

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

F I L E D

FEB 18 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CABLE-LA, INC.)
)
Plaintiff,)
)
vs.)
)
WILLIAMS COMMUNICATIONS, INC.)
formerly known as VYVX, Inc.,)
)
Defendant.)

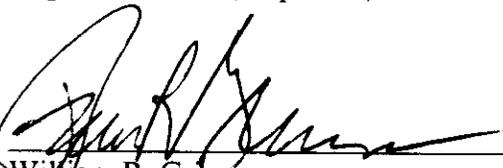
Case No. 99-CV-243-H(M)

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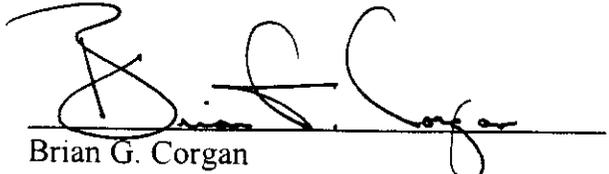
DATE **FEB 18 2000**

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Plaintiff Cable-La, Inc., Defendant Williams Communications, Inc., and Counterclaim Defendant Nobel Insurance Company, and pursuant to FED. R. CIV. P. 41(a)(1) and (c), hereby stipulate that the parties' Complaint, Counterclaim, and the civil action in its entirety are dismissed with prejudice with each party bearing its own costs, expenses, and attorneys' fees.

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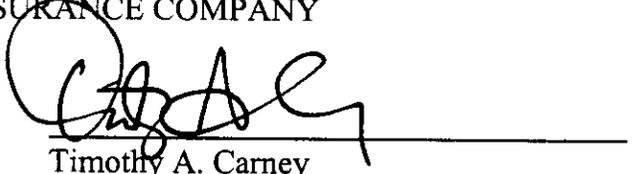
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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MELVIN J. GREEN,
SSN: 448-44-9352,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0104-EA ✓

ENTERED ON DOCKET

DATE FEB 18 2000

JUDGMENT

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

It is so ordered this 17th day of February, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MELVIN J. GREEN,
SSN: 448-44-9352,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0104-EA

ENTERED ON DOCKET

DATE FEB 18 2000

ORDER

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

Social Security Law and Standards of Review

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

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

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

¹ Step one requires claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510, 416.910. Step two requires that claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See id. §§ 404.1521, 416.921. If claimant is engaged in substantial gainful activity (step one) or if claimant’s impairment is not medically severe (step two), disability benefits are denied. At step three, claimant’s impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments “medically equivalent” to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If claimant’s step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant--taking into account his age, education, work experience, and RFC--can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work. See generally Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

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

Claimant's Background

Claimant was born on June 15, 1946, and was 50 years old at the time of the administrative hearing in this matter. He has a fifth grade education. Claimant worked as a truck driver, welder, and back hoe operator. Claimant alleges an inability to work beginning December 12, 1990, due to stomach and back problems. As claimant's attorney outlines, claimant's stomach problems are related to a variety of treatments and diagnoses, including two hernia operations, peptic ulcer disease, a gastroenterostomy,² a gastrectomy,³ gastritis, delay in gastric emptying, gastric outlet obstruction, colon polyps, stomal stenosis,⁴ and dumping syndrome,⁵ among other things. Claimant has complained of abdominal pain, belching, bloating, indigestion, heartburn, loss of appetite, reflux symptoms, intractable nausea and vomiting, and intermittent diarrhea. He contends that he has experienced numbness of his left leg, vertigo, difficulty sleeping, nervousness, and depression. He also claims to suffer from a personality disorder, and he has been diagnosed with a mild somatoform disorder and mild to severe antisocial personality.

² “[S]urgical creation of an artificial passage (anastomosis) between the stomach and intestines (usually the jejunum).” Dorland's Illustrated Medical Dictionary 681 (28th ed. 1994).

³ “[E]xcision of the whole or part of the stomach.” Id. at 680.

⁴ Stenosis is “narrowing or stricture of a duct or canal.” Id. at 1576. Stomal is “pertaining to a stoma or stomata,” id. at 1582, and a stoma is, in this instance, “the opening between two portions of the intestine in an anastomosis.” Id. at 1581.

⁵ “[A] complex reaction thought to be secondary to excessively rapid emptying of the gastric contents into the jejunum, manifested by nausea, weakness, sweating, palpitation, varying degrees of syncope, often a sensation of warmth, and sometimes diarrhea, occurring after ingestion of food by patients who have had partial gastrectomy and gastrojejunostomy. Id. at 1628.

Procedural History

Although the record is incomplete,⁶ it appears that claimant protectively applied for disability benefits under Title II (42 U.S.C. § 401 et seq.) and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.) in 1993. His applications were administratively denied, with the latest denial dated March 9, 1994,⁷ and claimant did not file a request for reconsideration. On August 17, 1994, claimant applied a second time for disability insurance and SSI benefits. Claimant's applications were denied in their entirety initially and on reconsideration. A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held June 25, 1996, in Tulsa, Oklahoma. By decision dated August 13, 1996, the ALJ found that claimant was not disabled at any time through the date his insured status expired, or at any time through the date of the decision. On December 4, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Decision of the Administrative Law Judge

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had residuals from a hernia and repair and severe peptic ulcer disease, impairments which were severe but which do not meet or equal the criteria of any of the impairments listed in 20

⁶ Page 35 is missing from the record, and other documents from claimant's 1993 application and denial appear to be missing.

⁷ Since claimant did not pursue these applications further, and the ALJ did not reopen the prior determination, the relevant period begins on March 10, 1994 (the date after the date of the last decision), and continues through December 31, 1994 (the date claimant was last insured) for purposes of eligibility under Title II, and through the date of the ALJ's decision for purposes of eligibility under Title XVI of the Social Security Act.

C.F.R. Pt. 4, Subpt. P, App. 1. The ALJ determined that claimant's statements concerning his impairments and their impact on his ability to work were not entirely credible based on the degree of medical treatment required, the reports of the treating and examining practitioners, and the medical history.

The ALJ made a finding that claimant had the residual functional capacity (RFC) to perform a full range of light work, diminished by the need to change positions by shifting his weight, either sitting or standing. The ALJ determined that claimant could not perform his past relevant work, but that he was capable of making an adjustment to unskilled work which exists in significant numbers in the national and regional economies, based on his RFC, age, education, and work experience. The ALJ concluded that claimant had not been under a disability, as defined in the Social Security Act, at any time through the date his insured status expired, or at any time through the date of the decision.

Review

Claimant asserts as error that: (1) the hypothetical questions posed to the vocation expert (VE) were faulty; (2) the ALJ ignored the opinion of the treating physician; and (3) a claimant's inability to afford medical care is not substantial evidence of his non-disability.

At step two, an ALJ may find that a claimant does not have a severe impairment and therefore, is not disabled if the claimant does not have any impairment or combination of impairments which significantly limits his physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). To determine whether the claimant's impairments are sufficiently severe, the Commissioner must "consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of

such severity.” 42 U.S.C. § 423(d)(2)(B); 20 C.F.R. §§ 404.1523, 416.923. The ALJ must consider both severe and nonsevere impairments when assessing residual functional capacity. See Soc. Sec. Rul. 96-8p, 1996 WL 374184 (S.S.A), at *5. If the claimant’s combined impairments are medically severe, the Commissioner must consider “the combined impact of the impairments throughout the disability determination process.” 42 U.S.C. § 423(d)(B); 20 C.F.R. § 404.1523; see also Soc. Sec. Rul. 85-28, 1985 WL 56856 (S.S.A.), at *4.

The ALJ found at step two that claimant had residuals from a hernia and repair and severe peptic ulcer disease, impairments which were severe (although he found at step three that they did not meet or equal the criteria of any of the impairments listed in 20 C.F.R. Pt. 4, Subpt. P, App. 1.) (R. 14, 22) The record amply supports the finding of severity, given the multiple surgeries and problems that claimant has suffered. At step two, a claimant is required only to make a “de minimus showing.” Williams v. Bowen, 844 F.2d 748, 751 (10th Cir. 1988). However, after the ALJ found claimant’s impairments severe at step two, he disregarded them at step four. His opinion does not mention the residuals from claimant’s hernia problems or peptic ulcer disease. He did set forth claimant’s testimony with regard to his “severe stomach problems with subsequent surgeries and diarrhea” (R. 17), but the ALJ did not discuss those impairments as part of his RFC assessment. Further, the ALJ did not discuss the restrictions, if any, associated with those impairments. He does discuss claimant’s need to change positions to tolerate his symptoms (R. 20), but it is not clear whether the ALJ is referring to claimant’s symptoms related to his back pain or those related to his hernia and stomach problems.

The ALJ's failure to perform the required function-by-function analysis of claimant's residual functional capacity, see SSR 96-8p, is compounded by the question he posed to the vocational expert. The ALJ asked the vocational expert to

assume we have a 50-year-old male, fifth grade education, marginal ability to read, write and use numbers. This individual would have the physical capability of performing work at the following levels. I'd like you to consider medium, also consider light, and also consider sedentary. This individual would need to occasionally change positions which would relieve any symptomatology that he might have, and by that I mean change positions in his seat if he's seated, or if he's standing shift his weight from one leg to the other to relieve any symptomatology. I'm mainly referring to pain. This individual has been diagnosed has having a somatoform disorder, anti-social personality disorder currently improved, and substance abuse disorder currently in remission. In that regard there would be no work related limitations that I would impose based upon those diagnosis. Assume further that this individual takes medication for relief of his symptomatology, but the medication usage would not preclude him from functioning at the levels I've indicated and he could remain reasonably alert to perform the required functions presented in a work setting.

(R. 373-74) The vocational expert testified that the individual could return to his past relevant work and there were other jobs existing in significant numbers in the national and regional economies which claimant could perform. (Id.)

In forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Shepherd v. Apfel, 184 F.3d 1196, 1203 (10th Cir. 1999); Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995). However, "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the [Commissioner's] decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). The ALJ's hypothetical does not indicate that claimant had residuals from a hernia, a repair, and severe peptic ulcer disease, nor does it describe those residuals. It does indicate

that claimant had “symptomatology,” but the ALJ describes that as claimant’s “pain.” There is no indication that claimant’s symptoms include claimant’s vomiting, diarrhea, or other complaints.

The ALJ could have found that claimant’s symptoms were not impairments in and of themselves, and ultimately he did find that claimant’s hernia, repair, and severe peptic ulcer disease were not disabling. Nonetheless, before he found that they were not disabling, he found that they were severe impairments, and he did not include these impairments in his question to the vocational expert. Since his nondisability finding was based, in part, on the vocational expert’s response to his faulty hypothetical question, the finding is not supported by substantial evidence.

Remaining Issues

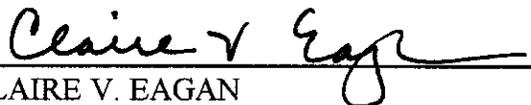
Since the Court reverses and remands based on the ALJ’s flawed hypothetical to the vocational expert, the Court declines to pass on the remaining issues of whether the ALJ improperly evaluated the opinion of claimant’s treating physician and claimant’s inability to afford medical care. On remand, however, the Commissioner may wish to reevaluate whether the treating physician’s opinion is adequately supported by the medical evidence, and he may wish to further explore claimant’s failure to pursue treatment or take medication as support for his determination that claimant lacked credibility.

Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. If the Commissioner “failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence.” Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ’s decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently

concluded otherwise. This remand “simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case.” Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988). The decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

DATED this 17th day of February, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

January 11, 1999 through December 31, 1999 and a rate of 8.73% per annum from January 1, 2000 through February 17, 2000, and postjudgment interest from this date until the date of payment at a rate of 6.287% per annum. Judgment is also hereby entered in favor of Defendants Jonathan W. Fleming and Great West Casualty Company and against Plaintiff Michael Schmauss on his loss of consortium claim.

Costs are assessed against Defendants Jonathan W. Fleming and Great West Casualty Company, if timely applied for under Local Rule 54.1. The parties are to pay their respective attorneys' fees.

DATED this 17th day of February, 2000.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

FEB 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TODD SPITALE,

Plaintiff,

vs.

CITY OF TULSA,

Defendant.

Case No. 99-C-347-E

ENTERED ON DOCKET

DATE FEB 17 2000

ORDER

Now before the Court is the Motion to Dismiss (docket #2) of the defendant, City of Tulsa, which was converted to a Motion for Summary Judgment at the scheduling conference on October 27, 1999.

Spitale, a former employee of defendant, City of Tulsa, seeks a declaratory judgment that the city's written policy that "substantiated death threats shall result in termination of employment," violates his rights under the First Amendment to the Constitution. The city seeks summary judgment, arguing that the written policy does not violate any rights under the First Amendment because the First Amendment does not protect the type of speech targeted by the written policy.

It is well settled that a city may not terminate an employee for "exercising his constitutionally protected right of free speech." Connick v. Myers, 461 U.S. 138, 146-47. 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The free speech claim must be analyzed using a four step analysis:

1. Does the employee's speech involve a matter of public concern?
2. If so, the Court must balance the employee's interest in commenting upon matters of public concern against the interest of the employer in promoting the efficiency of

the public services it performs. Speech is protected if the employees interest outweighs the interest of the employer.

3. If this balance tips in favor of the employee, the employee then must show that the speech was a substantial factor or a motivating factor in the detrimental employment decision.

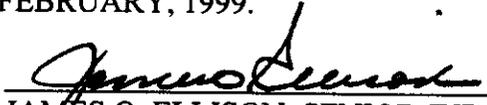
4. If so, the employer may demonstrate that it would have taken the same action against the employee even in the absence of the protected speech.

Dill v. City of Edmond, 155 F.3d 1193, 1201-2 (10th Cir. 1998).

With respect to the first step of the analysis, a matter is of "public concern" if it is "of interest to the community, whether for social, political or other reasons." Id. Matters of purely personal interest to the employee are not protected by the First Amendment. Id. The Court finds that speech that constitutes a death threat is of purely personal interest, and does not involve a matter of public concern. The death threat itself, notwithstanding the issue which gave rise to the death threat simply is not be "of interest to the community," but is a purely personal response to a situation that Mr. Spitale apparently finds frustrating or upsetting. Given this finding, there is no need to complete the remaining three steps of the analysis.

Defendant's Motion to Dismiss (converted to a motion for summary judgment) (Docket #2) is granted.

IT IS SO ORDERED THIS 16th DAY OF FEBRUARY, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

FEB 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CYNTHIA LEONE,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL,)
 Commissioner of the Social Security)
 Administration,)
)
 Defendant.)

CASE NO. 99-CV-403-M ✓

ENTERED ON DOCKET
FEB 17 2000
DATE _____

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 17th day of Feb., 2000.

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

14

MT
2-16-00

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

FILED

FEB 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CYNTHIA LEONE,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL,)
 Commissioner,)
 Social Security Administration,)
)
 Defendant.)

Case No. 99-CV-403-M

ENTERED ON DOCKET
FEB 17 2000
DATE

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that this case 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 update the medical records and re-evaluate Plaintiff's mental impairments. Plaintiff will be given the opportunity to appear at the hearing and submit any further evidence. The ALJ will obtain a consultative mental status examination with a mental medical assessment. After identifying Plaintiff's non-exertional limitations, the ALJ should also obtain vocational expert testimony and include all of Plaintiff's limitations in the hypothetical questions. If Plaintiff is found disabled considering all of Plaintiff's impairments, Plaintiff's alcoholism should be evaluated in accordance with 20 C.F.R. § 404.1535. Thus, the ALJ should make specific findings of what limitations would remain if Plaintiff stopped using alcohol.

THUS DONE AND SIGNED on this 17th day of Feb 2000.

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

13

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

FILED

FEB 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

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

ENTERED ON DOCKET
DATE FEB 17 2000

ORDER

Before the Court are Petitioner's "motion for reconsideration of mandate" (Docket #12), filed February 10, 2000, and Petitioner's "motion for extension of time to file notice of appeal" (#13), filed February 11, 2000. By Order and Judgment entered February 1, 2000, the Court dismissed Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus as time-barred by the statute of limitations. Petitioner is a prisoner, appearing *pro se*.

The Court liberally construes Petitioner's motion for reconsideration as a timely motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). Haines v. Kerner, 404 U.S. 519 (1972). Nonetheless, Petitioner does seek reconsideration of the Court's Order and Judgment dismissing the petition as time-barred. Whether to grant or deny a motion for reconsideration is committed to the Court's discretion. Hancock v. Oklahoma City, 857 F.2d 1394, 1395 (10th Cir. 1988). Generally, courts recognize three major grounds for reconsideration: 1) an intervening change in controlling law; 2) availability of new evidence; or 3) the need to correct clear error or prevent manifest injustice. Hamner v. BMY Combat Systems, 874 F.Supp. 322 (D. Kan. 1995).

In this instance, Petitioner does not argue that there has been an intervening change in controlling law or that new evidence has become available. Instead, Petitioner reasserts many of

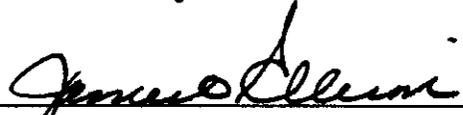
the same arguments presented in response to Respondent's motion to dismiss his petition for writ of habeas corpus and requests that the Court reconsider its prior ruling "in the interest of justice." Specifically, Petitioner asserts that (1) he was "solely reliant" on law library facilities and inmate assistance in preparing his petition and this constitutes an impediment to the timely filing of the petition created by the State of Oklahoma; (2) counsel hired by Petitioner to represent him in state post-conviction proceedings created an impediment to the timely filing of the petition; (3) "extenuating (sic) circumstances involved in the preparation and filing of said petition" made it impossible for Petitioner to file his petition in a timely manner; and (4) Petitioner's participation in the Harris litigation forestalled the timely filing of the petition. However, after reviewing the February 1, 2000 Order in light of Petitioner's arguments and legal authorities, the Court finds Petitioner has not shown any recognized basis for equitably tolling the deadline beyond the deadline determined in the February 1, 2000 Order. As a result, the Court finds no clear error in the Order denying the petition. In the absence of clear error in the February 1, 2000 Order, the Court finds no basis for reconsideration of the Order. Therefore, Petitioner's motion for reconsideration should be denied.

As to Petitioner's motion for extension of time to file his notice of appeal, the Court finds the motion is moot. According to Rule 4(a)(4)(A)(iv), Federal Rules of Appellate Procedure, Petitioner has thirty (30) days from the entry of today's Order disposing of his motion to reconsider, construed as a Rule 59(e) motion to alter or amend judgment, within which to file his notice of appeal. Therefore, an extension of time is not necessary and Petitioner's motion is moot.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's motion for reconsideration of mandate (#12), liberally construed as a Fed. R. Civ. P. 59(e) motion to alter or amend judgment, is **denied**.
2. Petitioner's motion for extension of time to file notice of appeal (#13) is **moot**.
3. Pursuant to Fed. R. App. P. 4(a)(4)(A)(iv), Petitioner has thirty (30) days from the entry of this Order within which to file a notice of appeal.

SO ORDERED THIS 16th day of February, 2000.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IVLLON H. ZACHARY, individually,)
and IVLLON H. ZACHARY, as parent)
of CALLIE LAINE ZACHARY, a minor,)

PLAINTIFF,)

vs.)

CASE No. 99-CV-576-BU-(M)

ARMSTRONG, INC.)

ENTERED ON DOCKET

DEFENDANT.)

DATE FEB 17 2000

REPORT AND RECOMMENDATION

Defendant's Motion For Summary Judgment [Dkt. 19] has been referred to the undersigned United States Magistrate Judge for a report and recommendation.

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).

The Tenth Circuit Court of Appeals stated:

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

* * *

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

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

Plaintiffs' Claims

Asserting claims under both products liability and negligence, the plaintiffs assert that their home furnace, manufactured by Defendant, was defective in that it produced dangerous amounts of carbon monoxide which it circulated throughout Plaintiffs' home, thereby poisoning the plaintiffs. Plaintiff's assert that they suffered

permanent injuries, including brain damage and other permanent conditions, caused by long term carbon monoxide poisoning.

Jurisdiction

Defendant contends that Plaintiffs do not meet the \$75,000 jurisdictional requirement under 28 U.S.C. § 1332. In making this argument, Defendant concedes that Plaintiffs allege lost income in excess of \$1 million, but argues that there is no support for this claim. Plaintiffs respond that they have expert testimony supporting their claim for damages in excess of the jurisdictional minimum and assert Defendant has taken the deposition of Plaintiff's expert on this issue. Defendant did not contest this point in its reply brief.

Based upon the argument presented, the Court finds that Defendant has presented insufficient evidence to question the jurisdictional requirements alleged by Plaintiffs and, therefore, RECOMMENDS that Defendant's motion for summary judgment on this issue be DENIED.

Products Liability

Defendant asserts that Plaintiffs have no proof that Defendant's product was defective and no proof that Plaintiffs have suffered injuries from carbon monoxide poisoning.

Contrary to Defendant's assertion, the evidentiary materials submitted by Plaintiffs in response to Defendant's motion for summary judgment provide a sufficient factual dispute to require a trial on Plaintiffs' product liability theory. Plaintiffs have submitted evidence from Frank Lott and Mark Dunbar, who both conclude that the

soot in Plaintiffs' home was caused by the furnace and that the soot evidenced the presence of carbon monoxide. Additionally, Plaintiffs have submitted the evidence of David Potter that his testing of the Defendant's heat exchanger revealed a leak in the heat exchanger. Additionally, Plaintiffs have submitted the evidence of Dr. Young that Plaintiff Ivllon H. Zachary reported symptoms to him which were consistent with carbon monoxide poisoning and that a blood test of Ivllon H. Zachary showed elevated carboxyhemoglobin levels consistent with carbon monoxide poisoning. Additionally, Plaintiffs submitted evidence from David Penney, Ph.D., and Terry Shaw, Ph.D., which demonstrated symptoms of both Plaintiffs consistent with carbon monoxide poisoning.

While Defendant contends that the testimony referenced above in support of Plaintiffs' theories is inadmissible under *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999), the admissibility of this testimony is more properly considered in a motion in limine.

Based upon the materials submitted, the undersigned RECOMMENDS that Defendant's Motion for Summary Judgment on Plaintiffs' claims based on products liability be DENIED.

Res Ipsa Loquitur

Defendant also seeks summary judgment contending "the doctrine of *res ipsa loquitur* does not apply to this action." [Defendant's Reply, p. 7].

Res ipsa loquitur is a pattern of proof which may be followed when an injury is alleged to have been negligently inflicted and the harm is shown *not to occur* in the usual course of everyday conduct unless a person who controls the instrumentality *likely to have produced that harm* fails

to exercise due care to prevent its occurrence. The purpose of the *res ipsa loquitur* evidentiary rule is to aid a plaintiff in making out a *prima facie* case of negligence in circumstances when direct proof of why the harm happened is beyond the power or knowledge of the plaintiff. Once the foundation facts for *res ipsa loquitur* are established, negligence *may be inferred* from the injurious occurrence without the aid of circumstances pointing to the responsible cause. The burden of producing further evidence (going forward with proof), but not the ultimate burden of persuasion, is then shifted to the defendant.

Whether a case is fit for the application of res ipsa loquitur presents a question of law. It is a judicial function to determine if a given inference may be drawn from a proffered set of circumstances. When, at the close of the plaintiff's case the evidence does not demonstrate a sufficient balance of probabilities in favor of negligence, or the issue still rests on conjecture, submission on *res ipsa loquitur* consideration is not the plaintiff's due.

Harder v. F.C. Clinton, Inc., 948 P.2d 298, 302-03 (Okl. 1997)[footnotes omitted, emphasis in original].

In this case, the evidence shows that the source of the soot in the home is a disputed fact with Plaintiff pointing to the furnace and Defendant pointing to other possible sources, i.e. the fireplace and candles. Thus, Defendant did not have exclusive control of the sources of soot in the home and an inference of negligence by Defendant would be improper in these circumstances. Therefore, it is the RECOMMENDATION of the undersigned that the *res ipsa loquitur* pattern of proof and rebuttable inference of negligence not be available to Plaintiffs.

Conclusion

Based upon the foregoing, it is the RECOMMENDATION of the undersigned United States Magistrate Judge that the Court DENY Defendant's Motion for Summary Judgment [Dkt. 19] on the issue of the Court's jurisdiction and on the issue of Plaintiffs claim against Defendant under the theory of products liability. It is further RECOMMENDED that the Court GRANT Defendant's Motion for Summary Judgment [Dkt. 19] as to Plaintiffs' claim against Defendant for negligence under the *Res Ipsa Loquitur* pattern of proof.

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 17th day of February, 2000.

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 17 Day of February, 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 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GREGORY LIN ALLEN,)
)
 Plaintiff,)
)
 vs.)
)
 STEVE MIDDLETON, et al.,)
)
 Defendants.)

No. 98-CV-39-BU (E) /

ENTERED ON DOCKET
FEB 16 2000
DATE _____

JUDGMENT

This matter came before the Court upon Defendants' motion to dismiss based on the statute of limitations. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's civil rights complaint is dismissed with prejudice as barred by the statute of limitations.

SO ORDERED THIS 16 day of February, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

25

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

FEB 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN BUDZINSKY,

Plaintiff,

v.

ELEMENTARY SCHOOL DISTRICT
NO. 10, OTTAWA COUNTY, OKLAHOMA
SCOTT SOUTH, TIM POTTS individually.

Defendants.

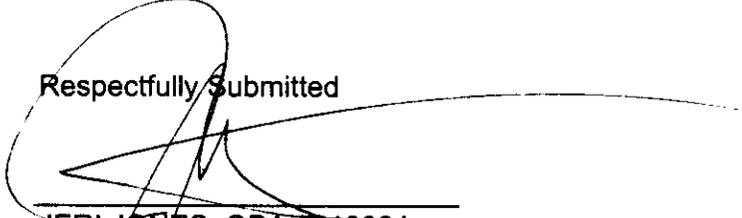
Case No. 99-CV 0328-E (J)

ENTERED ON DOCKET
DATE **FEB 16 2000**

PLAINTIFF'S STIPULATION OF VOLUNTARY DISMISSAL

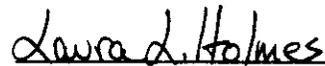
COMES NOW the Plaintiff by and through his attorneys of record and pursuant to Fed. R. Civ. P. 41(a)(1) hereby voluntarily dismisses his claim against the Defendant, with prejudice to the bringing of any further action.

Respectfully Submitted


JERI JONES, OBA #018084
ANTHONY LAIZURE, OBA #5170
Attorney for Plaintiff
STIPE LAW FIRM
2417 East Skelly Drive
P.O. Box 701110
Tulsa, OK 74170
(918) 749-0749

ENTERED ON DOCKET

DATE _____


Laura L. Holmes OBA # 14748
Attorney for Defendant
The Center for Educational Law
809 Northwest 36th Street
Oklahoma City, OK 73118
405/528-2800

35

CTJ

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

FILED

FEB 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GREGORY LIN ALLEN,

Plaintiff,

vs.

STEVE MIDDLETON, et al.,

Defendants.

No. 98-CV-39-BU (E)

ENTERED ON DOCKET
DATE FEB 16 2000

JUDGMENT

This matter came before the Court upon Defendants' motion to dismiss based on the statute of limitations. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's civil rights complaint is dismissed with prejudice as barred by the statute of limitations.

SO ORDERED THIS 16 day of February, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

25

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

FILED

FEB 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GREGORY LIN ALLEN,)
)
 Plaintiff,)
)
 vs.)
)
 STEVE MIDDLETON, et al.,)
)
 Defendants.)

No. 98-CV-39-BU (E) ✓

ENTERED ON DOCKET

DATE FEB 16 2000

ORDER

Before the Court is Defendants' motion to dismiss (#21) filed in this matter on June 18, 1999. Defendants seek dismissal of Plaintiff's second amended 42 U.S.C. § 1983 civil rights complaint (#19) based on the expiration of the applicable limitations period. Plaintiff, a prisoner appearing *pro se*, filed a response (#23) to the motion to dismiss. For the reasons discussed below, the Court finds Defendant's motion to dismiss should be granted and the second amended complaint should be dismissed as barred by the statute of limitations.

BACKGROUND

In his second amendment complaint, Plaintiff claims that on October 14, 1994, Defendants Lester, Middleton, Moore, and Stansil as well as "any and all unknown/unnamed 'John Doe' defendants" used excessive force during his arrest. According to Plaintiff, a bench warrant for his arrest issued following his failure to appear at a September 22, 1994 preliminary hearing. On October 14, 1994, he arranged to meet a bail bondsman at a mall parking lot located in Tulsa,

24

Oklahoma. Plaintiff claims that as he pulled in to park his truck at the mall, an unknown male, later identified as Defendant Lester, pulled in front of Plaintiff's truck. Without identifying himself, Defendant Lester got out of his vehicle and pointed a gun at Plaintiff. Plaintiff states that because Defendant Lester did not identify himself, Plaintiff put his vehicle in reverse and tried to leave the scene. At that point, Defendant Lester fired six rounds into the truck. Plaintiff attempted to evade police, but claims that "once it was apparent I was surrounded I gave up and did not resist." (#19 at "page A"). Plaintiff states he was handcuffed and then approximately ten police officers started hitting and kicking him. Plaintiff asserts that he was hit and slapped by police officers while en route to the police station and that the beating continued after arriving at the station. The beating stopped after Plaintiff agreed to "make statements on all [his] warrants."

In response to Plaintiff's second amended complaint, Defendants filed a motion to dismiss (#21), arguing that this action is barred by the statute of limitations. Plaintiff filed a response (#23) to Defendants' motion. The Court also notes that in his Affidavit attached to his second amended complaint (#19), Plaintiff states that "[t]he fear of retaliation kept me from seeking relief. Once I knew I would be safe from any retaliation I filed for relief."

ANALYSIS

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to the plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less

stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

No statute of limitations is expressly provided for claims under § 1983, but the Supreme Court has held that we must look to state law for the appropriate period of limitations in § 1983 cases. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). The Tenth Circuit Court of Appeals has stated that the appropriate period of limitations for § 1983 actions brought in the State of Oklahoma is two years, pursuant to Okla. Stat. Ann. tit. 12, § 95(3). Meade, 841 F.2d at 1522-24. While state law governs limitations and tolling issues, federal law determines the accrual of § 1983 claims. Fratu v. Deland, 49 F.3d 673, 675 (10th Cir. 1995); Baker v. Board of Regents, 991 F.2d 628, 632 (10th Cir.1993). A civil rights action accrues when "facts that would support a cause of action are or should be apparent." Fratu, 49 F.3d at 675 (quoting Blumberg v. HCA Management Co., 848 F.2d 642, 645 (5th Cir.1988); see also Johnson v. Johnson County Comm'n Bd., 925 F.2d 1299, 1301 (10th Cir.1991). Thus, a plaintiff must bring an action within two years of the date when facts that would support a cause of action are or should be apparent.

In the instant case, the events giving rise to Plaintiff's claims against Defendants occurred on October 14, 1994, more than three years before Plaintiff filed his complaint on January 15, 1998. Plaintiff does not assert that facts supporting his excessive use of force claims were not immediately apparent on October 14, 1994. Therefore, absent a basis for tolling the limitations period, Plaintiff's claims are barred by the statute of limitations.

However, Plaintiff asserts that he did not file his complaint within the limitations period because he feared retaliatory action. He claims he waited to file his complaint until he was

transferred to a prison in Kansas and "was out of danger." However, even if Oklahoma would recognize fear of retaliation, or duress, as a basis for tolling the statute of limitations,¹ a plaintiff must do more than simply allege a subjective fear that retaliation might occur in order to establish duress. A plaintiff must show some act or threat by the defendant that precluded the exercise of his free will and judgment and prevented him from exercising his legal rights. See, e.g., Jane Doe One v. Garcia, 5 F.Supp.2d 767, 770 (D. Ariz. 1998) (citing Moses v. Phelps Dodge Corp., 818 F.Supp. 1287, 1289 (D. Ariz. 1993)). In the instant case, Plaintiff fails to identify any act or threat by Defendants or anyone else which occurred during the two years following his arrest and prevented him from exercising his legal right to file a civil rights complaint. Plaintiff alleges only that "[o]n October 15, 1994, I was visited by two men who claimed to be Internal Affairs and who threatened me with more beatings. The only way I could guarantee my own safety was to wait until I was transferred to a different state via interstate corrections compact." (#23, ¶ 3). The Court finds that this single, unsupported allegation fails to demonstrate that Defendants prevented Plaintiff from filing a civil rights complaint within the two years following his October 14, 1994 arrest. Therefore, the limitations period should not be tolled in this case.

Accordingly, the Court concludes that Plaintiff's claims against Defendants for excessive use of force during his arrest on October 14, 1994 are barred by the two-year statute of limitations. Defendants' motion to dismiss should be granted and Plaintiff's complaint should be dismissed with prejudice as barred by the statute of limitations.

¹The Court has been unable to locate Oklahoma authority for equitable tolling under these circumstances, and Petitioner cites to none.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss (#21) is **granted**.
2. Plaintiff's complaint, as amended, is **dismissed with prejudice** as barred by the statute of limitations.

SO ORDERED THIS 16th day of FEBRUARY, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

CP
2/8/00

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

FILED

FEB 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

VICTOR M. FOSTER,)

Defendant.)

CASE NO. 99CV1081BU(M)

ENTERED ON DOCKET

FEB 16 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 \$2,707.42 and \$2,622.41, plus accrued interest of \$332.63 and \$367.79, plus administrative costs in the amount of \$10.00 and \$58.28, plus interest thereafter at the rate of 8% and 6.79% 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 Victor M. Foster will well and truly honor and

4

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 first day of March, 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 \$100.00, and a like sum on or before the first day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103-3809.

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

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

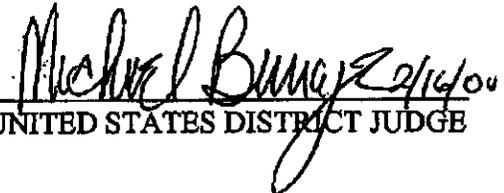
(e) The defendant shall provide the United States with current, accurate evidence of her assets, income and expenditures (including, but not limited to her Federal income tax returns) within fifteen (15) days for the date of a request for such evidence by the United States Attorney.

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

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

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

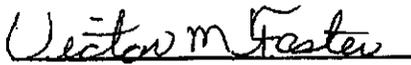
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Victor M. Foster, in the principal amount of \$2,707.42 and \$2,622.41, plus accrued interest in the amount of \$332.63 and \$367.79, plus interest at the rate of 8% and 6.79% until judgment, 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


VICTOR M. FOSTER

PEP/jmo

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

FILED

FEB 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL MORGAN,)
)
 Petitioner,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Respondent.)

Case No. 00-CV-065-BU (J)

ENTERED ON DOCKET
DATE FEB 16 2000

ORDER

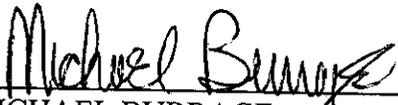
On January 21, 2000, Petitioner, appearing *pro se*, filed a 28 U.S.C. § 2241 pretrial petition for writ of habeas corpus (#1). Petitioner indicates that at the time he filed his petition, he was in custody pursuant to an indictment filed in this district court, Case No. 99-CR-146-H. Petitioner claims to be entitled to pretrial habeas corpus relief on three (3) grounds: (1) a conviction entered in a state district court, Case No. CRF-74-1154, was "not a true conviction," (2) he was not provided notice of orders entered in a state district court, Case Nos. PO-99-543 and PO-99-545, and (3) 18 U.S.C. § 922(g)(8) is unconstitutional.

The Court has reviewed the docket sheet for Petitioner's criminal case, Case No. 99-CR-146-H. The docket sheet indicates that on January 21, 2000, the same day the instant action was filed, Petitioner was found guilty by a jury of 7 of the 8 charges filed against him. The jury's verdict was filed of record on January 21, 2000. Petitioner did not file a motion for a new trial and his sentencing is set for March 24, 2000. Because Petitioner has now been convicted, the Court concludes that his request for pretrial habeas corpus relief is moot and should be denied on that

basis.¹ If Petitioner believes his conviction was obtained in violation of the Constitution, he must raise his constitutional claims on direct appeal.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 is **denied as moot**.

SO ORDERED THIS 16th day of FEBRUARY, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

¹Because Petitioner's pretrial habeas claims have been rendered moot by his conviction, the Court need not address the threshold question of whether habeas corpus review is even available to federal pretrial detainees. See Moore v. United States, 875 F. Supp. 620, 623 (D. Neb. 1994) (holding that to be entitled to habeas corpus relief, federal pretrial detainee must show that he is in custody and must have exhausted other available remedies).

MT

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

FILED

FEB 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RONALD PATTERSON and BETTY
PATTERSON, husband and wife,

Plaintiffs,

vs.

No. 99-CV0528K(M) U

AMERICAN SUMMIT INSURANCE
COMPANY,

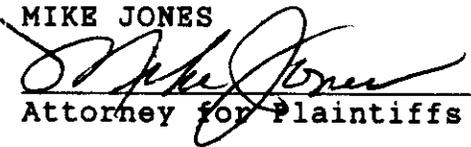
Defendant.

ENTERED ON DOCKET
FEB 15 2000
DATE _____

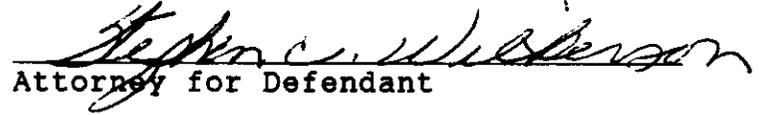
STIPULATION OF DISMISSAL

COME NOW the Plaintiffs, Ronald Patterson and Betty Patterson,
and the Defendant, American Summit Insurance Company, by and
through their respective attorneys, and in accordance with Rule
41(a)(1)(ii) of the Federal Rules of Civil Procedures, hereby
stipulate to the dismissal with prejudice of all claims and causes
of action involved herein with prejudice for the reason that all
matters, causes of action and issues in the case have been settled,
compromised and released herein.

MIKE JONES


Attorney for Plaintiffs

STEPHEN C. WILKERSON


Attorney for Defendant

13

CH

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

FILED

FEB 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KSP ENTERPRISES, INC.,)

Plaintiff,)

vs.)

FEDERAL INSURANCE COMPANY)
d/b/a CHUBB GROUP OF INSURANCE)
COMPANIES,)

Defendant.)

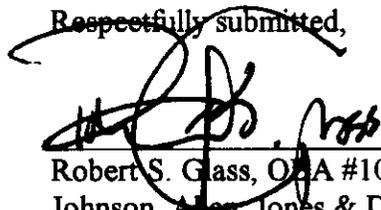
Case No. 99 CV 692 H (M) ✓

ENTERED ON DOCKET
DATE FEB 15 2000

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, KSP Enterprises, Inc., hereby dismisses with prejudice all of its claims against
Federal Insurance Company d/b/a Chubb Group of Insurance Companies filed herein.

Respectfully submitted,


Robert S. Glass, OBA #10824
Johnson, Allen, Jones & Dornblaser
15 West Sixth Street, Suite 2200
Tulsa, Oklahoma 74119
Tel: 918-584-6644
Fax: 918-584-6645

- and -

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
ATTORNEYS FOR PLAINTIFF

19

215

READ AND APPROVED:



John H. Tucker

Kerry R. Lewis

Rhodes, Hieronymus, Jones, Tucker & Gable

P.O. Box 21100

Tulsa, OK 74121-1100

Tel: (918) 582-1173

Fax: (918) 592-3390

ATTORNEYS FOR DEFENDANT

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

F I L E D

FEB 14 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RONALD P. RAGLAND, II,)
)
 Petitioner,)
)
 vs.)
)
 UNITED STATES MARSHALL)
 SERVICE,)
)
 Respondent.)

Case No. 99-C-878-B(M) ✓

ENTERED ON DOCKET

DATE FEB 15 2000

ORDER

Pursuant to the motion of the petitioner, Ronald P. Ragland, II, in the form of a letter dated February 11, 2000 to the undersigned, the Court grants petitioner's motion to dismiss his action as he is no longer incarcerated. The case is hereby dismissed.

IT IS SO ORDERED, this 14th day of February, 2000.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

4

2-11-2000

Thomas R. Brett, Senior Judge
United States District Court

In reference to case no. 99-CV-878-B (M)
which is Ronald P. Ragland II, Petitioner vs.
United States Marshal Service, Respondent, filed
on October 18, 1999. I would like to move
to dismiss this case since I am no
longer incarcerated.

Sincerely,

Ronald P. Ragland II

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

F I L E D

FEB 14 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY SWATSENBARG,

Plaintiff,

v.

KENNETH APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 99-CV-697-B (M)

ENTERED ON DOCKET

DATE FEB 15 2000

ORDER

The Court has for consideration the Report and Recommendation of the Magistrate Judge (hereinafter "R&R") filed January 18, 2000, in which the Magistrate Judge recommends that the above-styled case be dismissed pursuant to Fed. R. Civ. P. 4(m), following Plaintiff's failure to respond to a Show Cause Order entered by the Court on January 4, 1999, requiring Plaintiff to show cause, on or before January 14, 2000, why she had not filed a return of service within 30 days. Plaintiff was advised that failure to respond could result in dismissal. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

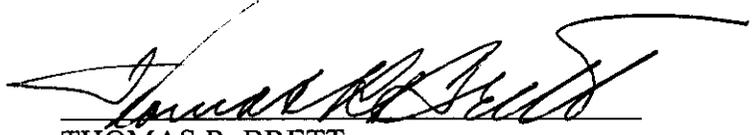
After careful consideration of the record and the issues, the Court has concluded that the R&R should be and the same is hereby AFFIRMED.

IT IS THEREFORE ORDERED that the above-styled case be dismissed for the reasons more

5

fully set out in the R&R.

DATED this 14th day of February, 2000.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ILLA A. TULL SR.,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social
Security Administration,

Defendant.

Case No. 98-CV-719-J ✓

ENTERED ON DOCKET
FEB 15 2000
DATE

ORDER

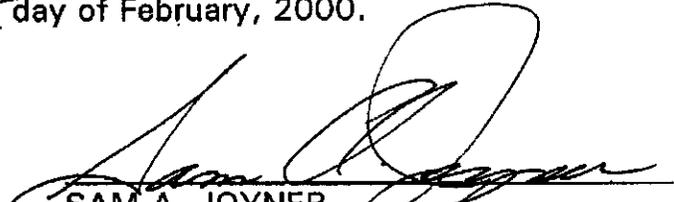
On October 28, 1999, this Court remanded this case to the Commissioner for further administrative action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$2,685.75 for attorney fees and \$8.54 in costs for all work done before the district court, is appropriate.

OK

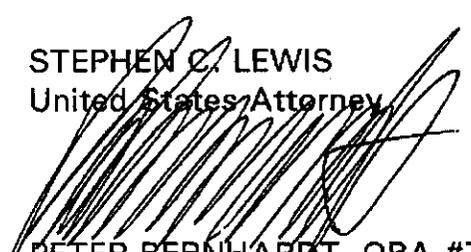
WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$2,685.75 and \$8.54 in costs for a total award of \$2,694.29 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 15 day of February, 2000.


SAM A. JOYNER
United States Magistrate Judge

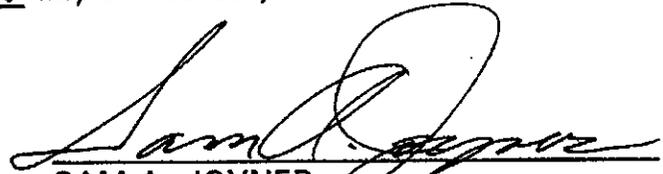
SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

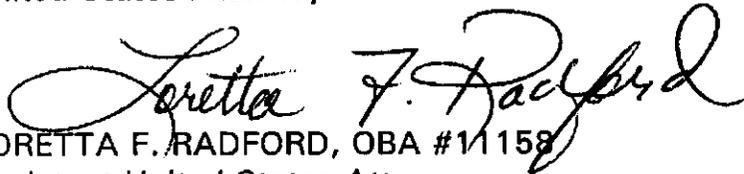
It is so ORDERED THIS 15 day of February 2000.



SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



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

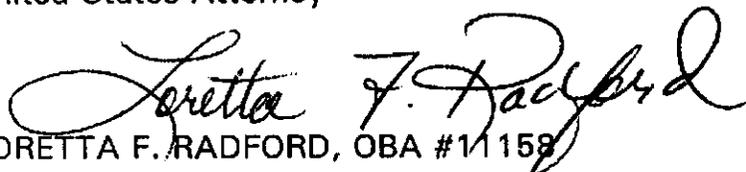
pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 15 day of February 2000.


SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

GAY SCOTT HEARN,)
)
 Plaintiff,)
)
 vs.)
)
 FURNITURE FACTORY OUTLET, INC. and)
 GARY MASNER,)
)
 Defendants.)

FEB 14 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ENTERED ON DOCKET
DATE FEB 15 2000

AMENDED 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.

^{*/} Due to a scrivener's error on pages 10, 11 and 20 of the original Report and Recommendation filed on February 7, 2000, the undersigned hereby substitutes this Amended Report and Recommendation for the original filed on February 7th. The parties' time to object shall continue to be governed by the filing of the original Report and Recommendation.

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.

Defendant's reliance on this Court's opinion by Judge Seven 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 is not motivated by gender will be rare indeed. See *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

III 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 14 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 -- 24 --
15 Day of Feb, 2000
Alone

FILED

FEB 11 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JAMES R. ISGRIG,)
)
Plaintiff,)
)
vs.)
)
CITY OF TULSA, OKLAHOMA,)
a municipal corporation,)
)
Defendant.)

No. 99-C-1012-B(J) ✓

ENTERED ON DOCKET
DATE FEB 14 2000

ORDER

In response to the Court's inquiries at Case Management Conference held Friday, February 11, 2000, Plaintiff announced he was not alleging a constitutional deprivation. Based upon that representation, the parties agreed and the Court finds there is no basis for federal subject matter jurisdiction. Accordingly, the case should be remanded to the District Court of Tulsa County, Oklahoma.

IT IS THEREFORE ORDERED that the above styled action is hereby remanded to the District Court of Tulsa County, Oklahoma. The Clerk of Court is directed to take the necessary action to remand this case without delay.

DATED THIS 11th DAY OF FEBRUARY, 2000, AT TULSA, OKLAHOMA.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 14 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHNNY RAY LAMBERT,)
)
Petitioner,)
)
vs.)
)
GARY GIBSON,)
)
Respondent.)

No. 98-CV-502-B (M)

ENTERED ON DOCKET
DATE **FEB 14 2000**

ORDER

Before the Court is Respondent's "motion to transfer successive petition in accordance with 28 U.S.C. § 2244(b)(3)(A)-(E)" (Docket #11). Petitioner has filed an objection (#13) to the motion to transfer.

Petitioner, a state inmate appearing *pro se*, originally filed this action on July 9, 1998, as a 42 U.S.C. § 1983 civil rights action. Petitioner alleges that his due process rights were violated in a prison disciplinary proceeding on May 12, 1995, which resulted in the loss of 120 earned credits and 30 days of disciplinary segregation. By Order entered March 8, 1999 (#5), the Court dismissed Petitioner's claims for compensatory and injunctive relief without prejudice based on Heck v. Humphry, 512 U.S. 477 (1994); and Edwards v. Balisok, 520 U.S. 641 (1997). In addition, to the extent Petitioner's claims challenge the length or duration of his confinement, the Court liberally construed the civil rights complaint as a 28 U.S.C. § 2254 petition for writ of habeas corpus and directed Respondent to show cause why the writ should not issue.

As stated in the March 8, 1999 Order, Petitioner had previously sought civil rights relief in this district court for alleged due process violations arising from the same disciplinary proceeding.

In that prior case, Case No. 96-CV-101-K, the court converted the civil rights complaint to a § 2254 petition for writ of habeas corpus and, on Respondent's motion, dismissed the petition without prejudice for failure to exhaust an available state remedy, the petition for writ of mandamus. The Order of dismissal without prejudice was entered on July 1, 1997.

In response to the Court's Order entered in the instant action on March 8, 1999, Respondent filed his motion to transfer successive petition. Respondent asserts that pursuant to § 2244(b)(3) and Coleman v. United States, 106 F.3d 339, 341 (10th Cir. 1997), this action must be transferred to the Tenth Circuit Court of Appeals so that Petitioner may move for an order authorizing this district court to consider his second and successive application. Respondent bases his argument on the fact that in addition to the prior habeas action filed in this district court, Petitioner also filed a § 2254 petition in the United States District Court for the Western District of Oklahoma, Case No. CIV-97-604-A. See #12, Ex. A. In that petition, filed April 21, 1997, Petitioner challenged his conviction for First Degree Murder, entered in Garfield County District Court, Case No. CRF-79-120, on Petitioner's plea of guilty. By Order entered September 24, 1997, Petitioner's request for habeas corpus relief was denied. Judgment was entered in favor of Respondent and against Petitioner on September 24, 1997. In the instant case, Respondent argues that because Petitioner's claim challenging the execution of his sentence could have and should have been brought in his prior petition filed in Case No. CIV-97-604-A, the instant petition constitutes a second or successive petition.

Petitioner objects (#13) to Respondent's motion to transfer, stating that "[t]he information that [Respondent] has furnished this Court has nothing to do with this case at bar." Petitioner apparently refers to the fact that the habeas claim in this action relates to the administration of his sentence while the habeas action filed in the Western District related to the constitutionality of his

conviction. However, both types of claims may be brought in a single § 2254 petition. See Reid v. State of Oklahoma, 101 F.3d 628 (10th Cir. 1996). And where the "operative facts" of each claim are known, the claims must be brought together. See id.

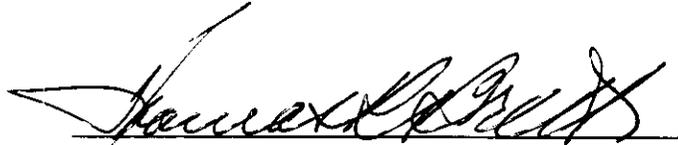
Therefore, the Court finds merit to Respondent's argument. The events giving rise to Petitioner's claim challenging the execution of his sentence occurred in May of 1995 and were known to Petitioner before he filed his § 2254 petition in the Western District, Case No. CIV-97-604-A, in April of 1997. As a result, the "operative facts" of the instant claim were available to Petitioner and he could have included his instant claim in that petition. See id. Thus, to the extent Petitioner seeks habeas relief in this action, his petition is a second or successive petition.

Pursuant to 28 U.S.C. § 2244(b)(3), a habeas petitioner must first seek authorization from the Court of Appeals before filing a second or successive habeas petition in the District Court. When a petitioner fails to comply with this requirement, the District Court should transfer the habeas petition to the Court of Appeals in the interest of justice pursuant to 28 U.S.C. § 1631. Coleman v. United States, 106 F.3d 339 (10th Cir. 1997). In this case, Petitioner did not seek the required authorization from the Tenth Circuit Court of Appeals before filing the document construed by the Court as a petition for a writ of habeas corpus. Therefore, the Court finds Respondent's motion to transfer should be granted and Petitioner's petition for a writ of habeas corpus should be transferred to the Tenth Circuit Court of Appeals for authorization.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to transfer successive petition in accordance with 28 U.S.C. § 2244(b)(3)(A)-(E) (#11) is **granted**.
2. Petitioner's petition for a writ of habeas corpus is **transferred** to the Tenth Circuit Court of Appeals so that Petitioner may move for an order authorizing this district court to consider his second and successive petition.
3. The Clerk is directed to send Docket #s 1, 5, 11, 12, and 13 along with this Order to the Tenth Circuit.

SO ORDERED THIS 17th day of Feb., 2000.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

F I L E D

FEB 12 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BOARD OF TRUSTEES OF RESILIENT)
FLOOR COVERERS LOCAL #1533 PENSION)
PLAN and MARLIN HEIM, Plan)
Administrator,)

Plaintiffs,)

vs.)

HOWARD CAVANESS, et al.,)

Defendants.)

Case No. 97-C-338-E

ENTERED ON DOCKET
DATE FEB 14 2000

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action is in the process of being resolved through negotiations with a third party administrator. 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 90 days that settlement has not been completed and further litigation is necessary.

SO ORDERED this 11th day of February, 2000.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

38

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

TWIN CITY FIRE INSURANCE COMPANY,
a Connecticut corporation,

Plaintiff,

v.

CHEROKEE NATION, et al.,

Defendants.

Case No. 99-CV-440-H

ENTERED ON DOCKET

FEB 14 2000

ADMINISTRATIVE CLOSING ORDER

The parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are ordered to notify the Court within thirty days from the file date of this order as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that thirty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 11th day of February, 2000.


Sven Erik Holmes
United States District Judge

FILED
FEB 14 2000
RECEIVED CLERK
U.S. DISTRICT COURT

15

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

JOHN LEONARD SWIMMER,)
)
 Petitioner,)
)
 vs.)
)
 TWYLA SNIDER,)
)
 Respondent.)

ENTERED ON DOCKET

DATE FEB 14 2000

Case No. 99-CV-095-H (J)

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FEB 14 2000
CLERK OF COURT

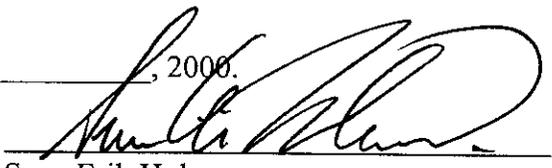
JUDGMENT

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 as follows: (a) to the extent Petitioner directly challenges his expired 1985 convictions, his claims are **dismissed with prejudice** for failure to satisfy the "in custody" requirement of § 2254(b); (b) to the extent Petitioner challenges the enhancement of his multiple Tulsa County convictions, each entered on Petitioner's April 11, 1997 plea of guilty, Petitioner's claims are **dismissed with prejudice** as barred by the § 2244(d) statute of limitations; and (c) to the extent Petitioner challenges the enhancement of his conviction entered in Rogers County District Court, Case No. CF-95-217, on Petitioner's February 25, 1999 plea of guilty, Petitioner's claims are unexhausted and this action is **dismissed without prejudice** for failure to exhaust available state remedies.

IT IS SO ORDERED.

This 11TH day of FEBRUARY, 2000.



Sven Erik Holmes
United States District Judge

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

JOHN LEONARD SWIMMER,)
)
 Petitioner,)
)
 vs.)
)
 TWYLA SNIDER,)
)
 Respondent.)

ENTERED ON DOCKET
DATE FEB 14 2000

Case No. 99-CV-095-H (J) ✓

FEB 14 2000

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FEB 14 2000

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge entered on January 6, 2000 (Docket #31), in this habeas corpus action brought pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommends that Respondent's motion to dismiss (#10) be granted, and Petitioner's petition for a writ of habeas corpus be dismissed without prejudice. On January 14, 2000, Petitioner filed a motion for enlargement of time to file an objection to the Report (#32). The Court granted Petitioner's requested enlargement of time. However, rather than filing an objection to the Report, Petitioner filed, on February 3, 2000, his "motion to withdraw petition for writ of habeas corpus" (#34).

Having reviewed the Report and the facts of this case, pursuant to Rule 8(b) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed. This action should be dismissed and Petitioner's motion to withdraw petition should be denied as moot.

DISCUSSION

As set forth in the Report, Petitioner filed the instant habeas corpus petition on February 2, 1999. In his petition, Petitioner challenges convictions entered in Tulsa County District Court, Case Nos. CRF-85-2064 and CRF-85-3642. Petitioner indicates he was sentenced to two (2) years imprisonment and to three (3) years imprisonment on the two convictions, respectively, to be served concurrently.

In response to the petition, Respondent filed a motion to dismiss. Respondent argued that Petitioner is no longer "in custody" as a result of the challenged convictions and that, as a result, Petitioner cannot directly challenge the expired convictions. Respondent also argued that any direct challenge to the 1985 convictions is time-barred. In footnote 1 of Respondent's brief in support of motion to dismiss (#11), Respondent acknowledged that Petitioner is currently in custody pursuant to multiple 1996 convictions entered in Tulsa County and that each of the sentences entered as a result of the 1996 convictions was enhanced by the 1985 convictions. However, Respondent argued that even if Petitioner were actually challenging the enhancement of his 1996 convictions, his effort would be barred by the § 2244(d) statute of limitations.

In response to Respondent's motion to dismiss, Petitioner stated that his 1985 sentences had in fact expired, but that the convictions had been used for enhancement purposes in Tulsa County Case Nos. CRF-96-1637, CRF-96-4000, CRF-96-4859, and CRF-96-5353, as well as a conviction entered in Rogers County District Court, Case No. CF-95-217 on February 25, 1999.

In reply to Petitioner's response, Respondent confirmed that a Judgment and Sentence was entered against Petitioner on May 11, 1999, as a result of Petitioner's February 25, 1999 plea of guilty, and that Petitioner was sentenced to 10 years imprisonment to be served concurrently with his 1996 convictions from Tulsa County. See #18. Respondent also indicated that the Rogers

County sentence was enhanced by only one of Petitioner's 1985 convictions, namely, Case No. CRF-85-2064. To the extent Petitioner had stated a challenge to the 1999 Rogers County conviction, Respondent noted that Petitioner's challenge to his 1999 conviction was pending in the state district court and asserted that Petitioner had completely failed to exhaust state remedies and that the petition should be dismissed on that basis.

In his Report, the Magistrate Judge concluded that: (1) Petitioner cannot directly challenge his expired 1985 convictions in this habeas action, (2) to the extent Petitioner challenges the enhancement of his multiple Tulsa County convictions, each entered on Petitioner's April 11, 1997 plea of guilty, Petitioner's claims are barred by § 2244(d), and (3) to the extent Petitioner challenges the enhancement of his Rogers County conviction, entered on Petitioner's February 25, 1999 plea of guilty, Petitioner's claims are unexhausted and this action should be dismissed for failure to exhaust available state remedies. Rather than filing an objection to the Report, Petitioner filed his "motion to withdraw petition for writ of habeas corpus."

In the absence of an objection, the Court finds that the Report should be adopted and affirmed in its entirety. As a result, Petitioner's motion to withdraw petition is rendered moot.

However, the Court notes that Petitioner expresses concern in his motion to withdraw that any future federal habeas action may be barred, either as a § 2244(b) second or successive habeas petition or by the § 2244(d) statute of limitations. As to Petitioner's concern that any future habeas corpus challenge may be considered a second or successive habeas corpus petition, Petitioner is advised that because his challenge to the 1999 Rogers County conviction is dismissed without prejudice for failure to exhaust, Petitioner may return to federal court to challenge his 1999 Rogers County conviction after all claims are exhausted without facing dismissal pursuant to § 2244(b).

McWilliams v. Colorado, 121 F.3d 573, 575 (10th Cir.1997) (finding that petitions which have been dismissed without prejudice for failure to exhaust state remedies do not count as previous petitions for purposes of the gatekeeping provisions of § 2244(b), as amended by the Antiterrorism and Effective Death Penalty Act (“AEDPA”)). As to Petitioner’s concern that any future habeas petition challenging his 1999 Rogers County conviction may be time-barred, Petitioner is reminded that the one-year limitations period imposed by § 2244(d) begins to run from the latest of the dates defined at § 2244(d)(1)(A), (B), (C), and (D). That date is usually the date on which the challenged judgment became final by the conclusion of direct review or the expiration of the time for seeking such review, as provided by § 2244(d)(1)(A). Petitioner is further reminded that the one-year period is tolled, or suspended, during the pendency of a “properly filed application for State post-conviction or other collateral review,” as provided by § 2244(d)(2). The record in this case indicates that at least through May 27, 1999, Petitioner had a motion to withdraw guilty plea pending in Rogers County District Court.¹ Thus, at least prior to May 27, 1999, Petitioner’s Rogers County conviction had not yet become final for purposes of the § 2244(d) limitations period. Because Petitioner should have sufficient time to comply with the one-year limitations period **if** he diligently pursues his state remedies,² the Court declines to hold the instant action in abeyance while Petitioner exhausts his state remedies, as requested by Petitioner in his motion to withdraw habeas petition.

¹As part of her reply to Petitioner’s objection to motion to dismiss (#18), Respondent states that Petitioner’s motion to withdraw guilty plea was set for hearing in Rogers County District Court on May 27, 1999. Respondent also attaches a copy of the state court docket sheet in support of her assertion. (#8, Ex. C).

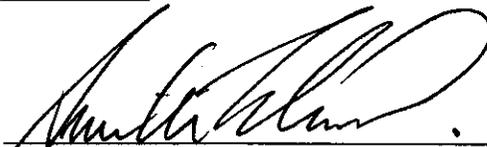
²To exhaust his state remedies, Petitioner must fairly present each of his habeas claims to the Oklahoma Court of Criminal Appeals. Once the Oklahoma Court of Criminal Appeals concludes its review of Petitioner’s claims, he must promptly file his federal habeas corpus petition or risk dismissal for exceeding the one-year limitations period.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the Magistrate Judge (#31) is **adopted and affirmed**.
2. Respondent's motion to dismiss (#10) is **granted**. Petitioner's claims are dismissed as follows:
 - a. To the extent Petitioner directly challenges his expired 1985 convictions, his claims are **dismissed with prejudice** for failure to satisfy the "in custody" requirement of § 2254(b);
 - b. To the extent Petitioner challenges the enhancement of his multiple Tulsa County convictions, each entered on Petitioner's April 11, 1997 plea of guilty, Petitioner's claims are **dismissed with prejudice** as barred by the § 2244(d) statute of limitations;
 - c. To the extent Petitioner challenges the enhancement of his conviction entered in Rogers County District Court, Case No. CF-95-217, on Petitioner's February 25, 1999 plea of guilty, Petitioner's claims are unexhausted and this action is **dismissed without prejudice** for failure to exhaust available state remedies.
3. Petitioner's motion to withdraw petition for writ of habeas corpus (#34) is **moot**.

IT IS SO ORDERED.

This 11TH day of FEBRUARY, 2000.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

STELLA IRENE CARROLL,
Personal representative of the
Estate of BILLY JOE CARROLL,
Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

FILED

FEB 11 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-727-K (M)

ENTERED IN DOCKET

FEB 11 2000

STIPULATION OF DISMISSAL

The Plaintiff, Stella Irene Carroll, Personal Representative of the Estate of Billy Joe Carroll, Deceased, by her undersigned attorneys of record; the Defendant United States of America, by its undersigned attorneys of record; and Third Party Defendant, Stella Irene Carroll, individually, by her undersigned attorney of record, having fully settled all claims asserted by the Plaintiff and by the Defendant in this litigation, hereby stipulate to, and request entry by the Court of the order submitted herewith dismissing all such claims with prejudice.

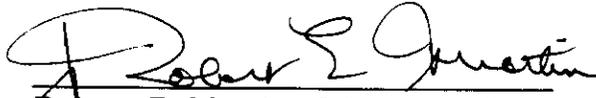
Dated this 11 day of Feb 2000.

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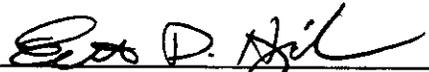
APPROVED AS TO CONTENT AND FORM:

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and



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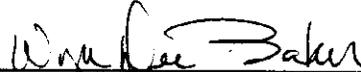
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ATTORNEY FOR THIRD PARTY DEFENDANT



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Tulsa, Oklahoma 74105

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

DEBORAH G. LASLEY,
SSN: 585-52-3235,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

FEB 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-1029-EA

ENTERED ON DOCKET
FEB 11 2000
DATE _____

ORDER

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

Social Security Law and Standards of Review

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

in any other kind of substantial gainful work in the national economy” Id. § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.¹

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

¹ Step one requires claimant to establish that she is not engaged in substantial gainful activity, as defined by 20 C.F.R. § 404.1510. Step two requires that claimant establish that she has a medically severe impairment or combination of impairments that significantly limit her ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant’s impairment is not medically severe (step two), disability benefits are denied. At step three, claimant’s impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments “medically equivalent” to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that she does not retain the residual functional capacity (RFC) to perform her past relevant work. If claimant’s step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant -- taking into account her age, education, work experience, and RFC -- can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work. See generally Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

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

Claimant’s Background

Claimant was born on February 5, 1952, and was 44 years old at the time of the ALJ’s decision. She has a high school education and some training and course work in typing, computer skills, and banking. Claimant worked as a bank teller. She alleges an inability to work beginning July 7, 1994, due to rheumatoid arthritis (RA), manifested by positive rheumatoid antigen², leg swelling, pitting edema³, synovitis⁴ of the hands, synovitis of the knees, arthralgia (joint pain), synovitis of the wrists, morning stiffness, myalgia (muscle pain), hands swelling, synovial swelling, and elevated SED (sedimentation) rate.

Procedural History

On May 5, 1994, claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.). Her claim was denied on July 5, 1994, and claimant was notified of the decision by notice dated July 6, 1994. Claimant applied again on March 9, 1995, but her application was denied in its

² An antigen is “any substance which is capable, under appropriate conditions, of inducing a specific immune response and of reacting with the products of that response, that is, with specific antibody or specifically sensitized T-lymphocytes, or both.” Dorland’s Illustrated Medical Dictionary 95 (28th ed. 1994).

³ Edema is “the presence of abnormally large amounts of fluid in the intercellular tissue spaces of the body, usually applied to demonstrable accumulation of excessive fluid in the subcutaneous tissues.” Dorland’s Illustrated Medical Dictionary 528 (28th ed. 1994). Pitting edema is “edema in which the tissues show prolonged existence of the pits produced by pressure.” Id. at 529.

⁴ Synovia is “a transparent alkaline viscid fluid, resembling the white of an egg, secreted by the synovial membrane, and contained in joint cavities, bursae, and tendon sheaths.” Dorland’s Illustrated Medical Dictionary 1645 (28th ed. 1994). Synovitis is “inflammation of a synovial membrane. It is usually painful, particularly on motion, and is characterized by a fluctuating swelling due to effusion within a synovial sac.” Id.

entirety initially and on reconsideration. A hearing before Administrative Law Judge Leslie S. Hauger, Jr. (ALJ) was held July 23, 1996, in Tulsa, Oklahoma. By decision dated July 31, 1996, the ALJ found that claimant was not disabled. On September 25, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. § 404.981.

Decision of the Administrative Law Judge

The ALJ made his decision at the fourth step of the sequential evaluation process. He found that claimant was impaired by arthralgia, but that it did not meet nor equal the criteria of any impairment in the Listing of Impairments (20 C.F.R. Pt. 404, Subpt. P, App. 1). He also determined that claimant had the residual functional capacity (RFC) to perform a full range of light work and had no nonexertional impairments to reduce further the light occupational base. The ALJ concluded that claimant could perform her past relevant work as a bank teller, and, therefore, claimant was not entitled to a period of disability under the Social Security Act. The ALJ found that the relevant period began on July 7, 1994, the day after claimant was previously denied benefits. He determined that there was no evidentiary basis for reopening the July 6, 1994 denial determination,⁵ and therefore, the doctrine of *res judicata* applied to the prior application.

⁵ Claimant testified she thought her legal representative was appealing the decision on her prior application, only to find that the appeal had never been filed. (R. 268-69) She also stated that SSA employees laughed after she informed them of the name of her representative. She filed her second application the same day. (R. 269) The ALJ's finding of no basis to reopen the prior determination is not reviewable by this Court absent a valid Constitutional claim. Califano v. Sanders, 430 U.S. 99, 107-08 (1977); Nelson v. Sec'y of Health & Human Services, 927 F.2d 1109, 1111 (10th Cir. 1990).

Review

Claimant asserts as error that: (1) the ALJ violated established legal standards for evaluating opinions from treating physicians; (2) the ALJ violated established legal standards for evaluating the claimant's credibility; and (3) the ALJ's RFC assessment is not supported by substantial evidence.

Treating Physician

Claimant argues that the ALJ improperly discounted the opinion of her treating physician, James D. McKay, D.O. The medical records indicate that Terence E. Grewe, D.O., a specialist in general practice and occupational medicine, referred claimant to Dr. McKay, a rheumatologist, in the spring of 1991. (R. 170). Dr. Grewe had previously ordered testing for claimant in January 1991 which revealed that claimant had a positive rheumatoid antigen. (R. 176-77). He suspected RA (see R. 171), noted that claimant had an elevated SED rate of 28 and pitting edema, and prescribed medication prior to his referral. (R. 170)

Dr. McKay ordered x-rays for claimant in June 1991, and those revealed "early inflammatory arthropathy of symmetrical nature." (R. 152) A year later, in July 1992, laboratory tests indicated that claimant had an elevated SED rate of 46. (R. 144) By May of 1993, that rate had fallen to 17 (within the normal range of 0-20). (R. 142) However, Dr. McKay diagnosed RA when he interpreted x-rays of claimant's knees, feet, and hands taken that same month. (R. 139) In September 1993, claimant's sedimentation rate was 14 (R. 138), and the rate fell further, to 12, in April 1994. (R. 136) Dr. McKay's reports of his examinations during the 1991-93 time period indicate that he consistently noted evidence of synovitis, synovial swelling, or some type of synovial change. (See R. 116, 124, 127, 134) Throughout this period and into 1994, he treated her for classic symptoms of RA, despite an SED rate within the normal range and despite his occasional

observation that she had no synovitis or effusion on the date of particular examinations. (R. 112-34, 209-16)

In August 1995, Dr. McKay completed an RFC evaluation. (R. 232-34) He opined that claimant could occasionally sit and infrequently stand, walk, or combine sitting and standing or walking. She could occasionally lift or carry up to 5 lbs., infrequently lift or carry up to 10 lbs., and never lift or carry more than 10 lbs. (R. 232) Dr. McKay indicated that claimant never had use of her feet for repetitive movements as in pushing and pulling leg controls, and she never had use of her hands for repetitive movement as in grasping and/or handling. She infrequently had use of her arms for repetitive movements as in reaching or pushing and pulling controls or levers. He believed that claimant was never able to bend squat, crawl, or climb. He also indicated a total restriction for claimant of activities involving unprotected heights, exposure to marked changes in temperature and humidity, exposure to dust, fumes and gases, and exposure to extremes in temperature. Her restriction of activities involving being around moving machinery was "moderate." (R. 233) He wrote that "Pt. has polyarthritis & fibromyalgia. She has pain in multiple joints of upper & lower extremities" and referenced Dr. Grewe for more information. (R. 234) Dr. Grewe continued to note "RA" and pain associated with it during 1994-96, and he continued to prescribe medication for claimant. (R. 217-25, 235) In 1996, Dr. Grewe again tested claimant and noted an increased SED rate of 27. (R. 227-28)

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments, including the claimant's symptoms, diagnosis and prognosis, what claimant can do despite the claimant's impairment, and any physical or mental restrictions. 20 C.F.R. § 404.1527(a)(2). The Commissioner will give controlling weight to that type of opinion if

it is well-supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. Id. § 404.1527(d)(2). A treating physician may also proffer an opinion that a claimant is totally disabled. However, such an opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Commissioner. Id. § 404.1527(e)(2).

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

The ALJ disregarded Dr. McKay's opinion "[b]ecause the objective medical evidence does not support the diagnosis of rheumatoid arthritis." (R. 16) This observation is contradicted by the x-rays, laboratory tests, prescriptions and progress notes of claimant's treating physicians, as discussed above. The only other medical evidence of record is that of the physicians who performed consultative examinations. Shortly before the denial of benefits on claimant's first application and the beginning of her current period of alleged disability, James M. Ritze, D.O., reported that claimant's "gait is slightly impaired when she walks. It is obvious that she has some discomfort and difficulty with walking." (R. 188) He also noted that she had "some synovial thickening in the wrist and hands proximally, in the ankles and the feet proximally." Id. He diagnosed her as having

rheumatoid arthritis “by history.” Id. He found that all of her joints have heat and tenderness. She exhibited diminished grip strength and ability to manipulate moderately heavy objects. (R. 189) She had difficulty manipulating small objects and difficulty opposing her thumb and finger tips. (R. 190) Heel-toe walking, toe-walking, and heel walking were “not achievable.” (R. 189)

Less than a year later, Dan E. Calhoun, M.D., indicated that claimant’s “[s]tance was normal, and gait was also normal, as far as speed, stability and safety, with no need of any assistive device for ambulation. She walked across the smooth, flat, carpeted surfaces in our office without any difficulty at all.” (R. 195) He also opined that she have “very minimal synovitis in the MCP joints of either hand, and none significantly in either wrist today.” (R. 196). He indicated that her “grip strength was equal bilaterally and appeared to be fairly good today in the afternoon. We did not make her repetitively grip or grasp, however.” (Id.) Dr. Calhoun diagnosed claimant with having rheumatoid arthritis “with pain and stiffness mostly in the hands and some in the wrists.” (Id.) However, he noted that her examination “was not very impressive today at least. Her complaints of symptoms in the hands and wrists seemed somewhat out of character with the physical exam today.” (Id.) He continued, “Besides the abnormalities noted in the hands, there was no other significant deformity, redness, swelling, heat or tenderness in any of the other major peripheral joints.” (Id.) He believed that, “[w]ith good treatment and follow up, her rheumatoid arthritis could be fairly well controlled, allowing her to resume work of some type.” (Id.)

Thus, even the examining physicians acknowledged that claimant had rheumatoid arthritis for some period of time. The Commissioner argues that much of the evidence upon which claimant relies reflects examinations that took place two to three years prior to the alleged onset date. The Commissioner does not cite authority, and the Court is not aware of any, requiring the Court to

ignore evidence of a potentially disabling condition existing prior to an alleged onset date if the condition continues into or becomes disabling during an insured period. Claimants can be diagnosed with a disease or illness before it becomes disabling or before claimant becomes eligible for benefits. The ALJ himself considered some evidence dating prior to the alleged onset date. (See, e.g., R. 14)

The Commissioner also points out that, subsequent to the progress report of April 8, 1994 which reflects Dr. McKay's RA diagnosis (R. 211), Dr. McKay did not report that claimant suffered from RA, but from arthralgia. (Resp. Br., Docket # 11, at 2; see R. 209-10) It is clear, however, that Dr. McKay considered claimant's arthralgia disabling (R. 234), and his RFC assessment defers to Dr. Grewe, who continued to list RA as his diagnosis for claimant during the relevant time period. (R. 217-25) The Commissioner argues that Dr. McKay did not sign the April 8, 1994 report. (Resp. Br., Docket # 11, at 2) It does appear, however, that Dr. McKay initialed the report, as he did all progress reports. (R. 211)

The Commissioner contends that Dr. McKay might not have been claimant's treating physician at the time he completed the May 11, 1995 RFC evaluation (R. 232-34) because the progress notes from Dr. McKay end the previous year. (Resp. Br., Docket # 11, at 2) The last date indicated on the notes is October 30, 1995, although the last examination appears to have been on August 1, 1995. (R. 209) While a gap of 5-8 months does not appear particularly significant, it is clear that claimant continued to receive treatment and medication from Dr. Grewe during the gap in the time period. (R. 222-25)

Contrary to the ALJ's statements, there is medical evidence to support a diagnosis of rheumatoid arthritis. The relevant question is, of course, whether claimant's rheumatoid arthritis was

disabling during the relevant time period. The ALJ failed to show good cause is shown for rejecting the opinion of the treating physician.

Pain and Credibility Assessment

Claimant testified that she has severe, constant pain due to RA. It occurs when she walks, stands, sits, or moves her hands. It is difficult for her to do anything repetitive. (R. 265) On a scale of 0-10, her pain is usually a 7. (R. 266) Lifting a glass of water makes her pain a 9 in her wrist, hand, and elbow. When she sits for an extended period of time, she experiences "needle like pains" in her lower back, hips and knees. She takes aspirin, Tylenol, and Relafen to relieve the pain. (R. 266) In the past, she has also taken Prozac for depression caused by the arthritis, as well as Propulsid and Prilosec for stomach problems caused by arthritis medication. (R. 208)

According to claimant, she can sit for no more than 30 minutes at most before she has to arise and walk around for five or ten minutes due to stiffness. (R. 266-67) She can read, do needlework, and watch television. (R. 267) She needlepoints (cross-stitch) because the doctor told her that it would help, but she can only do it for five or ten minutes at a time. (R. 272) The only housework she can do is some dusting, and she can do very little cooking. She goes shopping only once or twice a month; her husband does most of the shopping. (R. 267) Claimant stated that she cannot stand more than 2 or 3 minutes in one place, and 5 or 10 minutes if she can move around. She cannot walk more than 5 or 10 minutes. The heaviest thing she can lift is a quart of milk, but she has to use both hands to do so. (R. 268)

Claimant drove to the hearing, but she has difficulty holding on to the steering wheel. (R. 271) She does not go out to dinner with her husband. She goes to church three out of four Sundays a month, but she has to get up and move about during the meeting. (R. 273) She can still bathe with

the assistance of a hand rail in the shower. (R. 274) She cannot wear clothing with buttons or zippers, and she cannot wear shoes that tie because of the pain in her hands. She can write some, but not letters. She cannot talk on the telephone because she cannot hold the phone receiver. (R. 275) Claimant contends that the ALJ erred in his analysis of these subjective complaints of pain.

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

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

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

The ALJ considered claimant’s subjective complaints of disabling pain. He specifically referenced the parameters and the criteria set forth in 20 C.F.R. § 404.1529 and Social Security Ruling 96-7p, but he merely listed the factors and proclaimed that “claimant’s allegations are not

fully credible because, but not limited to, the objective findings, or the lack thereof, by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians, and the lack of discomfort shown by the claimant at the hearing.” (R. 15) In addition to this conclusory statement, the ALJ analyzed one of the relevant factors to determine the weight to be given claimant’s subjective allegations of pain: the consistency or compatibility of nonmedical testimony with objective medical evidence.

In so doing, the ALJ rejected claimant’s subjective complaints of pain for much the same reason as he rejected the opinion of claimant’s treating physician. He found that “claimant’s credibility is substantially diminished because there are no supporting x-rays, laboratory tests, etc., to substantiate the claimant’s symptoms” (R. 16) In the same paragraph, he reiterated that claimant’s “physicians, both examining and treating, have found no evidence of an impairment identifiable by examination, laboratory tests, x-rays or other tests.” (Id.) He interpreted Dr. Calhoun’s statements to mean that the “minimal synovitis” observed by Dr. Calhoun “did not significantly affect her ability to use her hands and wrists,” and the ALJ concluded that claimant has the use of her hands and wrists without limitation” (Id.) In conclusory fashion, he states that “[t]here is no objective support for the remainder of claimant’s pain and limitation.” (Id.)

In this manner, the ALJ made express findings as to the credibility of claimant’s subjective complaints of disabling pain, with an explanation of why specific evidence (or lack thereof, in this instance) led to the conclusion that claimant’s subjective complaints were not fully credible, as required by Kepler, 68 F.3d at 391. (R. 16) His conclusion, however, fails to properly take into account all of the objective medical evidence of claimant’s RA and arthralgia, as discussed above. “[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain

emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.” Hargis, 945 F.2d at 1489 (quoting Luna, 834 F.2d at 164). Since the ALJ did not consider all relevant evidence, his credibility determination is not entitled to “great deference.” See Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). “Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence.” Diaz v. Secretary of Health and Human Servs., 898 F.2d 774, 777 (10th Cir. 1990); Social Security Ruling 82-59, 1982 WL 31384. Here, the ALJ’s credibility determination was not supported by substantial evidence.

Residual Functional Capacity

RFC is what a claimant is capable of doing despite his or her impairments, 20 C.F.R. § 404.1545(a). The RFC is determined by considering all relevant evidence, consisting of, *inter alia*, physical abilities, symptoms including pain, and descriptions, including that of the claimant, of limitations, which go beyond symptoms. Id. § 404.1545. Age, education, past work experience, and transferability of skills are vocational factors to be considered. Physical abilities are determined by evaluation of exertional and nonexertional limitations in performing a certain category of work activity on a regular and continuing basis. Id.; see also id. §§ 404.1567, 416,1569(a). The ALJ found that claimant had the RFC to perform a full range of light work. (R. 16-17)

Light work involves lifting no more than twenty pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. Id. § 404.1567(b). “Frequent” means occurring from one-third to two-thirds of the time, and may involve standing or walking for a total of approximately 6 hours of an 8-hour workday. Alternatively, it may involve sitting most of the time but with some

pushing and pulling of arm-hand or leg-foot controls. Social Security Ruling 83-10, 1983 WL 31251 (S.S.A.).

The ALJ's RFC determination, like his credibility determination, is based on the lack of objective medical evidence.

The claimant's treating physicians' medical reports, to the extent they are legible, do no[t] contain any information which would help assess the claimant's residual functional capacity. Accordingly, the medical evidence shows that the claimant has the use of her hands and wrists without limitation and there is no objective evidence which could support a reduction in the claimant's ability to lift, stand, walk or sit, the objective medical evidence shows no impairment of these work-related activities.

(R. 16) As discussed above, the ALJ did not properly consider all relevant evidence. More important, for purposes of a step four analysis, the ALJ never made any findings regarding the physical and mental demands of claimant's past relevant work.

In making his determination at the fourth step of the sequential evaluation process, an ALJ is required to: (1) assess the nature and extent of claimant's physical and mental limitations to determine claimant's RFC for work activity on a regular and continuing basis, supported by substantial evidence from the record; (2) make findings regarding the physical and mental demands of claimant's past relevant work (either as claimant actually performed that work or as is customarily performed in national economy), based on factual information regarding those work demands which bear on medically established limitations; and (3) make findings about claimant's ability to meet the physical and mental demands of that past relevant work. Winfrey v. Chater, 92 F.3d 1017, 1023-26 (10th Cir. 1996). At step four, a vocational expert's (VE) role is limited: the VE may supply information about the demands of claimant's past relevant work; however, the VE cannot perform

the ALJ's fact-finding responsibilities regarding the claimant's past relevant work demands and the claimant's ability to perform past relevant work. Id. at 1025.

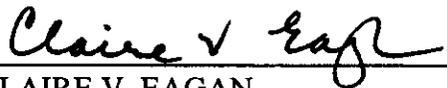
The ALJ's decision was issued one week before the Winfrey decision; however, Winfrey was a restatement of existing law, incorporating Social Security regulations and rulings, and the Tenth Circuit decisions in Henrie v. U.S. Dep't of Health & Human Servs., 13 F.3d 359 (10th Cir. 1993), and Washington v. Shalala, 37 F.3d 1437 (10th Cir. 1994). The only question the ALJ asked the VE was to provide the skill and exertional levels required of a bank teller. (R. 277) The VE testified that it required light work "with occasional stooping, kneeling, constant reaching, handling, at least the hands, and [] communications skills, talking and hearing, and it is considered a low skill and SVP of 5." (Id.) The VE testified, in response to questioning by the claimant's attorney, that claimant could not perform her past relevant work, or any work, for that matter, if her testimony regarding her RFC was accepted as true. (R. 277-78) The ALJ merely concludes, based on the VE's testimony, that claimant had the RFC necessary to perform her past relevant work. Clearly, this analysis does not constitute the function-by-function analysis contemplated by SSA 96-8p or otherwise meet the requirements of Winfrey. The ALJ failed to properly assess claimant's RFC.

Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. If the Commissioner "failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence." Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ's decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand "simply assures that the correct legal standards are invoked in

reaching a decision based on the facts of this case.” Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988). The decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

DATED this 10th day of February, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ERMA ANDERSON,
SSN: 542-68-0558

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 98-CV-864-J

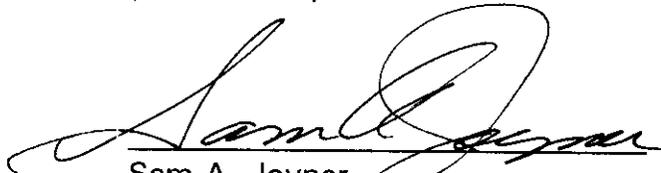
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DATE FEB 11 2000

JUDGMENT

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

It is so ordered this 10 day of February 2000.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

ERMA ANDERSON,
SSN:542-68-0558
Plaintiff,

vs.

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

FEB 10 2000 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-864-J /

ENTERED ON DOCKET

DATE FEB 11 2000

ORDER^{1/}

Plaintiff, Erma Anderson, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts the Commissioner erred because the ALJ failed to properly evaluate the medical evidence, erred in making vocational conclusions and erred in his credibility analysis. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

1. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, in her disability report, states that she is disabled following two surgeries on her lumbar spine, resulting in residual effects of pain in her lower back which radiates into both legs, and with weakness and numbness in her legs. [R. at 103]. Plaintiff sustained injuries to her lumbar spine in a slip and fall accident on

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

^{2/} Administrative Law Judge Leslie J. Hauger, Jr. (hereafter "ALJ") concluded that Plaintiff was not disabled on May 21, 1997. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on September 15, 1998. [R. at 5].

November 5, 1993, while working as a dietary supervisor at a nursing home. Dr. Terry Hoyt diagnosed lumbar strain and hip contusion [R. at 207-09]. Plaintiff continued working until April 1, 1994, when she quit because of pain in her lower back and legs. Radiographic studies performed prior to surgery showed herniated disks at L4-5 and L5-S1, with a large component of foraminal stenosis at L5-S1 and significant interspace collapse and instability at L4-S1. [R. at 124]. Plaintiff underwent extensive decompression, lumbar laminectomy and discectomy with internal fixation on May 18, 1994. [R. at 126-30]. Plaintiff returned to part-time work in November 1994 two days a week, with conservative therapy, but continued to experience chronic pain in her lower back and right leg. [R. at 170-78]. A CT scan of the lumbar spine, performed on May 26, 1995, showed a small focal central protrusion on the anterior surface of the thecal sac at L4-5, with some deformity of the left anterior side of the thecal sac at L5-S1. [R. at 141]. Plaintiff underwent a decompression and exploration surgery, with removal of fixation hardware on June 30, 1995. [R. at 143].

Dr. Donnie Hawkins was Plaintiff's treating physician and surgeon. Dr. Hawkins noted that Plaintiff continued to experience pain in her lower back and left leg after her second surgery. [R. at 166-68]. Dr. Hawkins's treatment notes from October 3, 1995, indicated that Plaintiff had reached maximum medical improvement and that further treatment would not be beneficial. While acknowledging that Plaintiff continued to experience pain and discomfort, Dr. Hawkins recommended that she return to work, and placed her on a 20-pound lifting restriction, with a maximum restriction of 30

pounds for infrequent lifting. Dr. Hawkins also recommended that Plaintiff avoid excessive or repetitive lifting, bending and twisting activities. [R. at 164-65].

Plaintiff began seeing Dr. Gerald Sutton in February 1996 for her back. Dr. Sutton's treatment notes from August 26, 1996, indicate that Plaintiff continued to experience low back pain with tingling in both legs, caused by prolonged sitting or standing. [R. at 215]. Treatment notes from March 13, 1997, noted chronic low back pain increasing in severity, limitation of motion and muscle spasm. [R. at 222]. On May 12, 1997, Dr. Sutton provided a medical source opinion on Plaintiff's capabilities, finding that she could lift 10 pounds occasionally, stand and walk for a total of three hours and sit for a total of three hours in a work day. Dr. Sutton also noted that Plaintiff was lying down for two hours each day and frequently had to change position, from standing to sitting, for relief of pain. [R. at 232].^{3/}

2. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims. See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

^{3/} This medical source opinion was not considered by the ALJ in making his decision. Plaintiff furnished this evidence to the Appeals Council, which made no reference to it in declining to review the ALJ's decision. [R. at 5].

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).^{4/}

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however,

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

meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

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

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when he uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

3. THE ALJ'S DECISION

The ALJ decided Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ concluded that Plaintiff had the residual functional capacity (RFC)

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

to perform a full range of sedentary exertional work with the additional limitations of only occasional stooping, climbing or twisting and the ability to alternate standing and sitting at will.

4. REVIEW

On appeal, Plaintiff alleges that the ALJ improperly evaluated the statements of her treating physicians in connection with other medical evidence, erred in making vocational conclusions and erred in assessing Plaintiff's credibility.

A. IMPROPER EVALUATION OF THE MEDICAL EVIDENCE.

Plaintiff contends that the ALJ failed to properly evaluate the findings of Dr. Hawkins, her treating physician, by failing to include all of the limitations that Dr. Hawkins placed upon Plaintiff. Plaintiff argues that the ALJ failed to consider Dr. Hawkins' October 3, 1995 treatment notes, which restricted Plaintiff from "excessive and repetitive lifting, bending and twisting activities with her spine." Plaintiff's Brief at 1-2. However, the ALJ's RFC assessment limited Plaintiff to occasional stooping, climbing or twisting. "Occasionally" is defined as occurring from "very little up to one-third of the time" and thus satisfies Dr. Hawkins' restrictions against excessive or repetitive performance of these functions. See Social Security Ruling 83-10. The ALJ limited Plaintiff to sedentary work, which does not require significant stooping, defined as bending forward from the waist. Social Security Rulings 83-10 and 83-14. While Dr. Hawkins limited Plaintiff to frequently lifting 20 pounds, the ALJ's RFC assessment further limited Plaintiff to frequently lifting only 10 pounds. The court finds that the ALJ adequately incorporated Dr. Hawkins' restrictions in the RFC assessment.

Plaintiff also contends that, in addition to the restrictions contained in the treatment notes of October 3, 1995, Dr. Hawkins completed a second assessment on that same day. Plaintiff argues that this second assessment placed further limitations upon Plaintiff, restricting her from prolonged sitting, standing and walking and requiring her to change positions frequently. [R. at 192]. The parties differ as to the binding effect of this assessment as the document appears to have been signed on Dr. Hawkins' behalf by another person, and there is no indication in the record as to whether Dr. Hawkins authorized this signature. However, even if it is accepted that this document signifies Dr. Hawkins' intent to place these additional restrictions on Plaintiff, the restrictions are still consistent with the ALJ's assessment. The ALJ's RFC assessment found Plaintiff required the ability to change position at will, i.e., alternate sitting and standing, and thereby avoid prolonged sitting and standing.

Plaintiff also contends that the ALJ failed to give adequate consideration to examination reports from Dr. Terry Hoyt and Dr. Griffith Miller. Dr. Hoyt treated Plaintiff prior to the time that she stopped working on April 1, 1994. His treatment notes diagnose lumbar strain, contusion of the right hip and recommend only that she avoid prolonged sitting or standing [R. at 204-07], which, as noted above, is covered by the ALJ's RFC. which permits Plaintiff the ability to alternate sitting and standing at will.

Dr. Miller examined Plaintiff twice in connection with her worker's compensation case. [R. at 159-62, 199-203]. The ALJ noted that he gave the reports of the physicians examining Plaintiff for her worker's compensation case reduced weight, but

indicated that to the extent those reports were considered by the worker's compensation court, that court's determination was "close" to Dr. Hawkins' findings. [R. at 16]. Plaintiff argues that Dr. Miller's findings and assessments corroborate Dr. Hawkins' findings of Plaintiff's limitations. Plaintiff's Brief at 2. Comparison of Dr. Miller's worker's compensation evaluation [R. at 160-61] with that of Dr. Hawkins shows Dr. Hawkins assigned a lower percentage of permanent partial disability to Plaintiff's impairments. [R. at 163]. The court finds that the ALJ's decision adequately explained his treatment of Dr. Miller's reports, and that such treatment was appropriate for an examining physician's opinion, pursuant to 20 C.F.R. § 404.1527(d).

Plaintiff next argues that the Appeals Council failed to consider Dr. Gerald Sutton's medical source opinion rendered on May 12, 1997. The record indicates that Dr. Sutton has been Plaintiff's treating physician since February 1996. On May 12, 1997, Dr. Sutton completed a medical source statement form, indicating that Plaintiff could occasionally lift up to ten pounds at a time, could sit continuously for 20 minutes for a total of three hours in an eight-hour work day, and could stand or walk continuously for 30 minutes for a total of three hours. Dr. Sutton noted on the form that "In an 8 hour [day] she is laying down 2 hours changes (sitting) standing frequently." [R. at 232].

The ALJ apparently did not receive Dr. Sutton's medical source statement in time to consider it in his decision rendered on May 21, 1997. Plaintiff submitted Dr. Sutton's statement to the Appeals Council, but the Appeals Council made no analysis of that statement in declining to review the ALJ's decision. [R. at 5]. Although

Plaintiff suggests that Dr. Sutton's statement is essentially identical to Dr. Hawkins' restrictions, Plaintiff argues that remand is necessary to allow the ALJ to consider the additional limitations Dr. Sutton placed upon the Plaintiff.

New evidence submitted to the Appeals Council becomes part of the administrative record to be considered by the court when evaluating the Commissioner's decision for substantial evidence, when, as here, the Appeals Council considers the new evidence and denies review without analysis. O'Dell v. Shalala, 44 F.3d 855 (10th Cir. 1994). Accordingly, the court reviews Dr. Sutton's statement to determine if it outweighs the evidence that was before the ALJ when he made his decision. The court reviews Dr. Sutton's statement in accordance with Social Security Ruling 96-2p, to determine if it would be accorded controlling weight as an assessment from a treating physician.

Social Security Ruling 96-2p provides that a case cannot be determined in reliance upon a medical opinion which lacks reasonable support in the medical evidence. The court notes several areas of concern pertaining to the information contained in Dr. Sutton's medical source statement. Dr. Sutton indicated that his assessment of Plaintiff covered the period from May 20, 1994 until May 12, 1997. As noted previously, Dr. Sutton did not begin treating Plaintiff until February 1996. Dr. Hawkins was Plaintiff's treating physician before February 1996, and his assessment of Plaintiff's capabilities during that time should be accorded more weight. Dr. Sutton did not indicate the basis on which he made his assessment of Plaintiff for the time prior to February 1996.

Although Plaintiff contends that Dr. Sutton's statement is "essentially identical" to the limitations imposed by Dr. Hawkins in October 1995, the record demonstrates that Dr. Hawkins' lifting limits were not as restricted as Dr. Sutton's. Plaintiff contends that Dr. Sutton simply quantified in hours and minutes Dr. Hawkins' restrictions against prolonged sitting and standing. Plaintiff's brief at 2-3. However, nothing in Dr. Hawkins' treatment notes, or in the medical evidence overall, suggests a three hour, cumulative limit for sitting and standing as recommended by Dr. Sutton. Dr. Sutton's notation that Plaintiff needs to change positions frequently from sitting to standing is accommodated by the ALJ's limitation that she be able to alternate sitting and standing at will.

Dr. Sutton's statement indicating that Plaintiff "is laying down" for two hours each day does not appear in the nature of a recommendation, but merely a report. Dr. Sutton did not state that Plaintiff "needs" to lie down for two hours a day. Nothing in the medical evidence supports the "need" to lie down for two hours a day. At the hearing, Plaintiff testified that she lies down three to four times a day for 15 to 20 minutes each time, for relief of back pain. [R. at 39]. Thus, even Plaintiff's testimony does not evidence a need to lie down for a full two hours each day.

Review of Dr. Sutton's records does not find support for the restrictions he recommended for Plaintiff. A May 1, 1997 telephone message from one of his staff questions whether the doctor has filled out the form from Plaintiff's attorney. Dr. Sutton scribbled on the form that he could not "fill it out because of lack of information to complete questions" and indicated that Plaintiff needed an office visit. [R. at 227].

This response calls into question the basis for the conclusions Dr. Sutton provided on the form eleven days later. Although Dr. Sutton's treatment notes indicated an increase in Plaintiff's low back pain, he did not indicate a need for lying down for two hours or other restriction of activities. At the hearing, Plaintiff testified that she had not discussed any restriction of her activities with Dr. Sutton. [R. at 42]. In contrast, Plaintiff readily identified restrictions placed upon her by Dr. Hawkins. [R. at 36]. It is reasonable to assume that Plaintiff would have some knowledge of the restrictions of her activities that Dr. Sutton considered in his May 12, 1997, statement, particularly if those restrictions were more severe than Dr. Hawkins' restrictions.

After review of Dr. Sutton's statement with all of the evidence, the court is persuaded that Dr. Sutton's statement is not well-supported by the medical evidence, including his own treatment notes. Dr. Sutton's statement thus does not meet the requisites for controlling weight to be given a treating physician's opinion under Social Security Ruling 96-2p. The court finds that Dr. Sutton's May 12, 1997 statement of Plaintiff's capabilities would not have outweighed the other evidence before the ALJ at the time of his decision.

In summary, the court finds that the ALJ gave adequate consideration to the treating physicians' evidence, as shown by the RFC he gave Plaintiff for sedentary work, reduced further by a need to change position frequently to avoid prolonged sitting and standing.

B. ERRONEOUS VOCATIONAL CONCLUSIONS.

Plaintiff alleges error in the vocational conclusions reached by the ALJ. Specifically, Plaintiff contends that the ALJ's hypothetical did not contain limitations pertaining to her need to avoid prolonged sitting and her need to lie down during the day. Plaintiff points out that when presented with these limitations, the vocational expert testified that a person could not perform substantial gainful activity. Plaintiff's Brief at 3-4.

The need to avoid prolonged sitting was addressed by the ALJ's requirement in the hypothetical that the person be allowed to alternate sitting and standing at will. The vocational expert testified that to perform the sedentary job of an order clerk with the ability to alternate sitting and standing, the person would need to be able to sit for a period of 15 to 30 minutes. [R. at 46]. This is consistent with Plaintiff's testimony that she could sit for 15 minutes at a time before having to change positions. [R. at 35].

The ALJ is required to include in his hypothetical question to the vocational expert those limitations which he finds credible and established by the evidence. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995). The ALJ heard Plaintiff's testimony that she lies down three to four times a day, for 15 to 30 minutes at a time, for relief of her pain. No medical evidence corroborates the need to lie down during the day. The ALJ's determination not to include that limitation in his hypothetical finds support in the record.

Dr. Sutton's statement of Plaintiff's capabilities was not available to the ALJ and the vocational expert at the hearing. As noted above, however, Dr. Sutton's statement lacks support in the evidence. Dr. Sutton provided no reason why three hours was the total number of hours in a day Plaintiff could sit, and the medical evidence does not support such a restriction. Similarly, while Dr. Sutton reported, rather than recommended, that Plaintiff lay down for two hours in a day, the medical evidence also does not support the need to lie down for two hours a day, as discussed above.

C. ERRORS IN ALJ'S CREDIBILITY ANALYSIS.

Plaintiff contends that the ALJ failed to conduct a proper credibility analysis, in that he relied on mistaken observations from the medical record and did not structure his analysis using the factors for assessing credibility set out in Luna. Plaintiff's Brief at 5. Plaintiff did not specifically set out any example of the ALJ's misinterpretation of the medical evidence, but the court's review of the credibility analysis finds no significant misstatement by the ALJ of the medical facts. The ALJ placed great reliance upon Dr. Hawkins' recommendation that Plaintiff return to work with lifting restrictions greater than those eventually set by the ALJ. The ALJ noted that at the time of the hearing, Plaintiff had not been given further restrictions by her doctors. The ALJ recited Plaintiff's daily activities as an indication that she was able to perform sedentary work activity with the limitations in her RFC assessment. The ALJ credited Plaintiff's back pain and need to change position in providing an ability to alternate sitting and standing. As the trier of fact, the ALJ's determination of credibility is

entitled to deference. Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992).

After reviewing the record, the court finds that the ALJ's determination of Plaintiff's credibility is supported by substantial evidence.

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

Dated this 10 day of February 2000.


Sam A. Joyner
United States Magistrate Judge

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

FILED

FEB 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LORI L. PATTEN,

Plaintiff,

v.

Case No. 99-CV-0151H(J)

OKLAHOMA HEART, INC.,
d/b/a OKLAHOMA HEART
INSTITUTE, and WAYNE N.
LEIMBACH, JR.,

Defendants.

ENTERED ON DOCKET
DATE FEB 11 2000

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a), Plaintiff Lori L. Patten, by and through her counsel of record, Randall L. Iola; Defendant Oklahoma Heart, Inc., d/b/a Oklahoma Heart Institute, by and through its counsel of record, W. Kirk Turner; and Wayne N. Leimbach, Jr., by and through his counsel of record, J. Patrick Cremin, hereby stipulate to the dismissal of the above-styled cause of action against the Defendants, Oklahoma Heart, Inc., d/b/a Oklahoma Heart Institute, and Wayne N. Leimbach, Jr., with prejudice to the refiling of same.

DATED this ____ day of February, 2000.



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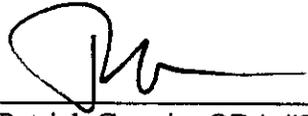


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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 10 2000

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

**BILLY J. WILLIAMS,
SSN: 440-28-6870,**

Plaintiff,

v.

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

Defendant.

Case No. 98-CV-0606-EA

ENTERED ON DOCKET

DATE FEB 11 2000

ORDER

On September 10, 1999, this Court reversed and remanded the Commissioner's decision for further proceedings, thereby making plaintiff the prevailing party. Plaintiff has submitted an application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), seeking an award in the amount of \$3,691.00 for attorney fees for all work done before the district court and \$8.54 for court costs. The Commissioner objects to plaintiff's motion, claiming that the amount requested is excessive. Specifically, the Commissioner argues as follows: plaintiff's request for attorney fees is excessive and warrants a 25% across-the-board reduction; alternatively, plaintiff's request for attorney fees should be reduced because plaintiff has included tasks which are not properly compensable under the EAJA.

The Commissioner requests a 25% across-the-board reduction because plaintiff's attorney bills his time in increments of fifteen minutes, or one quarter of an hour, instead of billing in increments of six minutes, or one-tenth of an hour. While the Court recognizes those authorities which disapprove of quarter-hour billing, this Court is not required or prepared to prohibit counsel from billing in this manner. However, quarter-hour billing is imprecise, and the Court is more likely

to find that counsel's billing practices are unreasonable when time obviously spent for a six-minute task is billed as a fifteen-minute task. Further, if the Court were to make an across-the-board reduction, the percentage would be the difference between a quarter of an hour and a tenth of an hour, or a 15% reduction.

In this matter, however, a fair result is obtained by reducing the amount of attorneys' fees by deducting an amount for clerical tasks that do not require attorney expertise and an amount for those tasks that should not have taken any attorney fifteen minutes to perform. As the Commissioner argues, tasks such as setting appointments, docketing due dates, preparing cover letters and standard correspondence,¹ sending summons, and mailing documents should be considered overhead or clerical tasks. Further, fifteen minutes to review or sign standard court documents regarding administration of the case is excessive. As the Commissioner also suggests, an entry-by-entry evaluation of plaintiff's request for attorney fees would be unnecessarily time-consuming and involve the Court in unnecessary micro-management.

The Commissioner asks the Court to reduce the amount awarded for attorney's fees by deducting 50% of the amount requested for entries to which the Commissioner specifically objects. The Commissioner has determined this amount to be one-half of \$460.50, or \$230.25. In Miller v. Apfel, No. 98-CV-0900 (N.D. Okla. Jan. 24, 2000) (unpublished decision), the Court followed the same recommendation by the Commissioner to reduce the amount awarded for attorney's fees by half for objectionable entries. The Court notes, however, that in light of that decision claimant's attorney voluntarily reviewed the amount he requested and offered to reduce his request by \$130.00

¹ This does not imply that the letters accompanying copies of briefs to the client which include explanation or analysis of the arguments, discussion of legal authorities or litigation strategy, and the like would be inappropriate for inclusion in an attorney fee request.

for 2 hours that were more clerical in nature and did not require the expertise of an attorney. Plaintiff has not requested additional compensation for time expended in legal research, writing, and processing of a reply brief to the Commissioner's objection. The Court deems claimant's request reasonable, and shall reduce the amount awarded by \$130.00. Plaintiff shall be entitled to no more than \$3,561.00 in attorney fees, representing a \$130.00 reduction from the \$3,691.00 requested by plaintiff.

In awarding costs, this Court is not persuaded by defendant's argument to reject "postage fees" which are the costs of certified mail. This Court has now rejected this argument twice. See Miller v. Apfel, No. 98-CV-0900-EA (N.D. Okla. Jan. 24, 2000) (unpublished decision); Perkins v. Apfel, No. 98-CV-0380-EA (N.D. Okla. Dec. 28, 1999) (unpublished decision). As set forth in these opinions, service of process is not only necessary to litigation, it is required. Fed. R. Civ. P. 4. The cost for service of process would be recoverable under 28 U.S.C. §1920(1) if defendants were served by the United States Marshal, and costs could be higher if plaintiff elected that method of service. Service by mail better serves the interests of economy and efficiency; in fact, process upon the United States, its agencies, corporations, or officers *must* be made, in part, by registered or certified mail. Fed. R. Civ. P. 4(i). Fees for service of process should be recoverable, even if certified mail costs necessarily include postage.

Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986), does not require a contrary result. That decision, as well as the cases it references for the proposition that postage fees are not recoverable under EAJA, does not indicate that the postage fees at issue there were expended to serve defendants, and this Court would agree that plaintiff cannot recover for postage fees on letters to clients, documents to opposing counsel, or the like. However, it is appropriate, as recognized by

the Eastern District of Oklahoma in Randolph v. Apfel, Case No. 98-248-S (E.D. Okla. June 10, 1999) (unpublished decision), to award costs for service of process effected by registered or certified mail.

IT IS THEREFORE ORDERED that plaintiff be awarded attorney fees in the amount of \$3,561.00 in attorney fees and costs of \$8.54 for a total award of \$3,569.54 under EAJA. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to Weakley, 803 F.2d at 580. This action is hereby dismissed.

It is so **ORDERED** this ^{9th} 10 day of February, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

LESTER L. BAKER,
SSN: 444-46-4701,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

FEB 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-0501-EA

FILED IN DOCKET
FEB 11 2000

ORDER

On October 13, 1999, this Court reversed and remanded the Commissioner's decision for further proceedings, thereby making plaintiff the prevailing party. Plaintiff has submitted an application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), seeking an award in the amount of \$3,525.25 for attorney fees for all work done before the district court and \$8.54 for court costs. The Commissioner objects to plaintiff's motion, claiming that the amount requested is excessive. Specifically, the Commissioner argues as follows: plaintiff's request for attorney fees is excessive and warrants a 25% across-the-board reduction; alternatively, plaintiff's request for attorney fees should be reduced because plaintiff has included tasks which are not properly compensable under the EAJA.

The Commissioner requests a 25% across-the-board reduction because plaintiff's attorney bills his time in increments of fifteen minutes, or one quarter of an hour, instead of billing in increments of six minutes, or one-tenth of an hour. While the Court recognizes those authorities which disapprove of quarter-hour billing, this Court is not required or prepared to prohibit counsel from billing in this manner. However, quarter-hour billing is imprecise, and the Court is more likely

to find that counsel's billing practices are unreasonable when time obviously spent for a six-minute task is billed as a fifteen-minute task. Further, if the Court were to make an across-the-board reduction, the percentage would be the difference between a quarter of an hour and a tenth of an hour, or a 15% reduction.

In this matter, however, a fair result is obtained by reducing the amount of attorneys' fees by deducting an amount for clerical tasks that do not require attorney expertise and an amount for those tasks that should not have taken any attorney fifteen minutes to perform. As the Commissioner argues, tasks such as setting appointments, docketing due dates, preparing cover letters and routine correspondence to a client accompanying copies of filed pleadings,¹ sending summons, preparing certificates of mailing, and mailing documents should be considered overhead or clerical tasks. Further, fifteen minutes to review or sign standard court documents regarding administration of the case is excessive. As the Commissioner also suggests, an entry-by-entry evaluation of plaintiff's request for attorney fees would be unnecessarily time-consuming and involve the Court in unnecessary micro-management.

Nonetheless, the Commissioner asks the Court to specifically deny plaintiff's request for a total of .25 hours of attorney time for preparation of a letter to the Appeals Council with a copy of the Order and Judgment of Remand. The Commissioner represents that the United States Attorney's Office routinely forward such Orders and Judgment to the Appeals Council, and the claimant's attorney engages in unnecessary, duplicative work when he sends the same documents to the Appeals Council. The Commissioner requests that an additional \$33.25 be deducted from claimant's attorney

¹ This does not imply that the letters accompanying copies of briefs to the client which include explanation or analysis of the arguments, discussion of legal authorities or litigation strategy, and the like would be inappropriate for inclusion in an attorney fee request.

fee request for that work. The Court does not agree that the sending of the letter is an unnecessary expenditure of time because claimant's attorney has no control over the United States Attorney's Office and thus no opportunity to ensure that a remand order is, in fact, sent to the Appeals Council in a timely manner. The Court does believe, however, that the sending of a cover letter with the order is a clerical task.

In any event, the amount of the deduction requested by the Commissioner may be offset by the time claimant's attorney legitimately spent on travel time in connection with oral argument. The Commissioner's argument that claimant is not entitled to compensation for travel time or expenses misrepresents a ruling set forth in Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). Weakley and the cases it cites, clearly indicate that travel *expenses* or travel *costs* are not authorized. Id. There is no mention of travel *time*. Claimant is still entitled to compensation for time her attorney spent in travel to the courthouse and back to the office after oral argument. The Court commends claimant's attorney for prorating that time with another case.

The Commissioner asks the Court to reduce the amount awarded for attorney's fees by deducting 50% of the amount requested for entries to which the Commissioner specifically objects. The Commissioner has determined this amount to be one-half of \$823.75, or \$411.88. In Miller v. Apfel, No. 98-CV-0900 (N.D. Okla. Jan. 24, 2000) (unpublished decision), the Court followed the same recommendation by the Commissioner to reduce the amount awarded for attorney's fees by half for objectionable entries. The Court notes, however, that in light of that decision claimant's attorney voluntarily reviewed the amount he requested and offered to reduce his request by \$140.62 for 2.25 hours that were more clerical in nature and did not require the expertise of an attorney. Plaintiff has not requested additional compensation for time expended in legal research, writing, and

processing of a reply brief to the Commissioner's objection. The Court deems claimant's request reasonable, and shall reduce the amount awarded by \$140.62. Plaintiff shall be entitled to no more than \$3,384.63 in attorney fees, representing a \$140.62 reduction from the \$3,525.25 requested by plaintiff.

In awarding costs, this Court is not persuaded by defendant's argument to reject "postage fees" which are the costs of certified mail. This Court has now rejected this argument twice. See Miller v. Apfel, No. 98-CV-0900-EA (N.D. Okla. Jan. 24, 2000) (unpublished decision); Perkins v. Apfel, No. 98-CV-0380-EA (N.D. Okla. Dec. 28, 1999) (unpublished decision). As set forth in Perkins, service of process is not only necessary to litigation, it is required. Fed. R. Civ. P. 4. The cost for service of process would be recoverable under 28 U.S.C. §1920(1) if defendants were served by the United States Marshal, and costs could be higher if plaintiff elected that method of service. Service by mail better serves the interests of economy and efficiency; in fact, process upon the United States, its agencies, corporations, or officers *must* be made, in part, by registered or certified mail. Fed. R. Civ. P. 4(i). Fees for service of process should be recoverable, even if certified mail costs necessarily include postage.

Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986), does not require a contrary result. That decision, as well as the cases it references for the proposition that postage fees are not recoverable under EAJA, does not indicate that the postage fees at issue there were expended to serve defendants, and this Court would agree that plaintiff cannot recover for postage fees on letters to clients, documents to opposing counsel, or the like. However, it is appropriate, as recognized by the Eastern District of Oklahoma in Randolph v. Apfel, Case No. 98-248-S (E.D. Okla. June 10,

1999) (unpublished decision), to award costs for service of process effected by registered or certified mail.

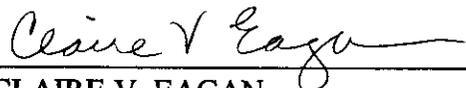
The Commissioner also objects to claimant's request for costs because claimant did not file a bill of costs, a brief in support, and a verification of the bill of costs. 28 U.S.C. §§ 1920, 1924; N.D. L.R. 54.1. Instead, plaintiff merely included such costs as an expense in his EAJA request. As the Court recognized in a recent decision, however, the long-standing practice in this district whereby prevailing parties in Social Security disability appeals have included their requests for costs in their EAJA applications for fees and other expenses, without objection. See Craine v. Apfel, 98-CV-0240-EA (N.D. Okla. Jan. 25, 2000). It would be inequitable and inefficient to require the prevailing parties in this type of case to submit a separate bill of costs within 14 days, while EAJA allows 30 days for an application for fees and expenses. The costs requested in these cases are typically \$8.54 (service costs only) or \$158.54 (filing fees and service costs). A separate hearing before the Court Clerk for such a small amount would cost more than the costs requested.

Accordingly, the Court chooses to exercise its discretion under N.D. L.R. 1.1(e) and waive the requirements of its local rules as they apply to the recovery of costs in Social Security disability appeals. Plaintiff is entitled to an award of costs. Counsel for the Commissioner should be aware of General Order 2000-2, In the Matter of EAJA Applications, issued February 2, 2000, which provides that future applications submitted pursuant to EAJA are exempted from the requirements of N.D. LR 54.1 and 54.2, and a party may seek costs, attorney fees and other expenses in one EAJA application. See G.O. 2000-2, attached hereto.

IT IS THEREFORE ORDERED that plaintiff be awarded attorney fees in the amount of \$3,384.63 in attorney fees and costs of \$8.54 for a total award of \$3,393.17 under EAJA. If attorney

fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to Weakley, 803 F.2d at 580. This action is hereby dismissed.

It is so **ORDERED** this 10th day of February, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE