conclusions reached.

This Court’s determination that the cause of the engine failure is still undetermined, along with a failure of any evidence supporting the various theories for a bad faith claim propounded by Plaintiffs, compels this Court to conclude that the Plaintiffs’ bad faith claim must fail as a matter of law.

IT IS THEREFORE ORDERED that the Defendant’s Motion for Summary Judgment and/or Partial Summary Judgment (Docket #33) is granted as to the Plaintiffs’ bad faith claims.

Plaintiffs' Motion to Bifurcate (Docket # 45) is rendered moot by this Order. Unopposed Application of Plaintiffs for Additional Time to Submit Requested Jury Instructions and Voir Dire (Docket # 75) is granted.

DATED THIS 31st DAY OF JANUARY, 2000.


THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LAUREN JACKSON HANKINS,)
)
Petitioner,)
)
vs.)
)
BOBBY BOONE, Warden,)
)
Respondent.)

Case No. 99-CV-414-E (M)

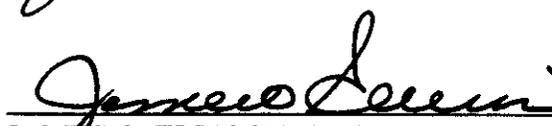
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JUDGMENT

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

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

SO ORDERED THIS 31st day of January, 2000.



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 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LAUREN JACKSON HANKINS,)
)
Petitioner,)
)
vs.)
)
BOBBY BOONE, Warden,)
)
Respondent.)

Case No. 99-CV-414-E (M)

ENTERED ON DOCKET
FEB 01 2000
DATE _____

ORDER

Before the Court are Respondent's motion to dismiss petition for habeas corpus as time barred by the statute of limitations (Docket #4) and Petitioner's motion for leave to file amended habeas corpus petition (#6). Petitioner, appearing in this matter *pro se*, has filed a response to Respondent's motion to dismiss (#7). Respondent's motion to dismiss is premised on the allegation that Petitioner, a state inmate appearing *pro se*, failed to file this petition for writ of habeas corpus within the one-year limitations period prescribed by 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). For the reasons discussed below, the Court finds that the petition is untimely filed and Respondent's motion to dismiss should be granted. Petitioner's motion for leave to file amended habeas corpus petition, liberally construed as a motion to supplement the response to the motion to dismiss, should be granted. See Haines v. Kerner, 404 U.S. 519 (1972). The proposed amended habeas corpus application should be filed of record as of July 22, 1999, and liberally construed, id., as a supplement to the response to the motion to dismiss.

9

BACKGROUND

Petitioner was convicted by a jury of Felonious Possession of Firearm and Murder in the Second Degree in Creek County District Court, Case No. CRF-89-305. He was sentenced to life imprisonment on each count, to be served consecutively. Petitioner appealed his judgment and sentence to the Oklahoma Court of Criminal Appeals ("OCCA") where, on March 7, 1994, his convictions were affirmed (see #5, Ex. A). Nothing in the record indicates Petitioner sought *certiorari* review in the United States Supreme Court.

Petitioner, while represented by counsel, filed an application for post-conviction relief in the state district court on March 21, 1997 (see #5, "Order on Post Conviction Relief," attached as an exhibit to Ex. B). The state district court denied post-conviction relief on March 17, 1998 (id.). Although Petitioner filed a post-conviction appeal, the OCCA dismissed the appeal as untimely. (#5, Ex. B.) However, because Petitioner successfully argued that he had been denied a post-conviction appeal through no fault of his own, the OCCA granted Petitioner a post-conviction appeal out of time. The OCCA affirmed the trial court's denial of post-conviction relief on December 29, 1998 (#5, Ex. C).

Petitioner filed the instant petition for writ of habeas corpus on May 27, 1999 (#1).

ANALYSIS

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

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

(A) the date on which the judgment became final by the

conclusion of direct review or the expiration of the time for seeking such review;

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

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

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

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

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

In addition, the tolling provision of 28 U.S.C. § 2244(d)(2) applies in § 2254 cases to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled while pursuing state post-conviction proceedings properly filed during the grace period.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Petitioner's conviction became final on or about June 7, 1994, after the 90 day time period for filing a petition for writ of *certiorari* in the United States Supreme Court had lapsed. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, Petitioner's conviction became final before enactment of the AEDPA and, as a result, his limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner had one year, or until April 23, 1997, to file his petition for writ of habeas corpus.

However, as discussed above, the limitations period is tolled during the grace period when Petitioner had "a properly filed application for State post-conviction or other collateral review" pending in the state courts. 28 U.S.C. § 2244(d)(2). In this case, Petitioner filed an application for post-conviction relief in the state district court on March 21, 1997, or thirty-three (33) days prior to the April 23, 1997 deadline for filing his federal habeas petition. The filing of an application for post-conviction relief in the state courts effectively suspends the running of the limitations clock during the pendency of the post-conviction action. However, once the post-conviction action is resolved in the state courts, the federal limitations period begins to run again. The petitioner has the time remaining on his limitations clock when the post-conviction action was commenced to file his federal petition.

Petitioner in the instant case had 33 days remaining in his limitations period when he filed his application for post-conviction relief. Therefore, once his post-conviction action was resolved in the state courts, he had 33 days to file his federal habeas petition. Since the OCCA affirmed the denial of post-conviction relief on December 29, 1998, Petitioner had 33 days, or until February 1, 1999, to file a timely federal petition. However, Petitioner did not file the instant petition until May

27, 1999, or almost four (4) months beyond the deadline. Therefore, unless Petitioner can demonstrate that he is entitled to other statutory or equitable tolling of the limitations period, his petition is clearly untimely.

In his response to the motion to dismiss (#7), Petitioner argues that his petition should be considered timely because (1) "his tolling period did not begin to run until December 29, 1998, the date on which the Oklahoma Court of Criminal Appeals affirmed the Order denying relief"; (2) that under Caspari v. Bohlen, 510 U.S. 383, 390 (1994), he should be credited with the 90 day period allowed for seeking *certiorari* review by the United States Supreme Court; and (3) the Federal Courts violate due process when case law is created which effectively voids a defendant's right to file a post-conviction application. (#7). However, after liberally construing Petitioner's claims, see Haines v. Kerner, 404 U.S. 519 (1972), the Court finds no merit to any of Petitioner's arguments.

The Court rejects Petitioner's argument that his petition is not time-barred by the AEDPA because it was filed within one year of December 29, 1998, the date of the Court of Criminal Appeals' disposition of his post-conviction appeal. The final disposition of a post-conviction application does not trigger the commencement of the limitations period. Instead, the limitations period typically begins to run when the challenged conviction becomes final by the conclusion of direct review. 28 U.S.C. § 2244(d)(1)(A). As discussed above, Petitioner's conviction in this case became final long before enactment of the AEDPA. As a result, his limitations period began to run on April 24, 1996, the date of the AEDPA's enactment. Furthermore, pursuant to § 2244(d)(2), the pendency of a properly filed post-conviction application tolls or suspends the running of the period; the conclusion of a post-conviction proceeding does not trigger the commencement of the limitations period as urged by Petitioner. Therefore, Petitioner's argument lacks merit.

Similarly, the Court rejects Petitioner's claim that he is entitled to an additional tolling period of ninety days for the period during which he could have sought review of the state court's denial of his application for post-conviction relief by the United States Supreme Court. See Sup.Ct.R. 13 (indicating that a petition for a writ of certiorari is timely when it is filed within ninety days following the entry of judgment). In addressing this precise issue, the Tenth Circuit Court of Appeals has held that:

The tolling provision in § 2244(d)(2) is distinguishable from § 2244(d)(1)(A), which does take into account the time during which a petition for certiorari to the United States Supreme Court can be filed. Section 2244(d)(1) provides alternative dates from which the one-year limitation period begins to run. Subsection (A) provides that the one-year limitation period runs from 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.' Courts have held that, for purposes of this subsection and a similar section in § 2255, the judgment is not final and the one-year limitation period for filing for federal post-conviction relief does not begin to run until after the United States Supreme Court has denied review, or, if no petition for certiorari is filed, after the time for filing a petition for certiorari with the Supreme Court has passed

The same rationale does not extend, however, to the tolling provision of § 2244(d)(2). The state post-conviction proceeding is final after the state's highest court has addressed the application. Exhaustion of state remedies, which is a precondition to the ability to petition for a writ of habeas corpus, does not include a direct appeal to the United States Supreme Court from the state's denial of post-conviction relief, and neither is a federal court's jurisdiction to entertain a habeas petition affected by whether or not review of the state's denial of post-conviction relief is sought in the Supreme Court . . . The tolling provision specifically refers to a properly filed application for 'State post-conviction or other collateral review.' 28 U.S.C. § 2244(d)(2). We are satisfied that, in the wording of § 2244(d)(2), 'State' modifies the phrase 'post-conviction review' and the phrase 'other collateral review.' A petition for writ of certiorari to the United States Supreme Court is simply not an application for state review of any kind; it is neither an application for state post-conviction review nor an application for other state collateral review.

Rhine v. Boone, 182 F.3d 1153, 1155-56 (10th Cir. 1999) (citations omitted). Based on the reasoning endorsed by the Tenth Circuit Court of Appeals, this Court finds that the limitations period

was not tolled during the 90-day period following resolution of Petitioner's post-conviction application by the OCCA during which Petitioner could have sought certiorari review by the Supreme Court.

The Court also rejects Petitioner's last argument raised in his response, i.e., that imposition of the limitations period mandated by § 2244(d) violates due process by interfering with a petitioner's ability to seek post-conviction relief in the state courts of Oklahoma. The § 2244(d) limitation period requires a petitioner to pursue his federal habeas claims diligently. Because a prisoner is required to exhaust state remedies before bringing his § 2254 petition, he must also act promptly to exhaust state remedies, including post-conviction or other collateral application. The tolling provision of § 2244(d)(2) serves to extend the period so that a petitioner may satisfy the exhaustion requirement of § 2254(b) via a post-conviction or other collateral proceeding properly filed during the limitation period. Application of § 2244(d) in no way "voids" a petitioner's ability to seek post-conviction relief in state court, as urged by Petitioner.

B. Petitioner's motion for leave to file amended habeas corpus petition

The Court has reviewed the additional claims identified by Petitioner in his proposed amended habeas corpus application. Petitioner seeks leave to add the following claims: (1) he was denied effective assistance of counsel during his state post-conviction proceedings since the unnecessary and unexplained delay in filing the state post-conviction application adversely affected Petitioner's ability to file a timely federal habeas corpus petition, (2) Petitioner was denied access to courts by the imposition of a procedural bar on post-conviction claims by the Oklahoma Court of Criminal Appeals, and (3) Petitioner is not subject to the limitation period defined by the AEDPA

because he was a member of the consolidated Harris v. Champion litigation.

Neither Petitioner's first nor third proposed claims challenges the constitutionality of Petitioner's conviction and sentence. Instead, each of these claims constitutes an additional argument for overcoming the limitations bar. Therefore, to the extent the proposed "amended habeas corpus application" presents additional arguments relevant to whether Petitioner's claims are time-barred, the Court finds Petitioner's motion for leave to file an amended habeas corpus petition should be liberally construed as a motion to supplement his response to Respondent's motion to dismiss. The Court further finds Petitioner's motion should be granted and he should be allowed to supplement his response with the additional arguments asserted as "propositions I and III" in the document entitled "amended habeas corpus application as to title 28 U.S.C. Section 2254 and section 2244 AEDPA law of 1996" (#8), liberally construed as a supplement to the response.

However, the Court finds that neither of the two additional arguments has merit. First, the Court rejects Petitioner's first assertion that ineffective assistance rendered by the attorney representing him during post-conviction proceedings should excuse the untimely filing of the instant habeas corpus petition. Petitioner's counsel filed the post-conviction application with thirty-three days remaining in the limitations period. Therefore, once post-conviction proceedings were concluded Petitioner had sufficient time, thirty-three (33) days, to file his federal petition. Furthermore, assuming counsel's delay did constitute ineffective assistance, this Court finds that ineffective assistance rendered during post-conviction proceedings does not justify equitable tolling of the § 2244(d) limitations period. Cf. Coleman v. Thompson, 501 U.S. 722, 757 (1991) ("Because [petitioner] had no [federal constitutional] right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of [his] claims in state court cannot constitute cause to excuse

the default in federal habeas."); Smallwood v. Gibson, 191 F.3d 1257, 1269 (10th Cir. 1999) (finding that ineffective assistance of counsel rendered in state post-conviction proceedings cannot constitute "cause" to overcome procedural bar).

As his "proposition III," Petitioner states that he had a prior § 2254 petition challenging this same conviction on the basis that he had been prejudiced by the OCCA's delay in considering his direct appeal. Petitioner's prior habeas petition was consolidated with other petitions raising the same claim and was addressed in Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994). Petitioner now argues that because "the federal courts declined juris diction (sic) of the unexhausted claims filed by Harris v. Champion, (Cite Omitted) petitioners and expressly held that that (sic) once exhausted claims were present (sic) to the State Courts, such Petitioners could return to the respective Federal District Court to present such claims," his instant petition should not be dismissed. (#8 at 7-8). In support of his argument, Petitioner cites McWilliams v. Colorado, 121 F.3d 573, 575 (10th Cir. 1997) (holding that "a habeas petition filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies does not qualify as a 'second or successive' application within the meaning of § 2244(b)(1)"). However, the issue presented by Petitioner's argument, whether the instant petition is a second or successive petition subject to dismissal under § 2244(b)(1), is not presently before the Court. Instead, the Court must determine whether this petition is untimely and subject to dismissal under § 2244(d). The Court finds that Petitioner's status as a litigant in the Harris litigation does not excuse compliance with the limitations period imposed by § 2244(d). Although Petitioner was required to satisfy the exhaustion requirement of § 2254(b) before returning to federal court with his habeas corpus claims, he was also required to pursue his claims diligently within the time parameters established in § 2244(d). Petitioner failed to file the instant petition

within the one-year limitations period and, in spite of his participation in the Harris litigation, the instant petition is subject to dismissal under § 2244(d).

As the second proposition of error raised in his pleading entitled "amended habeas corpus application," Petitioner alleges that the imposition of a procedural bar by the OCCA on his post-conviction claims constitutes a due process violation. Because this claim challenges the validity of his conviction rather than the application of § 2244(d) and the Court has concluded that this petition is time barred, the Court is precluded from considering this claim.

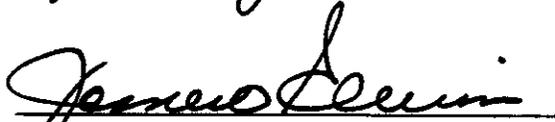
CONCLUSION

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

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus (#4) is **granted**.
2. Petitioner's "motion for leave to file amended habeas corpus petition" (#6), liberally construed as a motion to supplement response to Respondent's motion to dismiss, is **granted**.
3. The Clerk is directed to file the proposed "amended habeas corpus application," liberally construed as a supplement to the response to Respondent's motion to dismiss, of record as of July 22, 1999.
4. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 31st day of January, 2000.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DOUGLAS DWAIN HARRIS,)
)
 Defendant.)

Case No. 00CV0053E (E)

ENTERED ON DOCKET

DATE JAN 31 2000

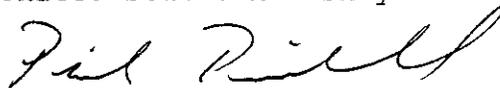
NOTICE OF DISMISSAL

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 31st day of January, 2000.

UNITED STATES OF AMERICA

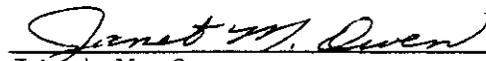
Stephen C. Lewis
United States Attorney



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 31st day of January, 2000, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Douglas Dwain Harris, 1220 E. 142nd Street, Glenpool, OK 74033.


Janet M. Owen
Financial Litigation Agent

015

2

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

BILLY JOE HESS,)
)
 Petitioner,)
)
 vs.)
)
 STEPHEN KAISER, Warden,)
)
 Respondent.)

ENTERED ON DOCKET
DATE FEB 01 2000

Case No. 99-CV-0230-K (E) ✓

FILED

JAN 31 2000 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

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

SO ORDERED THIS 28 day of January, 2000.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

BILLY JOE HESS,)
)
 Petitioner,)
)
 vs.)
)
 STEPHEN KAISER, Warden,)
)
 Respondent.)

ENTERED ON DOCKET
DATE FEB 01 2000

Case No. 99-CV-0230-K (E)

F I L E D

JAN 31 2000 *SA*

ORDER

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

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #16) entered on November 16, 1999, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that the petition for writ of habeas corpus be denied. On January 3, 2000, after receiving an extension of time, Petitioner filed a timely objection to the Report (#19).

In accordance with Rule 8(b) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Petitioner has objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed.

BACKGROUND

Petitioner was convicted by a jury of one count of Second Degree Burglary and of two counts of Knowingly Concealing Stolen Property in Delaware County District Court, Case No. CF-96-231. He received a sentence of twenty (20) years imprisonment on each count, to be served consecutively. Petitioner perfected a direct appeal in the Oklahoma Court of Criminal Appeals ("OCCA") where

his conviction was affirmed, by summary opinion, on September 9, 1998 (#10, Ex. A). On December 7, 1998, the OCCA entered its Order correcting the September 9, 1998 summary opinion (#10, Ex. B).

Petitioner filed the instant habeas corpus action on March 29, 1999. He presents three claims, each of which was considered and rejected by the OCCA on direct appeal: (1) admission of the co-defendant's statement to police violated constitutional rights to confront and cross-examine the witnesses, (2) Petitioner was prejudiced by the prosecutor's misconduct, and (3) consecutive sentences are excessive and should be modified to run concurrently. In her Report, the Magistrate Judge found that habeas corpus relief could not be granted on Petitioner's claims based on the applicable standard provided at § 2254(d).

Petitioner objects to the Magistrate Judge's conclusions, alleging that "[b]y all accounts, it appears that the Court have (sic) interjected his (sic) personal regards into this proceeding and have (sic) failed to objectively consider the obvious Due Process violations of Petitioner's Rights relating to the wrongful forfeiture of his liberty in violation of those rights. Accordingly, the Report and Recommendation should be overruled in its entirety." (#19 at 16, "Conclusion"). In support of his general objection to the Report, Petitioner provides a portion of the same brief submitted both on direct appeal to the OCCA (#10, attachment to Ex. B) and in reply (#15) to Respondent's response in the instant case.

DISCUSSION

Pursuant to Rule 8(b)(3), *Rules Governing § 2254 Cases*, when a magistrate judge has issued a report and recommendation on a dispositive matter in a habeas corpus case, any party may serve

and file written objections to the proposed finding and recommendations within ten days after being served with a copy. The district court judge then “shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” Rule 8(b)(4). The Court of Appeals for the Tenth Circuit has ruled that “a party’s objections to the magistrate judge’s report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review.” United States v. One Parcel of Real Property, 73 F.3d 1057, 1060 (10th Cir. 1996). When a party makes only a general objection, the policy behind the Magistrate’s Act, i.e., to improve judicial efficiency, to relieve courts of unnecessary work and to improve access to the courts, is frustrated. Id. at 1059 (citing Niehaus v. Kansas Bar Ass’n, 793 F.2d 1159, 1165 (10th Cir. 1986)).

In the instant case, Petitioner filed his motion for extension of time to file an objection to the Report (#17) within the ten day time period authorized by Rule 8(b)(3). Petitioner was allowed an additional thirty (30) days within which to file his objection. Thereafter, Petitioner filed a timely objection (#19). However, his objection is general and completely fails to identify specific issues for this Court’s review. In the absence of a specific objection from Petitioner, the Court has reviewed the Report and finds no error. The Magistrate Judge thoroughly considered each of Petitioner’s claims in light of the applicable law and correctly concluded that each claim was without merit. Contrary to Petitioner’s assertion, nothing in the Report suggests that the Magistrate interjected her “personal regards” or was otherwise biased in her consideration of Petitioner’s claims. Therefore, the Court finds the Report and Recommendation of the Magistrate Judge should be adopted and affirmed. Petitioner’s petition for writ of habeas corpus should be denied.

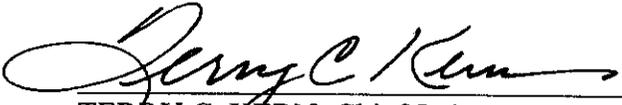
CONCLUSION

The Court has reviewed de novo those portions of the Report to which the Petitioner has objected, see Rule 8(b), Rules Governing Section 2254 Cases, and 28 U.S.C. § 636(b)(1)(C), and concludes that the Report and Recommendation of the United States Magistrate Judge should be adopted and affirmed. Petitioner's petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the United States Magistrate Judge (#16) is **adopted and affirmed.**
2. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied.**

SO ORDERED THIS 28 day of January, 2000.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED
JAN 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GARY DEAN CHILDERS,)
)
 Plaintiff,)
)
 v.)
)
 DON ALLEN, MAX NEWBERRY,)
 BOB TOMLINSON, and DANNY BROWN,)
)
 Defendants.)

Case No. 99-CV-0084-BU (E) ✓

ENTERED ON DOCKET
DATE FEB 1 2000

REPORT AND RECOMMENDATION

Plaintiff, a prisoner appearing *pro se*, submitted a civil rights complaint pursuant to 42 U.S.C. § 1983¹ (Docket #1) on January 28, 1999. The District Court referred the case to the undersigned for Report and Recommendation. See 28 U.S.C. § 636. Defendants Brown, Tomlinson, and Newberry (collectively referenced herein as "defendants") filed a motion to dismiss and for summary judgment on July 1, 1999 (Docket # 16). On that same day, defendants filed their Special Report (Docket # 17) relating to the factual basis of plaintiff's claims. Plaintiff filed an "Objection" on July 14, 1999 (Docket # 18), which included an objection to the defendants' Special Report [18-1], and a motion for discovery [18-2]. He also filed a separate Objection to Special Report (Docket # 19). On August 17, 1999, plaintiff filed a motion for trial by jury (Docket # 20), defendants filed a response (Docket # 21), and plaintiff filed a reply (Docket # 22).

1 42 U.S.C. § 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

23

For the reasons set forth below, the undersigned recommends that defendants' motion to dismiss and for summary judgment (Docket # 16) be **DENIED**; that plaintiff's motion for discovery (Docket # 18-2) be **GRANTED**; that plaintiff's Objection to Special Report (Docket # 19) be **DENIED**; and that plaintiff's motion for trial by jury (Docket # 20) be **DENIED**.

Background

Plaintiff alleges that defendants forced him to work in unsafe conditions which resulted in physical injury to him while he worked for Oklahoma State Industries ("OSI"), a division of the Oklahoma Department of Corrections. Defendants were OSI supervisors. Plaintiff describes Newberry as a regional supervisor, Tomlinson as a Supervisor V, Brown as a Supervisor IV, and Allen as a "low-level" supervisor. He contends that they failed to replace or repair a defective forklift, performed poor site supervision, failed to provide adequate training policies and procedures, and failed to have, or heed, safety policies and procedures. He complains that defendants were thus grossly negligent and deliberately indifferent to his health and safety. He claims that defendants violated his Eighth Amendment rights, waived their immunity from suit, and are vicariously liable for his injuries.

Specifically, plaintiff claims that he sustained permanent injury to his back when he was working in a basket or cage operated by a defective forklift. He claims that his degenerative back condition pre-existed his incarceration, and he had to wear a special full torso back brace while he was employed at OSI. On January 19, 1993, the institutional health services staff indicated that plaintiff would benefit from "permanent job restriction" and restricted him to sedentary work, indicating that he was "not eligible for outside crew work or community corrections." (Objection,

Docket # 18, Ex. I.) He asserts that Brown, Tomlinson, and Allen knew he had a bad back; nonetheless, they hired him without medical clearance.

Plaintiff alleges that Newberry "redlined" the forklift by issuing an inter-office directive to cease and desist with the in-plant operation of the forklift that was unsafe for use due to a faulty electrical alternator system. He claims that Newberry failed to ensure that the directive was followed, and he failed to provide adequate training policies and procedures for supervisors to recognize inmates' physical capacity to perform certain types of work assignments. Plaintiff charges that Tomlinson disobeyed the directive to cease and desist with the in-plant operation of the forklift, and that Tomlinson failed to train his employees to use safety procedures and precautions that would have prevented injury to plaintiff.

Plaintiff contends that Brown, a training safety officer, ordered him to leave his assigned job as a tag applicator and, instead, work on a dust bin collector that was part of a sand blasting device. According to plaintiff, Brown ignored plaintiff's objections that he did not want to do any climbing because of his bad back and that the forklift was unsafe. Plaintiff also claims that Brown failed to follow established OSHA procedures and policies that would have prevented injury to plaintiff. Brown claims that plaintiff should not have been around the equipment because he was not assigned to maintenance, that he did not know that plaintiff was outside the building or on the equipment until he was told that plaintiff "supposedly got hurt." Brown also affied that he was unaware of any memorandum from Max Newberry "about not using or to red line the hyster forklift." (Id.,

Attachment C.)² The tag plant supervisor, who was not named as a defendant, affied that plaintiff was not assigned to maintenance on March 15, 1995, but was told to work on a tag blanker. (Id. Attachment D.)³

Finally, plaintiff explains that Allen drove by the forklift in a pick-up truck pulling a trailer that caught the forklift, which had elevated plaintiff approximately 20 feet, and caused the basket in which plaintiff was working to swing violently. In so doing, plaintiff claims, Allen disregarded established safety procedures and policies. Plaintiff claims that he felt severe back pains and shooting pains down his legs, lost consciousness, and slumped into the bottom of the basket. The forklift had to be jump-started to lower the basket and obtain medical attention for plaintiff.

Terry Woods, an inmate who witnessed the incident, stated that Allen was attempting to go around the forklift by leaving the road and driving over a wet, grassy area behind the forklift. (Objection, Docket # 18, Ex. VII.) When the trailer first caught the forklift, plaintiff told Woods that the jolt hurt his back but he thought he was "alright." Then Allen tried to pull the trailer off the forklift by "gunning" the motor of the pick-up truck and forcing the trailer and forklift apart, again causing the basket or cage in which plaintiff was standing to swing violently. Plaintiff told Woods

2 Defendants' Special Report (Docket # 17) attaches plaintiff's Consolidated Record Card ("CRC") as Attachment A, the special report filed in the Osage County District Court as Attachment B, an affidavit by Danny Brown as Attachment C, and an affidavit by Charles Harris as Attachment D. Confusingly, the attachments to the Osage County report are also listed alphabetically as attachments, and Attachments H-Q are inserted between pages of the Policy and Operations Manual attached as Attachment G. At the very least, the state could have *numbered* its attachments to the report, or listed them as *exhibits* instead of attachments, to avoid this confusion in the record. The Court will reference the attachments to the Osage County report in the same manner as defendants reference them: the Osage County report attachments will be referenced with the corresponding lower case letter after the upper case "B."

3 The same tag plant supervisor wrote a glowing letter of recommendation regarding plaintiff's work under his supervision from October 14, 1990 to December 10, 1992. (Objection, Docket # 18, Ex. AA.)

it "really hurt" and that he felt like he was ready to pass out. Woods told Terry Crow, an inmate who was operating the forklift, to lower it because plaintiff was hurt. Crow responded that he would have to jump-start the motor to start the forklift. Woods explained that OSI "has not taken care of their equipment when broken, or needs service." (Id.) Twenty minutes later, the forklift was lowered. Woods stated that Allen bent the front axle on the trailer and was repairing it instead of staying at the scene to determine if plaintiff was hurt. (Id.)

When medical staff arrived, plaintiff complained that he could not feel his legs or stand up. He was placed on a backboard and transported to the prison health services center for 14 days of bed rest, pain control and muscle relaxants. (Special Report, Docket # 17, Attachments Bd, Be.) X-rays indicated that he had "minimal, stable, narrowing of the disc space at L4/5." (Id., Attachment Bf.) He claims that he has permanent nerve damage because of lack of care after the injury, and that the injury will negatively affect his ability to earn a living when his prison term is over. The injury occurred on March 15, 1995.

Twice in three months after the incident plaintiff was disciplined for possession of contraband (various tools made into knives or weapons). (Id., Attachments Bh, Bm.) In late March 1995, he was placed in disciplinary segregation for 30 days and he lost 100 days of earned early release credits. In June 1995, he was placed in disciplinary segregation for 15 days and fined five dollars. He was also reassigned from his work at the Tag Plant to "unemployed." (Id., Attachment Bj). In July 1995, a medical doctor indicated that plaintiff had chronic back problems that were not surgically correctable; however, the doctor reported that plaintiff could be active and productive, and he suggested that he be medically unassigned until a sedentary light duty type job could be found." (Id., Attachment Bk.) Plaintiff was reassigned from "unemployed" to "medically unassigned." (Id.,

Attachment B1.) As a result of this reassignment, plaintiff claims that he can no longer earn the money or early release credits⁴ that he previously earned from working for OSI. Plaintiff characterizes his damages as loss of \$45-50 per month, future earnings, and early release credits. He seeks damages in the amount of \$600,000 per defendant and five times that amount as compensation for his pain and suffering.⁵

Defendants Brown, Tomlinson, and Newberry (collectively referenced herein as "defendants") filed a motion to dismiss and for summary judgment on July 1, 1999 (Docket # 16).⁶ Defendants contend that (1) the suit should be barred under the doctrine of *res judicata*; (2) the statute of limitations has run on plaintiff's Section 1983 claim; (3) plaintiff failed to establish a violation of his Eighth Amendment rights; (4) plaintiff failed to establish the personal participation of defendant Newberry or Tomlinson; (5) defendants are immune from suit in their official capacities; and (6) defendants are entitled to qualified immunity.

4 Claims for early release credits are not proper under a civil rights claim, but belong, instead, in a petition for writ of habeas corpus. See, e.g., Preiser v. Rodriguez, 411 U.S. 475, 499-500 (1973); Smith v. Maschner, 899 F.2d 940, 951 (10th Cir. 1990). Plaintiff has filed a petition for writ of habeas corpus, and his request for reinstatement of his early release credits is being addressed in that matter. See Childers v. Champion, No. 99-CV-0231-E(EA) (N.D. Okla.).

5 Plaintiff states that he filed a tort claim in Osage County on March 5, 1997, but it was dismissed because he missed a 180-day deadline under the relevant Oklahoma statute. He claims that he moved for leave to amend to add his Section 1983 claim on April 29, 1997, arguing that the new claim should relate back to the date of the original petition. He contends that the district court never ruled on it, but apparently he appealed the underlying decision to the Oklahoma Supreme Court (Case No. 90,088). According to plaintiff, the Oklahoma Supreme Court ruled on September 29, 1998 that petitioner's claim was unchanged from his original petition, and it affirmed the Osage County decision.

6 Defendant Allen is no longer employed by OSI and is not represented by the State of Oklahoma Attorney General's Office. He did not join in defendants' motion to dismiss or for summary judgment. Since it is unclear whether he has been served properly, in a separate order the Court has directed the State to provide to the Court the address for Allen's last known residence and place of employment.

Discussion

Standard of Review

Defendants move the Court to dismiss this action for failure to state a claim under Fed. R. Civ. P. 12 (b)(6). In considering the sufficiency of the claim, the undersigned follows the familiar rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); Seamons v. Snow, 84 F.3d 1226, 1231 (10th Cir. 1996). The complaint is construed in favor of plaintiff and all material allegations made therein are accepted as true. Warth v. Seldin, 422 U.S. 490, 501 (1975); Seamons, 84 F.3d at 1231. *Pro se* complaints, in particular, must be read liberally and "held to a less stringent standard than formal pleadings drafted by lawyers." Green v. Branson, 108 F.3d 1296, 1303 (10th Cir. 1997) (citing Riddle v. Mondrageon, 83 F.3d 1197, 1202 (10th Cir. 1996)).

As discussed in full below, none of defendants' arguments provides a sufficient basis for the Court to grant dismissal.

As an alternative to their motion to dismiss, defendants request summary judgment on plaintiff's claims as provided in Fed. R. Civ. P. Rule 56, because matters outside the pleading have been presented to and not excluded by the court. Fed. R. Civ. P. 12(b). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); see generally Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

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.

Celotex, 477 U.S. at 317.

Plaintiff filed a motion for discovery (Docket # 14) on May 3, 1999, and the Court denied it on May 5, 1999 as premature because it was submitted prior to the submission of defendants' Special Report. (Order, Docket # 15). In that Order, the Court explained that the Special Report "may contain many of the documents plaintiff requests in his Motion for Discovery." Id. The Special Report did not contain many of the documents requested by plaintiff. Much of the information contained in the disorganized exhibits attached to the Special Report was superfluous. It contains some, but not all, of the information necessary for a fair evaluation of plaintiff's claim. Defendants have argued throughout their motion that the lack of evidence presented by plaintiff precludes a decision in plaintiff's favor. However, plaintiff has not had an opportunity to discover the information pertinent to his claims, and defendants have denied him the documents he requests. (See Objection, Docket # 18, Ex. III.)

To invoke summary judgment treatment of defendants' motion to dismiss, all parties must be given reasonable opportunity to present all material made pertinent to the motion by Rule 56. See Fed. R. Civ. P. 12(b). Plaintiff has shown good cause for the documents he requests. Defendants are directed to respond within 30 days to the list of documents plaintiff sought to be produced that accompany his May 3, 1999 motion for discovery. The Rules of Civil Procedure applicable to discovery motions (Rules 26, 34 and 37, in particular) shall be applicable. As discussed below, the arguments in defendants' motion to dismiss do not obviate plaintiff's need for discovery.

Res Judicata

The doctrine of *res judicata* prohibits litigation of certain claims based on the resolution of an earlier action between the same parties. "Under *res judicata*, a final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90 (1980); Klein v. Zavaras, 80 F.3d 432, 434 (10th Cir. 1996). In determining whether a state court judgment precludes a subsequent action in federal court, the state judgment is given full faith and credit, giving it the same preclusive effect as would the courts of the state issuing the judgment. 28 U.S.C. § 1783; see also Allen, 449 U.S. at 96.

Here, plaintiff claims that the Oklahoma Supreme Court specifically ruled that its decision would not preclude a civil rights action under Section 1983.⁷ He maintains that his tort claim against the government was dismissed because he failed to meet the 180-day time limit for bringing his claim under Okla. Stat. tit. 51, §§156, 157. His state court action was based on the defendants' negligence; his civil rights action is based on their deliberate indifference. Defendants assert that the state court action was dismissed for failure to comply with the Governmental Tort Claims Act, and the Oklahoma Supreme Court affirmed that decision. The statute of limitations for actions under the Act, Okla. Stat. tit. 51, § 157, is viewed as procedural. See Vaughn v. City of Broken Arrow, 981 P.2d 316, 319 n. 1 (Okla. 1995). The case was thus decided on a procedural issue; it was not decided on the merits.⁸ The doctrine of *res judicata* is not applicable to plaintiff's claim.

7 He also claims that the Oklahoma Supreme Court never ruled on his petition for rehearing, filed October 14, 1998.

8 Unfortunately, neither plaintiff nor defendants attached a copy of the Osage County decision or the Oklahoma Supreme Court decision they reference in their briefs. Accepting defendants' assertions as true, however, plaintiff's claims are not barred by the doctrine of *res judicata*.

Defendants insist that there is no evidence to prove that plaintiff has a valid Section 1983 claim for deliberate indifference. However, as discussed above, plaintiff has not been given an opportunity to discover evidence showing that Brown ordered him into the forklift basket, and that Brown knew that plaintiff suffered from a bad back. Nor has he been permitted to discover evidence demonstrating that Newberry and Tomlinson were present or made decisions with deliberate indifference to plaintiff's safety.

Statute of Limitations

Claims brought under 42 U.S.C. § 1983 are subject to statute of limitations for personal injury actions set forth in state law. Wilson v. Garcia, 471 U.S. 261, 280 (1985). In Owens v. Okure, 488 U.S. 235-, 249-50 (1989), the Supreme Court modified the rule to require courts to borrow the general or residual statute for personal injury actions. Thus, the applicable limitations period for Section 1983 claims brought in federal court in Oklahoma is the two-year statute of limitations set forth in Okla. Stat. tit. 12, § 95(3) (1991) for injury to the rights of another. See, e.g., Hunt v. Bennett, 17 F.3d 1263, 1265 (10th Cir. 1994). The running of the statute of limitations in a Section 1983 action begins when the cause of actions accrues, when "facts that would support a cause of action are or should be apparent." Fratus v. Deland, 49 F.3d 673, 675 (10th Cir. 1995).

Defendants argue that the statute of limitations begins running on March 15, 1995, the date of plaintiff's injury. They point out that his complaint was not filed until January 28, 1999. Plaintiff argues that he filed a motion for leave to amend his petition in Osage County to include a 42 U.S.C. § 1983 claim before the Oklahoma Supreme Court held, on September 29, 1998, that plaintiff had missed the 180-day-deadline for filing a cause of action under the Oklahoma Governmental Tort Claims Act. He claims that the Oklahoma Supreme Court specifically stated that its ruling did not

preclude consideration of a civil rights action, but the Osage County District Court never ruled on his motion. He contends that the district court should have permitted his new claim to relate back, and that the Oklahoma Supreme Court, in fact, ruled that his amendment related back to the original filing. He also invokes the Oklahoma savings statute, Okla. Stat. tit. 12, § 100, and, in the alternative, he argues that his claim is subject to equitable tolling because of restricted access to the law library and legal assistance in prison.

In Wilson, the United States Supreme Court also ruled that, when borrowing state limitation periods under 42 U.S.C. § 1988, a court must also borrow a state's "provisions regarding tolling, revival, and questions of application." Id. at 269, n.17 (quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 464 (1975); see Thomas v. Denny's, Inc., 111 F.3d 1506, 1513 (10th Cir. 1997) (holding that damages awarded under Section 1981 were limited by the applicable two-year statute of limitations). The directive also applies to a state's saving provisions. Brown v. Hartshorne Pub. Sch. Dist. No. 1, 926 F.2d 959, 962 (10th Cir. 1991).

The applicable savings provision provides:

If any action is commenced within due time, and a judgment thereon for the plaintiff is reversed, or if the plaintiff fail in such action otherwise than upon the merits, the plaintiff, or, if he should die, and the cause of action survive, his representatives may commence a new action within one (1) year after the reversal or failure although the time limit for commencing the action shall have expired before the new action if filed.

Okla. Stat. tit. 12, § 100 (1991).

The Oklahoma Supreme Court has construed Section 100 in light of Oklahoma's transactional approach to the definition of a cause of action. See Chandler v. Denton, 741 P.2d 855, 862-64 (Okla. 1987). Under that approach, "a plaintiff must allege the operative events upon which he relies for his theories of recovery within the time period prescribed by the applicable statute." Id. at 863. If

he does so and Section 100 is otherwise applicable, he may assert a new theory of recovery based on those events in his new action. *Id.* at 863-864. Since plaintiff alleged the operative events in his first timely suit, his failure to assert his Section 1983 theory of recovery within two years did not preclude him from pursuing that theory in this Court within a year after his failure otherwise than upon the merits in state court. The dismissal in that case was final on September 29, 1998; he filed this case within one year, on January 28, 1999. This action is not barred by the statute of limitations.

Eighth Amendment

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Supreme court has held that the Eighth Amendment requires prison officials to "provide humane conditions of confinement," which includes taking "reasonable measures to guarantee the safety of inmates." See Farmer v. Brennan, 511 U.S. 825, 832 (1994) (internal quotation marks and citation omitted). An inmate claiming that officials failed to prevent harm must demonstrate that the conditions of his confinement pose "a substantial risk of serious harm," and that the officials had a "sufficiently culpable state of mind," reflecting their "deliberate indifference to inmate health or safety." Farmer, 511 U.S. at 834 (quoting Wilson v. Seiter, 501 U.S. 294, 297 (1993)); see also Giron v. Corrections Corp. of America, 191 F.3d 1281(10th Cir. 1999).

The Farmer Court held that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health and safety." 511 U.S. at 837. "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a

prison official knew of a substantial risk from the very fact that the risk was obvious.” Id. at 842 (citation omitted); see also Perkins v. Kansas Dep’t of Corrections, 165 F.3d 803, 809-10 (10th Cir. 1999).

Plaintiff claims that defendants violated his Eighth Amendment rights. His writing is not entirely clear, but he sufficiently asserts that defendants were “deliberately indifferent” to his safety and health when they compelled him to perform physical labor which constituted a danger to his health and resulted in unnecessary and wanton infliction of pain upon him. As set forth above, plaintiff contends that Newberry ordered the forklift red-lined, that Tomlinson disregarded the order, that Brown ordered plaintiff to work in the defective forklift, that Allen caused the forklift to shake violently, and that all defendants knew he had a bad back and failed to create, teach, or follow adequate safety policies and procedures. Defendants argue that plaintiff has failed to establish an Eighth Amendment violation and point to the lack of evidence to prove the facts alleged. However, as discussed above, plaintiff has not been given an opportunity to discover all of the evidence supporting his allegations.

Numerous cases indicate that prison work conditions and injury while participating in prison work programs are subject to scrutiny under the Eighth Amendment. See, e.g. Palmer v. Johnson, 193 F.3d 346 (5th Cir. 1999); Bagola v. Kindt, 131 F.3d 632 (7th Cir. 1997); Stephens v. Johnson, 83 F.3d 198 (8th Cir. 1996); Wallis v. Baldwin, 70 F.3d 1074 (9th Cir. 1995). As plaintiff noted, the Eighth Amendment’s prohibition against cruel and unusual punishment forbids knowingly compelling an inmate to perform labor that is beyond the inmate’s strength, dangerous to his or her life or health, or unduly painful. Sanchez v. Taggart, 144 F.3d 1154 (8th Cir. 1998); Berry v. Bunnell, 39 F.3d 1056

(9th Cir. 1994); Choate v. Lockhart, 7 F.3d 1370 (8th Cir. 1993); Madewell v. Roberts, 909 F.2d 1203 (8th Cir. 1990).

Plaintiff has sufficiently stated a claim to withstand defendants' motion to dismiss. If plaintiff is unable to discover enough evidence to support his claim, however, defendants may reassert their motion for summary judgment after sufficient time for discovery.

Supervisor Liability

Claimant has not expressly indicated whether his suit is against defendants in their official or individual capacities. When a plaintiff names an official in his individual capacity, the plaintiff is seeking "to impose personal liability upon a government official for actions he takes under color of state law." Kentucky v. Graham, 473 U.S. 159, 165 (1985). Plaintiff labels his claim as one for "vicarious liability (*respondeat superior*)." (Opening Brief, Docket # 10, at 12). As defendants argue, a government body cannot be held liable under Section 1983 based on the doctrine of *respondeat superior*, *i.e.*, due to tortious acts of its employee. Monell v. Department of Social Servs., 436 U.S. 658, 690-92 (1978). However, the text of plaintiff's arguments indicates that he is, in essence, suing defendants on a theory of supervisor liability.

It is well-established that individual liability does not attach to a supervisor unless an "affirmative link" exists between an alleged constitutional violation and the supervisor's exercise of control or direction, or his failure to supervise. Rizzo v. Goode, 423 U.S. 362, 371 (1976); see Green v. Branson, 108 F.3d 1296, 1302 (10th Cir. 1997); Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir. 1988). To hold a supervisor liable for the acts of an subordinate, the supervisor "must have participated or acquiesced in the constitutional deprivations." Meade, 841 F.2d at 1527 (citation omitted). Further, "[l]iability of a supervisor under § 1983 must be predicated on the supervisor's

deliberate indifference, rather than mere negligence.” Langley v. Adams County, Colo., 987 F.2d 1473, 1481 (10th Cir. 1993); see also Hovater v. Robinson, 1 F.3d 1063, 1066 (10th Cir. 1993).

Plaintiff has alleged that Newberry failed to enforce his order to “red-line” the forklift, and failed to provide proper training and supervision. He alleges that Tomlinson failed to carry out Newberry’s orders and failed to properly train and supervise his employees. If plaintiff is able to discover evidence supporting these allegations, he may be able to establish that an “affirmative link” exists between an absence of safe working conditions and the exercise of control or direction, or failure to supervise, by Newberry and Tomlinson. However, plaintiff must then be able to show that their conduct rises to a level of deliberate indifference sufficient to hold them liable for a violation of plaintiff’s Eighth Amendment rights. See Choate v. Lockhart, 7 F.3d 1370 (8th Cir. 1993),

In Choate, an inmate who fell off of a roof while working on a construction crew brought a Section 1983 action against the supervising prison officials and the director of a state’s Department of Corrections. The Court found that the supervisors’ conduct did not constitute deliberate indifference in violation of the Eighth Amendment, and the director of the Department of Correction was not liable to the inmate absent personal involvement in the constitutional violation or corrective inaction amounting to deliberate indifference. Id. at 1374. The evidence indicated that the supervisors had no knowledge of the inmate’s physical limitations resulting from an artificial kneecap, and they had no duty to check the medical records of their crew members to determine whether they could do the work assigned. Id. at 1374-75. Further, the supervisors did not choose which inmates were assigned to the project, and the defendant testified that he never complained to them that he was unable to perform his assigned tasks. The court also noted that three inmates on the project testified that one of the supervisors was very safety conscious and that he began many workdays stressing

safety to the crew. The court added that the supervisors' failure to erect toe boards on the roof or require inmates to wear rubber-soled shoes, despite one complaint about slickness, did not violate the Constitution. The director had no personal involvement other than visiting the work site which was on the premises of his state-owned residence. Id., at 1375.

Here, plaintiff alleges that his supervisors had to know of his condition because of the back brace he wore when he worked. He also alleges that Brown ordered him to leave his job as a tag applicator and work in the forklift basket. He contends that he told Brown he was not able to climb and did not want to work in the defective forklift. Another inmate who witnessed the incident stated that the supervisors were not safety-conscious. Plaintiff has alleged specific training or supervision deficiencies which indicate that plaintiff's supervisors could have been deliberately indifferent to the Constitutional violations he claims to have suffered. Summary judgment in defendants' favor in their individual capacities is not warranted at this stage of the case.

Official Capacity Claims

Defendants claim that they are immune from suit in their official capacities. This argument is only partially true, however. It is clear that a suit against a state official, acting within his or her official capacity, is a suit against the state itself. Kentucky v. Graham, 473 U.S. 159, 166 (1985); Hunt v. Bennett, 17 F.3d 1263, 1267 (10th Cir. 1994); Russ v. Uppah, 972 F.2d 300, 303 (10th Cir. 1992). A state, and a state official sued in his or her official capacity, is not considered a "person" subject to suit under Section 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). However, Hafer v. Melo, 502 U.S. 21, 26 (1991), clarified the holding in Will and held that state officers may be held liable in their individual capacities for damages under Section 1983 based upon actions taken in their official capacities. The Hafer Court explained that the phrase "acting in their

official capacities,” used in Will, “is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury.” Id.

Thus, plaintiff may not sue defendants in their official capacities, but he may sue them in their individual capacities for actions taken in their official capacities. Since plaintiff has not drawn a distinction or declared the capacity in which he named defendants, the undersigned assumes that he is suing them in their individual capacities for acts performed in their official capacities. If he had named them in their official capacities, as defendant argues, they would not be proper parties to this lawsuit. The primary reason it makes a difference as to the capacity in which defendants are sued is because qualified immunity is only available to defendants sued in their individual capacities. Hafer, 502 U.S. at 25-26; Kentucky v. Graham, 473 U.S. at 166-67.

Qualified Immunity

A public official performing a discretionary function enjoys qualified immunity in a civil action for damages, provided his or her conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Lawmaster v. Ward, 125 F.3d 1341, 1347 (10th Cir. 1997). “The contours of the right allegedly violated must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [I]n light of pre-existing law the unlawfulness must be apparent.” Anderson v. Creighton, 483 U.S. 635, 640 (1987). Qualified immunity is “immunity from suit rather than a mere defense to liability.” Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

The Tenth Circuit follows a two-part test once a defendant raises a qualified immunity defense: “First, the plaintiff must show the defendant’s conduct violated a constitutional or statutory right; second, the plaintiff must show the right the defendant’s conduct violated was clearly

established such that a reasonable person in the defendant's position would have known the conduct violated the right." Lawmaster, 125 F.3d at 1347 (citing Anderson, 483 U.S. at 638-40; Harlow, 457 U.S. at 818-19); see also Siegert v. Gilley, 500 U.S. 226, 232 (1991); Anaya v. Crossroads Managed Care Systems, Inc., No. 97-1358, 1999 WL 993435, at *8 (10th Nov. 2, 1999). If the plaintiff makes such a showing, the defendant must show on motion for summary judgment that "no material issues of fact remain as to whether the defendant's actions were objectively reasonable in light of the law and the information the defendant possessed at the time of his actions." Salmon v. Schwarz, 948 F.2d 1131, 1136 (10th Cir. 1991) (citations omitted). "The question of whether the defendants are entitled to qualified immunity is a legal one; [the] court cannot avoid the question by framing it as a factual issue." Lawmaster, 125 F.3d at 1347.

As set forth above, plaintiff's allegations, if true, are sufficient to implicate a violation of his Eighth Amendment rights, and he has shown that those rights were clearly established such that a reasonable person in any of the defendants' positions would have known that their conduct violated those rights. Under the Eighth Amendment, prison officials who know about and disregard an excessive risk to inmate health and safety can be held liable for denying an inmate humane conditions of confinement. Specifically, the Eighth Amendment's prohibition against cruel and unusual punishment forbids knowingly compelling an inmate to perform labor that is beyond the inmate's strength, dangerous to his or her life or health, or unduly painful.

Material issues of fact remain as to whether the defendants' actions were objectively reasonable in light of the law and the information the defendants possessed at the time of their actions, and plaintiff should be permitted to discover additional information to support his allegations.

Defendants' conduct, if proven, would violate clearly established federal statutory or constitutional rights of which a reasonable person would have known.

RECOMMENDATION

For the reasons cited herein, the undersigned recommends that defendants' motion to dismiss and for summary judgment (Docket # 16) be **DENIED**; that plaintiff's motion for discovery (Docket 18-2) be **GRANTED**; that plaintiff's Objection to Special Report (Docket # 19) be **DENIED**; and that plaintiff's motion for trial by jury (Docket # 20) be **DENIED**.

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); 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 31st day of January, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

19 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 1st Day of February, 2000.
C. Portellon, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 31 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM D. BRISTOW,
SSN: 446-44-8841,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

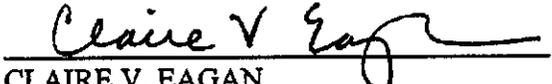
Case No. 99-CV-0234-EA ✓

ENTERED ON DOCKET
FEB 1 2000
DATE _____

ORDER

Plaintiff filed this social security appeal on March 31, 1999. Pursuant to the Scheduling Order entered August 20, 1999, "[w]ithin sixty (60) days of the filing of the transcript and answer, plaintiff shall file a brief" Defendant filed its answer and transcript on August 26, 1999. Plaintiff's brief was due October 25, 1999. On January 14, 2000, the Court ordered plaintiff to show cause by January 25, 2000 (11 days after the date of the Order) why this case should not be dismissed for plaintiff's failure to file his brief as set forth in the Scheduling Order. To date, plaintiff has not responded to the Court's show cause order. Consequently, this case is dismissed without prejudice for failure to prosecute and for failure to follow the orders of this Court.

IT IS SO ORDERED this 31st day of January, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

FILED

JAN 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RUFORD HENDERSON, et al.,

Plaintiffs,

vs.

AMR CORPORATION, AMERICAN
AIRLINES, INC. and THE SABRE
GROUP, INC.,

Defendants.

Case No. 97-CV-457-K (E)

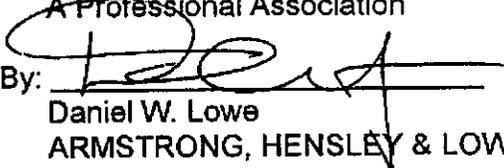
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DATE FEB 1 2000

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1), Plaintiff Lavana Abair and Defendants The SABRE Group, Inc., (now known as Sabre, Inc.) American Airlines, Inc. and AMR Corporation (collectively "Defendants") 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.

ARMSTRONG, HENSLEY & LOWE,
A Professional Association

By: 

Daniel W. Lowe
ARMSTRONG, HENSLEY & LOWE
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Attorneys for Plaintiff Lavana Abair

203

ck

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JOHN A. BUGG, OBA #13665

By:



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Attorneys for Defendants,
AMERICAN AIRLINES, INC.,
SABRE, INC., formerly known as
THE SABRE GROUP, INC. and
AMR CORPORATION

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

FILED

JAN 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD R. NICHOLS, *et al.*,

Plaintiffs,

v.

G. DAVID GORDON, *et al.*,

Defendants.

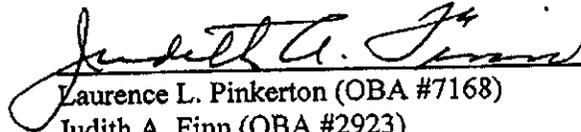
Case No. 95-C-1126H ✓

ENTERED ON DOCKET

DATE FEB 1 2000

**PLAINTIFFS' NOTICE OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANTS, IRA RIMER, PROGRESSIVE CAPITAL
CORPORATION, AND STRUTHERS INVESTMENT ENTERPRISES**

COME NOW, Donald R. Nichols and Virginia Nichols, husband and wife, Plaintiffs in the above-styled and captioned cause of action, hereby dismiss *with prejudice* their claims against the Defendants, Ira Rimer, Progressive Capital Corporation, and Struthers Investment Enterprises, each party to bear his, her, or its own costs and attorney fees.



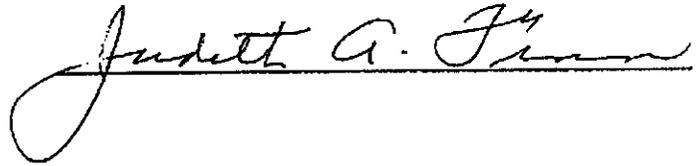
Laurence L. Pinkerton (OBA #7168)
Judith A. Finn (OBA #2923)
PINKERTON & FINN, P.C.
2000 First Place
15 East 5th Street
Tulsa, Oklahoma 74103-4367
(918) 587-1800
Attorneys for Plaintiffs

193

CERTIFICATE OF SERVICE

I, Judith A. Finn, do hereby certify that on the 31st day of January, 2000, I caused to be mailed a true and correct copy of the above and foregoing *Plaintiffs' Notice of Dismissal With Prejudice as to Defendants, Ira Rimer, Progressive Capital Corporation, And Struthers Investment Enterprises*, with proper postage thereon fully prepaid, to:

Paul H. Peterson, Esq.
601 S. Boulder, Suite 806
Tulsa, Oklahoma 74119

A handwritten signature in cursive script that reads "Judith A. Finn". The signature is written in black ink and is positioned to the right of the typed name. A horizontal line is drawn underneath the signature.

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

FILED

JAN 31 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD R. NICHOLS, *et al.*,

Plaintiffs,

v.

G. DAVID GORDON, *et al.*,

Defendants.

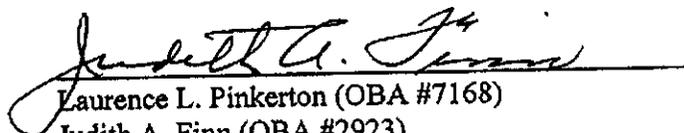
Case No. 95-C-1126H ✓

ENTERED ON DOCKET

DATE **FEB 1 2000**

**PLAINTIFFS' NOTICE OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANTS, IRA RIMER, PROGRESSIVE CAPITAL
CORPORATION, AND STRUTHERS INVESTMENT ENTERPRISES**

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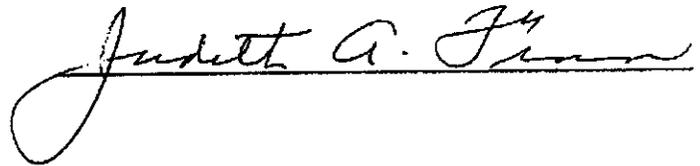


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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GARY N. McBEATH and)
A-1 COMMUNICATIONS and)
DAVID A SCOTT)
Plaintiffs,)
v.)
UNITED STATES OF AMERICA)
Defendant.)

ENTERED ON DOCKET

DATE FEB 01 2000

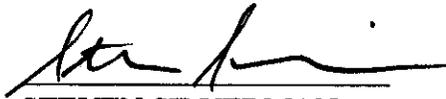
Civil No. 97CV649H(W)

FILED
JAN 31 2000
CLERK OF COURT

STIPULATION FOR DISMISSAL

It is hereby stipulated and agreed that the original and amended complaint in the above-entitled action be dismissed with prejudice, the parties to bear their respective costs, including any possible attorneys' fees or other expenses of this litigation.

Stephen L. Hill, Jr.
United States Attorney



STEVEN SILVERMAN
Trial Attorney, Tax Division
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Counsel for United States



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Telephone: (918) 582-6131
Facsimile: (918) 584-4213
Attorney for Plaintiffs

IT IS SO ORDERED
Dated: JANUARY 26, 2000



SVEN ERIK HOLMES
United States District Judge
District of Oklahoma

1-24-00