

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

FILED

MAR 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RANDY BROCK,)

Plaintiff,)

v.)

CITY OF OWASSO, a municipal)
corporation; RODNEY J. RAY, individually)
and in his official capacity as City Manager)
for Owasso; and MARIA ALEXANDER,)
individually and in her official capacity as)
Chief of Police for Owasso,)

Defendants.)

No. 99-CV-547 C (M)

ENTERED ON DOCKET
DATE MAR 20 2000

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 17th day of March 2000, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refileing of a future action.


United States District Judge

Gregory D. Nellis, OBA #6609
Scott R. Hall, OBA #16231
1500 ParkCentre
525 South Main
Tulsa, OK 74103-4524
Telephone: (918) 582-8877
Facsimile: (918) 585-8096

NOTE: This Order is to be immediately delivered to opposing counsel upon receipt.

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

FILED

MAR 20 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RANDY & CATHERINE MARTIN, as
parents and next friend of their minor
daughter, BRANDY MARTIN, *et al.*,

Plaintiffs,

v.

INDEPENDENT SCHOOL DISTRICT
NO. 8 OF TULSA COUNTY, a/k/a
SPERRY PUBLIC SCHOOLS, *et al.*,

Defendants.

Case No. 98-CV-416-H
CLASS ACTION

ENTERED ON DOCKET

DATE MAR 20 2000

ORDER

This matter comes before the Court on Plaintiffs' application for attorney fees (Docket # 25). Plaintiffs seek attorney fees for Professor Ray Yasser and Mr. Samuel J. Schiller in the amounts of \$14,347.50 and \$24,210.00, respectively. Plaintiffs further seek costs for Professor Yasser and Mr. Schiller in the amounts of \$21.00 and \$2006.01, respectively. Defendant Independent School District No. 8 of Tulsa County ("Sperry School District") objects to the award of any fees in this case, contending that the settlement agreement entered into by the parties on January 6, 2000, does not provide for such an award, and furthermore, that Plaintiffs did not obtain their primary objective in bringing the suit. Alternatively, Sperry School District requests that the Court reduce the Plaintiffs' lodestar calculation by at least 50%.

Sperry School District first argues that the Court should decline to award attorney fees in this case because Plaintiffs failed to give the school district notice of their claims prior to filing this suit. In doing so, the school district draws an analogy to recent Supreme Court and Tenth Circuit cases holding that school districts will be held liable for sexual harrassment claims by students only where they had notice of the harassment and failed to take appropriate steps to prevent such harassment. See Davis v. Monroe County Board of Ed., 526 U.S. 629 (1999); Murell v. School District No. 1, Denver, Colo., 186 F.3d 1238 (10th Cir. 1999). The Court

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rejects the application of these principles in the context of Title IX claims for failure to provide equal opportunities for participation in athletics. Unlike sexual harassment, where the liability of school districts has only recently been clarified, the Title IX requirement of equivalent athletic opportunities for female and male students has long been established. Furthermore, while it is conceivable that a school district would not have notice of an individual incident of sexual harassment, the Court finds that, given the longstanding requirements of Title IX and the direct control exerted by school officials over interscholastic sports teams, notice of significant inequality between the opportunities provided boys and girls may be imputed to the school district. Finally, the Court notes that in this case, following the notice of alleged deficiencies set forth in the complaint, the parties reached a temporary impasse over the proper allocation and use of school facilities. This suggests that notice prior to the filing of the instant action would have been unavailing. Accordingly, the Court rejects the notion that Plaintiffs should have been required to provide the school district with notice of their claims, or that they be denied an award of attorney fees for failing to provide such notice.¹

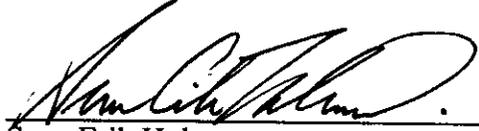
Sperry School District also argues that attorney fees should be denied because Plaintiffs failed to obtain their primary objective in bringing the suit, i.e., construction of a new locker room for female athletes. Plaintiffs respond that construction of a new facility was not their primary objective, and in support, point to their brief of May 5, 1999, which states that the school district has two options: to reconfigure the existing facility, or to construct new facilities for female athletes. The Court finds that Plaintiffs' goals in filing this lawsuit were not limited to achieving the construction of a new locker facility for female athletes. The Court further finds that the settlement agreement reached by the parties satisfied Plaintiffs' primary objectives. Based on the above, the Court concludes that Plaintiffs are entitled to an award of attorney fees in this case, and turns to the appropriate amount of such an award.

¹ The Court observes that Plaintiffs indicate that they did communicate with both school administrators and school board members prior to filing this lawsuit.

awards to Plaintiffs fees in the total amount of \$30,846.00 and costs in the total amount of \$2,027.01.

IT IS SO ORDERED.

This 17TH day of March, 2000.

A handwritten signature in black ink, appearing to read "Sven Erik Holmes", written over a horizontal line.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BE BILINGUAL, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 PHILLIPS PETROLEUM COMPANY, and)
 CLAUDIA MACOUZET,)
)
 Defendants.)

Case No. 99-CV-206-Bu(J) ✓

ENTERED ON DOCKET
DATE MAR 20 2000

REPORT AND RECOMMENDATION

The following motions are now before the Court:

1. Defendant Claudia Macouzet's Motion for Summary Judgment, [Doc. No. 24]; and
2. Defendant Phillips Petroleum Company's ("Phillips") Motion for Summary Judgement, [Doc. No. 27].

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 Defendants' motions for summary judgment be **GRANTED**.^{1/}

^{1/} The undersigned notes that currently there is also pending in this case Plaintiff's motion for leave to amend its complaint, and Plaintiff's motion to file a supplemental complaint. [Doc. Nos. 44 and 53 respectively]. Those motions have not been referred to the undersigned for consideration. Consequently, the undersigned has not reviewed or relied on the briefs filed in connection with those motions to resolve the issues presented in this Report and Recommendation.

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faxed to parties

I. SUMMARY OF CLAIMS ASSERTED BY PLAINTIFF

Plaintiff asserts the following claims in its Amended Complaint:

A. CLAIMS AGAINST PHILLIPS

Intentional Interference with a Contractual Relationship – Plaintiff alleges that Phillips intentionally interfered with a contractual relationship between Plaintiff and Plaintiff’s employees. Doc. No. 9, ¶¶ 5.1-5.5.

Violation of Oklahoma’s Uniform Trade Secrets Act – Plaintiff alleges that Ms. Macouzet misappropriated Plaintiff’s trade secrets, and then in concert with Phillips used those trade secrets to teach foreign languages to Phillips’ employees at a fraction of the price Plaintiff would have charged to teach Phillips’ employees a foreign language. Doc. No. 9, ¶¶ 7.1-7.6.

Violation of Oklahoma’s Uniform Deceptive Trade Practices Act – Plaintiff alleges that Ms. Macouzet’s alleged misappropriation of Plaintiff’s trade secrets and the use of those trade secrets by Ms. Macouzet and Phillips is a deceptive trade practice. Doc. No. 9, ¶¶ 8.1-8.6.

B. CLAIMS AGAINST Ms. MACOUZET

Intentional Interference with a Contractual Relationship – Plaintiff alleges that Ms. Macouzet intentionally interfered with a contractual relationship between Plaintiff and Phillips. Doc. No. 9, ¶¶ 6.1-6.5.

Violation of Oklahoma’s Uniform Trade Secrets Act – Plaintiff alleges that Ms. Macouzet misappropriated Plaintiff’s trade secrets, and then in concert with Phillips used those trade secrets to teach foreign languages to Phillips’ employees at a fraction

of the price Plaintiff would have charged to teach Phillips' employees a foreign language. Doc. No. 9, ¶¶ 7.1-7.6.

Violation of Oklahoma's Uniform Deceptive Trade Practices Act – Plaintiff alleges that Ms. Macouzet's alleged misappropriation of Plaintiff's trade secrets and the use of those trade secrets by Ms. Macouzet and Phillips is a deceptive trade practice. Doc. No. 9, ¶¶ 8.1-8.6.

Breach of Contract – Ms. Macouzet and Plaintiff executed an employment contract with a non-compete clause. Plaintiff alleges that Ms. Macouzet's misappropriation of Plaintiff's trade secrets and her use of those secrets to teach Phillips' employees is a breach of the employment contract. Doc. No. 9, ¶¶ 9.1-9.5.

C. CLAIMS ABANDONED BY PLAINTIFF

Plaintiff concedes in its responses to the Defendants' motions for summary judgment that the following claims should be dismissed: the intentional interference with contractual relationship claim against Ms. Macouzet, and the deceptive trade practices claim against Phillips and Ms. Macouzet. The undersigned recommends, therefore, that the Court grant summary judgment for Defendants on these claims.

The only claims remaining are: the intentional interference with contractual relationship claim against Phillips, the misappropriation of trade secrets claim against Phillips and Ms. Macouzet, and the breach of employment contract claim against Ms. Macouzet. This remainder of this Report will address itself to the merits of these remaining claims.

II. SUMMARY JUDGMENT STANDARD

A court may grant summary judgment only when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court will find no genuine issue of triable fact if it determines that the summary judgment record taken as a whole could not lead a rational trier of fact to find for Plaintiff. Because Plaintiff will bear the burden of proof at trial, Plaintiff must go beyond its pleadings and identify specific facts which establish the existence of each element essential to its case. Defendants need only point to an absence of evidence to support a single element of Plaintiffs' case. The court will, however, resolve all doubts in favor of Plaintiff, the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988); Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

III. FACTUAL SUMMARY^{2/}

Plaintiff is a corporation headquartered in Houston, Texas. Plaintiff is in the business of providing foreign language instruction and translation. Ann Elizabeth Thrush is the president of Plaintiff. Phillips is a petroleum company in the business of locating and developing oil and natural gas. At all relevant times, Plaintiff and Phillips were not in competition with each other.

Plaintiff and Phillips entered into a contract in 1992 pursuant to which Plaintiff was to provide foreign language instruction to Phillips' employees at Phillips' Bellaire, Texas facility. Plaintiff and Phillips entered into another contract in 1993 pursuant to which Plaintiff was to provide foreign language instruction to Phillips' employees at Phillips' Bartlesville, Oklahoma facility.^{3/}

To teach foreign languages to students, Plaintiff uses teaching manuals, student workbooks, and audio cassette tapes developed by Ms. Thrush. Plaintiff's instructors teach using the teaching manuals, and Plaintiff markets and sells the workbooks and audio tapes to customers. The manuals created by Plaintiff contain information which itself is not novel or unique. Plaintiff alleges, however, that the manuals' unique arrangement of otherwise known information, and the training Plaintiff's instructors

^{2/} The undersigned finds no genuine dispute regarding the facts summarized in this section. See Fed. R. Civ. P. 56(d).

^{3/} This contract had an initial term running from January 4, 1993 to August 31, 1993. At the end of the initial term, the contract was subject to renewal on mutually agreeable terms subject, however, to termination, with or without cause, by either party after five days written notice. See Doc. No. 29, Exhibit "B," Deposition Exhibit "7."

receive on how to use the manuals, amounts to a proprietary teaching method which qualifies as a trade secret.

Since 1989, Plaintiff has sold over a thousand workbooks and hundreds of the tapes to individuals and corporations, including Phillips. Plaintiff imposed no restrictions on Phillips' use or dissemination of the workbooks or audio tapes. Plaintiff is not currently claiming any trade secret protection for the workbooks or tapes it created.

Other than the business it conducted with Phillips in Bartlesville, Plaintiff has conducted no other business in Oklahoma. Plaintiff has no offices in Oklahoma. The foreign language instruction by Plaintiff's instructors was conducted at Phillips' offices in Bartlesville. Phillips provided office space, office supplies, computers, and telephones to Plaintiff's teachers.

In October 1995, Plaintiff hired Ms. Macouzet, a Mexican national, as a Spanish instructor. Plaintiff and Ms. Macouzet signed an employment agreement on October 13, 1995. See Doc. No. 26, Exhibit "A." The agreement contained a "covenant not to compete." Id. at ¶¶ I and IV. Phillips was in no way a party to Ms. Macouzet's employment agreement.

Plaintiff instructed Ms. Macouzet on how to teach using Plaintiff's "method" of instruction. As an employee of Plaintiff, Ms. Macouzet reported to work in Bartlesville in January 1996 to teach Spanish to Phillips' employees. Ms. Macouzet was also named as a regional manger for Plaintiff to supervise the other instructors who were providing language instruction in Bartlesville. Plaintiff fired Ms. Macouzet on December

20, 1996, citing her insubordination and failure to report to the Houston office. Ms. Macouzet returned to Mexico on December 24, 1996 and remained there until sometime in March 1997 when she returned to the United States to live with her son's family in Houston.

Prior to her employment with Plaintiff, Ms. Macouzet had graduated from National Autonomous University of Mexico with an honors degree in education. Ms. Macouzet organized and created several programs to teach the history, traditions, culture and architecture of Mexico City, Mexico. Ms. Macouzet had also received extensive Motessori training and had taken numerous courses in education at the university level. Ms. Macouzet's previous work experience included teaching in a variety of schools, running her own school, and serving as the promotions director for the mayor's office in Mexico City. As Plaintiff stated in a November 1995 petition filed with the INS in support of Ms. Macouzet's non-immigrant worker status,

[Ms. Macouzet] is well-qualified for the professional position of Teacher. She holds a [sic] the equivalent of a bachelor's degree in Education from the National Autonomous University of Mexico, and was awarded Licentiate in Pedagogy in 1989. Ms. Macouzet has taught in Mexico City at the Arnold Gessel Elementary School, where she acted as Principal, as well as having served as an interpreter and translator for the Mayor's Office in Mexico City. Ms. Macouzet has worked with professionals for many years and has acquired the knowledge necessary to function as a teacher for adults who wish to improve their language skills in hopes of improving business relationships and promote future business prospects.

Doc. No. 26, Exhibit "A."

In July 1996, four months before Plaintiff fired Ms. Macouzet, Phillips terminated its contract with Plaintiff for foreign language instruction at Phillips' Bellaire, Texas facility. On April 4, 1997, Phillips notified Plaintiff that as of April 18, 1997, Phillips would no longer need Plaintiff's services in Bartlesville, Oklahoma. On April 18, 1997, five months after Plaintiff fired Ms. Macouzet, Phillips terminated its contract with Plaintiff for foreign language instruction in Bartlesville. Phillips' decision to terminate its relationship with Plaintiff was not based on any input, comments or actions by Ms. Macouzet.

On May 19 1997, Phillips offered Ms. Macouzet a teaching position in Bartlesville, teaching Spanish to Phillips' employees. Ms. Macouzet had been unemployed since Plaintiff terminated her employment, and prior to being offered a job by Phillips, Ms. Macouzet had not spoken with anyone from Phillips about working as an employee for Phillips. After her return to Bartlesville as a Phillips employee, Ms. Macouzet did not use Plaintiff's manuals, workbooks or audio tapes to teach Spanish to Phillips employees. Since returning to Phillips, Ms. Macouzet has prepared her own teaching materials and has worked with Phillips to select and purchase numerous teaching materials and learning aids from various companies other than Plaintiff.^{4/}

^{4/} Phillips also hired Genevieve Fitzpatrick and Tatiana Yana Hestand, both former employees of Plaintiff, at roughly the same time it hired Ms. Macouzet. Ms. Fitzpatrick was to teach French and Ms. Hestand was to teach Russian. Both Ms. Fitzpatrick and Ms. Hestand had years of language teaching experience before their employment with either Plaintiff or Phillips. Ms. Fitzpatrick and Ms. Hestand have also testified that they do not use Plaintiff's manuals, workbooks, or tapes while teaching as a Phillips employee.

IV. PLAINTIFF HAS FAILED TO PRESENT EVIDENCE SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO EACH ELEMENT OF ITS MISAPPROPRIATION OF TRADE SECRETS CLAIM UNDER OKLAHOMA'S UNIFORM TRADE SECRETS ACT, 78 Okla. Stat. §§ 85-94.

To recover damages for the misappropriation of a trade secret under Oklahoma's Uniform Trade Secrets Act ("UTSA"), Plaintiff must establish that the alleged secret was:

1. Secret – Plaintiff must show that its teaching "method" is not generally known in the language instruction industry. 78 Okla. Stat. § 86(4)(a). "[A] substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information." Central Plastics Co. v. Goodson, 537 P.2d 330, 333 (Okla. 1975) (quoting the Restatement of Torts, § 757 cmt. b (1939)). Under the UTSA, a "trade secret" is a method that "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use" 78 Okla. Stat. § 86(4)(a).
2. Maintained as Secret by Plaintiff – Plaintiff must show that with regard to its teaching "method," it took reasonable precautions to ensure that its method was retained in secrecy and not disclosed. 78 Okla. Stat. § 86(4)(b).
3. Misappropriated by Defendants – Plaintiff must show that Defendants acquired, disclosed or used Plaintiff's secret teaching method through an "improper means." 78 Okla. Stat. § 86(2). Under the UTSA, "improper means" include "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." Id. at § 86(1).

See generally, Micro Consulting, Inc. v. Zubeldia, 813 F. Supp. 1514, 1534 (W.D. Okla. 1990); and Restatement of Torts, § 757 (1939).

A. THERE IS A GENUINE ISSUE OF FACT REGARDING PLAINTIFF'S POSSESSION OF A "SECRET" TEACHING METHOD.

Plaintiff must show that it has developed a method of teaching foreign languages that is not generally known in the language instruction industry (i.e., a unique method). As support for this element of its claim, Plaintiff cites solely to testimony from Ann Elizabeth Thrush, Plaintiff's president and the creator of the alleged, secret method. Plaintiff cites to pages 80-88, 199-201 and 219-200 of Ms. Thrush's July 15, 1999 deposition as support for its claim that its teaching method is not generally known in the language instruction industry. See Doc. No. 38, Exhibit "A."

The undersigned finds very little support in that portion of Ms. Thrush's testimony cited by Plaintiff for the proposition that Plaintiff's teaching method is unique. Ms. Thrush testified that she decided, after having worked for Berlitz, a nationally-franchised foreign language instruction company, to write her own method for teaching Spanish. She testifies that the method she ultimately developed is many ideas, thousands of things, put together. Doc. No. 38, Exhibit "A," p. 85. The method in its present form is the product of an evolutionary process of corrections and modifications that took years. Id. at 220. In Ms. Thrush's opinion, the method she developed is effective because people can speak the language correctly right away and make their own sentences after one lesson. Id. at pp. 82 and 87. When asked what makes Plaintiff's method different from other foreign language instruction methods, Ms. Thrush testified in essence that she did not know because she had nothing to

compare her method with. Id. at p. 220. The undersigned finds that this testimony standing alone is insufficient to create a genuine issue of fact regarding the uniqueness of Plaintiff's teaching method.

Because the record in this case is large, and particularly because the relevant deposition transcripts submitted by the parties were scattered across many attachments, exhibits and appendices, the undersigned asked Defendant Phillips to submit clean copies of all the relevant deposition transcripts for the Court's review. The Court has read the complete depositions of: Ann Elizabeth Thrush, president of Plaintiff and creator of the alleged secret method; Norma Medina, an employee of Plaintiff responsible for training new instructors to use Plaintiff's method; Annette Thrush Moss, Ann Elizabeth Thrush's daughter, who worked for Plaintiff during the relevant time and was trained in Plaintiff's teaching method; and Patricia Romines and Jamie Wilson, Phillips employees involved with the termination of Plaintiff's contract with Phillips. The undersigned has also reviewed the exhibits submitted by the parties, and the deposition excerpts submitted by the parties from witnesses other than those identified above (e.g., Pedro Carranza, a former instructor for Plaintiff who taught at Phillips).

As discussed above, a review of Ms. Thrush's testimony, which was identified by Plaintiff in its summary judgment brief, did not convince the undersigned that Plaintiff had submitted sufficient evidence to withstand summary judgment on the first element of its trade secret claim. After reviewing all of the deposition testimony described above, however, the undersigned is convinced that Plaintiff has some

evidence from which a jury could discern a unique teaching method. Plaintiffs have presented no evidence that the materials in its manuals are necessarily unique. In fact, Plaintiff admits that the information in its manuals are "otherwise known components of [the foreign language covered by each manual]." Doc. No. 38, p. 5, ¶ 2. There is, however, at least some testimony from Ms. Medina,^{5/} Ms. Moss,^{6/} and Ms. Thrush,^{7/} not specifically identified by Plaintiff, that the way in which Plaintiff's instructors are taught to use the information in Plaintiff's manuals is unique. The undersigned finds, therefore, that summary judgment is not appropriate on the first element of Plaintiff's trade secret claim.

B. THERE IS A GENUINE ISSUE OF FACT REGARDING PLAINTIFF'S EFFORTS TO MAINTAIN THE SECRECY OF ITS TEACHING METHOD.

Plaintiff must show that with regard to its teaching "method," it took reasonable precautions to ensure that its method was retained in secrecy and not disclosed. Plaintiff required its employees to sign non-disclosure agreements, and Plaintiff did not share its method with anyone but its own employees. The undersigned finds that Plaintiff has presented evidence from which a jury could conclude that Plaintiff took steps reasonable under the circumstances to protect the secrecy of its teaching method. Summary judgment is not, therefore, appropriate on the second element of Plaintiff's trade secret claim.

^{5/} See, e.g., October 7, 1999 Deposition of Norma Medina, pp. 63-65.

^{6/} See, e.g., Deposition of Annette Thrush Moss, pp. 92-95.

^{7/} See, e.g., July 15, 1999 Deposition of Ann E. Thrush, pp. 141; and October 5, 1999 Deposition of Ann Elizabeth Thrush, pp. 67-70, and 80-81.

C. THERE IS NO GENUINE ISSUE OF FACT REGARDING DEFENDANTS' MISAPPROPRIATION OF PLAINTIFF'S TEACHING METHOD.

1. No Evidence of Misappropriation by Ms. Macouzet

Plaintiff must show that Defendants "misappropriated" Plaintiff's secret teaching method by violating either § 86(2)(a) or § 86(2)(b). To establish a violation of § 86(2)(a), Plaintiff must establish that the Defendants "acquired" Plaintiff's teaching method by using improper means. To establish a violation of § 86(2)(b), Plaintiff must establish that Defendants disclosed or used Plaintiff's secret teaching method after either (1) directly acquiring Plaintiff's teaching method through an improper means, or (2) acquiring Plaintiff's teaching method from someone who owed a duty to Plaintiff to maintain the secrecy of the teaching method.

Ms. Macouzet "acquired" Plaintiff's teaching method because Plaintiff trained her in the teaching method so that she might work as a language instructor for Plaintiff. She did not acquire the teaching method by breaching her employment contract, which does impose on her a duty to maintain the secrecy of Plaintiff's proprietary information. There is, therefore, no evidence that Ms. Macouzet acquired Plaintiff's secret teaching method by using an improper means.

Ms. Macouzet might be liable under § 86(2)(b) if she used Plaintiff's teaching method after becoming a Phillips employee or if she disclosed Plaintiff's teaching method to Phillips. There is, however, no evidence that either occurred. Other than the fact that Plaintiff's teaching method is now known by Ms. Macouzet, and that Ms. Macouzet's knowledge now works for Phillips, there is no evidence in the record

establishing that, after Plaintiff terminated Ms. Macouzet's employment, Ms. Macouzet has ever disclosed or used Plaintiff's teaching method.

Plaintiff points to the following facts to establish Ms. Macouzet used or disclosed Plaintiff's allegedly secret teaching method:

1. Plaintiff trusted Ms. Macouzet enough to train her to use its teaching method;
2. Ms. Macouzet was liked by Phillips management;
3. Plaintiff fired Ms. Macouzet citing insubordination;
4. During discovery, Ms. Macouzet produced an index from one of Plaintiff's Spanish I teaching manuals; and
5. Ms. Macouzet admits that to prepare for the Spanish classes she now teaches for Phillips, she uses all of her previous knowledge.

Doc. No. 38, pp. 9-10.

Plaintiff's reliance on the index from the Spanish I manual is misplaced. There is no evidence in the record that Ms. Macouzet used, or could use, the "index" from one of Plaintiff's teaching manuals to teach Spanish upon her return to Bartlesville as a Phillips employee. The **only** evidence of record is the fact that Plaintiff left the index behind in a box at Phillips when Phillips terminated its contract with Plaintiff. Ms. Macouzet saw the index once on her return to Bartlesville as a Phillips employee when she was cleaning Phillips' foreign language lab. Ms. Macouzet saw the index in a box with other materials belonging to Plaintiff which had been left after Phillips' and Plaintiff's relationship ended. The only evidence of record establishes that the index

remained in the box undisturbed until it was produced by Defendants to Plaintiff during discovery in this case.^{8/}

Plaintiff also argues that the jury should be permitted to infer that Ms. Macouzet is using or disclosing Plaintiff's teaching method because Ms. Macouzet was taught the method and she is using all of her knowledge to currently prepare her Spanish classes. The Court must be wary of the breadth of Plaintiff's argument because society has "an interest in preserving the job mobility of technically skilled employees, who will be less attractive to new employers so far as their acquired skills and knowledge are regarded as trade secrets." Developments in the Law - Competitive Torts, 77 Harv. L. Rev. 947, 951 (1964). See also BS&B v. Keystone Steel Fabrication, Inc., 584 F.2d 946, 952 (10th Cir. 1978). The undersigned recognizes that it is often difficult to distinguish between the skills acquired by an employee in a lifetime of working and the trade secrets, if any, of a past employer. While the former may be used by the employee in subsequent employment, the latter may not. Plaintiff makes no distinction, however, between the personal experience and previous training as a language instructor which Ms. Macouzet may have obtained throughout her life, and her use of the allegedly secret training method she learned while working for Plaintiff.

^{8/} As discussed above, Plaintiff has also failed to present sufficient evidence to establish a trade secret in any of its teaching manuals, much less the index to one of its manuals. The undersigned has found that any potential trade secret exists in the training Plaintiff's instructors receive on how to use the manual and not the manual itself.

Plaintiff simply asks the Court and, ultimately the jury, to assume that Ms. Macouzet must be using and disclosing Plaintiff's teaching method. However, the only available evidence is to the contrary. Ms. Macouzet, and all of Plaintiff's former employees who were hired by Phillips, have all testified that they are not using Plaintiff's teaching method in their classes. Ms. Macouzet, and Plaintiff's other former employees, took a week-long training course, after being hired by Phillips, designed to train her how to use an "accelerated learning" method, developed in Europe, to teach foreign languages. According to Ms. Macouzet, the accelerated learning method she learned was significantly different from Plaintiff's teaching method. Ms. Macouzet has continued to do her own research, studying the techniques of various authors on the subject. Ms. Macouzet admits that she combines all of her past experience to prepare for and teach her classes, but her method of teaching does not now resemble Plaintiff's method. See December 1, 1999 Deposition of Claudia Macouzet, pp. 183-190, 196-197 and 208-211.

Plaintiff has made no attempt to analyze how Ms. Macouzet teaches today to determine if her teaching method makes significant use of Plaintiff's allegedly secret teaching method. For instance, Plaintiff has not presented any evidence from current students which would demonstrate that they are being taught using Plaintiff's method. Plaintiff could have had an expert monitor Ms. Macouzet's classes and describe her current method, and compare it to Plaintiff's method. Plaintiff has not presented any of the materials Ms. Macouzet is currently preparing and using in her classes in an attempt to show that they are similar to Plaintiff's materials. Absent such an analysis

by Plaintiff, neither the Court or the jury should assume Ms. Macouzet is misappropriating Plaintiff's teaching method. This is especially true given the fact that Ms. Macouzet's livelihood apparently depends on her ability to use her skills as a teacher of Spanish. See Micro Consulting, 813 F. Supp. at 1535 (holding that courts must insure that an employee is not being restrained from using her knowledge, skill and experience to gain her livelihood).

2. No Evidence of Misappropriation by Phillips

Plaintiff argues that Phillips has improperly acquired and used Plaintiff's teaching method by inducing Ms. Macouzet to breach her employment contract, which required her to maintain the secrecy of Plaintiff's teaching method. In support of its argument, Plaintiff points to the same facts outlined above in connection with Ms. Macouzet. See Doc. No. 37, pp. 12-13. Plaintiff premises Phillips' liability on Ms. Macouzet's alleged disclosure or use of Plaintiff's teaching method. Other than hiring Plaintiff's former employees, Plaintiff identifies no other way in which Phillips misappropriated Plaintiff's teaching method. Plaintiff has submitted insufficient evidence to establish that Ms. Macouzet has used or disclosed Plaintiff's teaching method. Thus, Plaintiff cannot establish the last element of its trade secret claim against either Phillips or Ms. Macouzet. Summary judgment in favor of Defendants is, therefore, appropriate on Plaintiff's misappropriation of trade secret claim.

Plaintiff's reliance on the Tenth Circuit's decision in Telex Corporation v. IBM, 510 F.2d 894 (10th Cir. 1975) is misplaced. Telex is distinguishable on its facts. In Telex, certain high-level IBM employees left their employment with IBM and went to

work for Telex. These employees brought with them information about computer systems IBM was designing that had not yet been marketed. This information permitted Telex to make devices which would be compatible with IBM's new computer systems, and thus compete with devices IBM would offer in the market. By using the information it obtained from IBM's former employees, Telex was able to hit the market with its devices much sooner than it otherwise would have. Ordinarily, Telex would have had to wait for IBM to market its devices, and then reverse engineer IBM's devices so Telex could build its own compatible devices. The Court ultimately found that it was this "lead time" which placed Telex in a much better position than it would have been had it not misappropriated IBM's trade secrets by inducing IBM's employees to breach obligations they owed to IBM. Id. at 928-29. IBM was able to clearly establish Telex's acquisition and use of IBM's trade secrets by showing that Telex developed devices it would not have been able to develop at the time it did without the benefit of IBM's information. Plaintiff has presented no evidence in this case which rises to the level of the evidence presented in Telex.

V. **PLAINTIFF HAS FAILED TO PRESENT EVIDENCE SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO EACH ELEMENT OF ITS BREACH OF EMPLOYMENT CONTRACT CLAIM AGAINST MS. MACOUZET.**

Ms. Macouzet executed an employment contract when she was hired by Plaintiff.

See Doc. No. 29, Exhibit "B," Deposition Exhibit "8." The contract contains a covenant not to compete which provides as follows:

[1]For a period of one (1) year after the termination of Employee's employment for any reason, Employee agrees that he/she will not, either directly or indirectly, enter into competition with Be Bilingual. [2]Employee agrees that he/she will not become manager, owner, officer of, or consultant for, any other company, corporation or entity within Harris County, Texas, or any county immediately adjacent to any county in which Be Bilingual [does] Business,^{9/} where such other company, corporation or entity is engaged, either directly or indirectly, in a Business which is competitive with the business of Be Bilingual. [3]Employee agrees that this restriction applies to Employee's performance of the same or similar duties and activities that Employee performed for Be Bilingual or activities where the performance of which activities could result in the disclosure of the Confidential Business Information of Be Bilingual. [4]Be Bilingual and Employee agree that this covenant not to compete does not limit Employee's right to work as an employee of a competitor if Employee is engaged solely in teaching foreign languages and in [sic] not a manager, owner, officer or consultant for such competitor and is not making use of Be Bilingual's Confidential Business Information [defined in ¶ VI] or contacting, soliciting, or providing language instructions to any present or former customer of Be Bilingual.

Id. at p. 1, ¶ I (emphasis added).

In its summary judgment brief, Plaintiff alleges only that Ms. Macouzet breached the clause emphasized above. Doc. No. 38, pp. 10-11. Plaintiff argues that Ms. Macouzet breached the emphasized clause by (1) making use of Plaintiff's secret teaching method,

^{9/} The contract defines "Business" as the teaching of foreign languages. Id. at p. 1, first WHEREAS.

and (2) providing language instruction to Phillips, a former customer of Plaintiff. The undersigned does not agree.

A. THE LANGUAGE OF THE CONTRACT DOES NOT SUPPORT PLAINTIFF'S BREACH OF CONTRACT ARGUMENT.

Plaintiff fails to recognize that the clause it relies on is not part of a restriction on Ms. Macouzet's future employment. Rather, the fourth sentence, of which the clause Plaintiff emphasizes is a part, is itself an exclusion from the restrictions which come before it. The restrictions on Ms. Macouzet's future employment are stated in the first two sentences. The third sentence is a statement of what the parties understand to be included within the restrictions in the first two sentences. The fourth sentence, upon which Plaintiff relies, is a statement of what the parties understand is not included within the restrictions stated in the first two sentences. Plaintiff must, therefore, first establish that Ms. Macouzet is violating one of the restrictions stated in the first two sentences, interpreted with the understanding stated in sentence three.

Plaintiff makes no attempt in its summary judgment brief to establish the violation of either of the restrictions stated in the first two sentences. Rather, Plaintiff relies solely on the fourth sentence, which, despite the first two sentences, permits Ms. Macouzet to work for one of Plaintiff's competitors (e.g., another foreign language school) as a language instructor as long as the conditions in that sentence are satisfied (i.e., not using Plaintiff's teaching method and not instructing one of Plaintiff's former customers).

Plaintiff has offered nothing which would establish the applicability of the fourth sentence to this case. Phillips is in the oil and gas business and Plaintiff is in the language instruction business. Obviously, Phillips is not in the same market as Plaintiff and is not

ving for the same customers as Plaintiff. Plaintiff has, therefore, presented no evidence from which a jury could find that Phillips was one of Plaintiff's competitors. Having failed to do so, Plaintiff has failed to establish that the clause upon which it relies was in any way breached by Ms. Macouzet.^{10/}

Plaintiff also argues that Plaintiff breached the clause identified above by using Plaintiff's confidential business information. Plaintiff's Amended Complaint can also be read as asserting a violation of the employment contract's non-disclosure covenant.^{11/} As the undersigned discussed, *supra*, in Part IV(C) of this Report and Recommendation, Plaintiff has failed to present any evidence which would establish that Ms. Macouzet has used or disclosed to Phillips any of Plaintiff's "confidential business information." Having failed to do so, Plaintiff has failed to implicate either the clause upon which it relies or the non-disclosure covenant in Ms. Macouzet's employment contract.

^{10/} As an aside, the undersigned also notes that the contract also contains the following forum selection clause: "[A]ny action brought under this Agreement shall be brought only in the State of Texas." Doc. No. 29, Exhibit "B," p. 3, ¶ VI(D). Obviously, Plaintiff did not bring this action in the State of Texas. This action would, therefore, appear to be precluded by the language of the very Agreement upon which Plaintiff sues.

^{11/} The contract's non-disclosure covenant provides as follows:

The Employee agrees that any confidential or proprietary business information or trade secret information (herein referred to collectively as "Confidential Business Information") of Company gained by Employee during his/her employment with Company which is not generally known to other [sic] in the relevant trade or industry and which Employee has obtained knowledge of as a result of his/her employment with Company, whether relating to methods, processes, techniques, inventions, discoveries, lists of sales, customers and suppliers or other marketing information, as well as improvements thereof or know-how relating thereto, shall be secret and confidential and shall not be used or disclosed by him/her to third parties unrelated to the Company either during or after his/her employment with Company, except as Company may otherwise authorize in writing.

See Doc. No. 29, Exhibit "B," Deposition Exhibit "8," p. 2, ¶ IV(A)(1).

Plaintiff has failed to present evidence or argument sufficient to establish a breach of either the covenant not to compete or the non-disclosure of confidential business information clause in Ms. Macouzet's employment contract. The undersigned recommends, therefore, that the Court grant summary judgment in favor of Ms. Macouzet on Plaintiff's breach of employment contract claim.

B. THE ENFORCEABILITY OF THE COVENANT NOT TO COMPETE DEPENDS ON ITS REASONABLENESS.

Ms. Macouzet argues in her summary judgment briefs that even if the terms of the employment contract applied in this case, they would constitute restraints of trade, unenforceable under 15 Okla. Stat. § 217. Section 217 provides as follows:

Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by Sections 218 and 219 of this title, is to that extent void.

15 Okla. Stat. § 217. Section 218 provides as follows:

One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county and any county or counties contiguous thereto, or a specified city or town or any part thereof, so long as the buyer, or any person deriving title to the goodwill from him carries on a like business therein. Provided, that any such agreement which is otherwise lawful but which exceeds the territorial limitations specified by this section may be deemed valid, but only within the county comprising the primary place of the conduct of the subject business and within any counties contiguous thereto.

15 Okla Stat. § 218. Section 219 provides as follows:

Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within a specified county and any county or counties contiguous thereto, or a specified city or town or any part

thereof. Provided, that any such agreement which is otherwise lawful but which exceeds the territorial limitations specified by this section may be deemed valid, but only within the county comprising the primary place of the conduct of the business of the subject partnership and within any counties contiguous thereto.

15 Okla. Stat. § 219.

Relying on sections 217-219 of title 15 of the Oklahoma Statutes, Ms. Macouzet's insists that covenants not to compete are statutorily void in Oklahoma unless they fall within two narrowly defined categories: sale of corporate goodwill or dissolution of a partnership, neither of which are applicable in this case. Ms. Macouzet even cites Bayly, Martin & Fay v. Pickard, 780 P.2d 1168 (Okla. 1989) in support of her argument. Ms. Macouzet's counsel must, however, have failed to read Bayly in its entirety because the Court in Bayly specifically rejects the restrictive view of § 217 Ms. Macouzet is advocating. Ms. Macouzet and her counsel have ignored the following language from the Court's opinion in Bayly:

The majority rule is that unreasonable restraints are prohibited and that reasonable restrictions will be enforced. At common law, all contracts restraining trade were void. Later, the rules were relaxed, and contracts founded upon reasonable limitations of time and place were upheld. In E.S. Miller Laboratories, Inc. v. Griffin, 194 P.2d 877, 879 (1948), this Court considered the effect of the enactment of §§ 217-219 on the common law, and it determined that the common law rules which analyzed covenants not to compete based on their reasonableness did not survive the enactment of §§ 217-219.

However, this finding was eroded by Tatum v. Colonial Life & Accident Ins. Co., 465 P.2d 448, 451 (Okla.1970), which held that a limited restraint on trade did not violate § 217. In both Crown Paint Co. v. Bankston, 640 P.2d 948, 952 (Okla.1981), and Bd. of Regents v. Nat'l Collegiate Athletic Ass'n (NCAA), 561 P.2d 499, 508 (Okla.1977), we found that § 217 invalidated only unreasonable restraints on the exercise of

trade. Although the rule of reason which requires that in order to be valid, a covenant must be deemed reasonable by the court, had been incorporated as a matter of law into agreements falling within the parameters of 79 O.S.1981 § 1, [the rule's] application to § 217 was questionable before the Crown Paint and NCAA decisions.

Some states having legislation similar to §§ 217-219 do not subscribe to the rule of reason. Nevertheless, this Court's rulings in Crown Paint and NCAA align Oklahoma with jurisdictions which have similar legislation and which weigh the reasonableness of restrictions to determine their enforceability. Section 217 prohibits only unreasonable restraints on the exercise of a lawful profession, trade, or business.

Bayly, 780 P.2d at 1170-72 (footnotes omitted).

The covenant not to compete in Ms. Macouzet's employment contract is not *per se* void as Ms. Macouzet argues. Rather, the covenant not to compete will be void and unenforceable only if it imposes unreasonable restraints on Ms. Macouzet's ability to exercise her vocation. Ms. Macouzet has not addressed the reasonableness of the restraints imposed by the covenant not to compete, and because the undersigned has found that the covenant is not implicated by the facts of this case, the undersigned will not address the issue further.^{12/}

^{12/} The undersigned notes that the contract contains the following a choice-of-law provision: "This Agreement and the legal relations between the parties thereto shall be governed and construed in accordance with the laws of the State of Texas . . ." Doc. No. 29, Exhibit "B," p. 3, ¶ VI(D). None of the parties have addressed this clause. All of the parties have cited and relied on Oklahoma law in connection with the interpretation and enforceability of the employment contract. The undersigned notes, however, that Texas law regarding the enforceability of covenants not to compete is substantially similar to Oklahoma law, with one important difference. See Light v. Centel Cellular Co. of Texas, 883 S.W. 2d 642, 643-44 (Tex. 1994); and Tex. Bus. & Com. Code Ann. §§ 15.50-15.52. In Texas, the traditional burden of proof would be reversed under the facts of this case (i.e., a covenant not to compete within an at will personal service contract). See § 15.51(b). In Texas, Plaintiff would have the burden of establishing that the covenant not to compete is reasonable. In other words, Ms. Macouzet would not have the burden of establishing that the covenant was unreasonable. Plaintiff has made no such showing in this case.

VI. PLAINTIFF HAS FAILED TO PRESENT EVIDENCE SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO EACH ELEMENT OF ITS TORTIOUS INTERFERENCE CLAIM AGAINST PHILLIPS.

Under Oklahoma law, the tort of intentional interference with a contract requires Plaintiff to establish that:

1. Plaintiff had a contractual right with which Phillips interfered;
2. Phillips' alleged interference was intentional (i.e., malicious) and not privileged or justifiable; and
3. Phillips' intentional and unjustifiable interference proximately caused Plaintiff harm.

Vice v. Conoco, Inc., 150 F.3d 1286, 1292 (10th Cir. 1998) (citing James Energy, Co. v. HCG Energy Corp., 847 P.2d 333, 340 (Okla. 1992)).

Plaintiff has not clearly articulated the contractual right upon which it is relying. In its summary judgment brief, Plaintiff argues that "[b]y contacting [Plaintiff's] employees about possible employment with itself, Phillips [i]ntentionally [i]nterfered with those employees' contracts with [Plaintiff]." Doc. No. 37, p. 8. From the rest of Plaintiff's argument, it becomes clear that Plaintiff is relying on the employment contract discussed, *supra*, in Part V of this Report and Recommendation. Thus, to the extent the employment contract is valid, Plaintiff has identified a contract right sufficient to satisfy the first element of its tortious interference claim. As has already been discussed, however, the undersigned has determined that Plaintiff has failed to present sufficient evidence of any breach of the employment contract executed by Ms.

Macouzet.^{13/} There is no evidence that Phillips interfered with the contract right identified by Plaintiff. The undersigned recommends, therefore, that the Court grant summary judgment for Defendant on Plaintiff's tortious interference claim.

Even if Plaintiff were able to establish that there was a breach of the employment contract and that the breach was induced in part by Phillips' conduct, the undersigned finds no evidence in the record that Plaintiff has been damaged by any alleged breach of the covenant not to compete in the employment contract. Plaintiff fired Ms. Macouzet. Phillips fired Plaintiff. Plaintiff laid off its remaining employees in Bartlesville. Phillips hired Ms. Macouzet and other former employees of Plaintiff. Even if Ms. Macouzet and the other employees could be said to be competing with Plaintiff by teaching for Phillips, the business which they would be denying Plaintiff had already been denied Plaintiff prior to any breach of the employment contract. In other words, the alleged breach of the covenant not to compete could not be a cause in fact of Plaintiff's loss of Phillips' business. However, with respect to a breach of the non-disclosure covenant in the employment contract, Plaintiff could probably establish damages, because Phillips would have the benefit of using a proprietary teaching method for which it did not pay.

^{13/} Plaintiff's tortious interference claim appears to be premised on interference with the contractual rights Plaintiff had in connection with all former employees ultimately hired by Phillips. There are, however, no employment contracts in the record other than the one executed by Ms. Macouzet. The undersigned assumes, therefore, that the terms of the employment contracts executed by the other former employees of Plaintiff hired by Phillips are substantially similar to the contract executed by Ms. Macouzet.

The Oklahoma Supreme Court has defined the second element of Plaintiff's tortious interference claim as follows:

Malice, as part of the second element of this tort, is the intentional performance of a wrongful act without justification or excuse. Privilege, also found in the second element of proof, is defined in the Restatement (Second) of Torts § 773 (1977). It states:

"One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract . . . does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction."

Morrow Development Corporation, v. American Bank and Trust Company, 875 P.2d 411, 416 (Okla. 1994). It is not unlawful for one to interfere with the contractual relations of another if it is done by fair means, with honest intent, and to better one's own business and not principally to harm another. See Del State Bank v. Salmon, 548 P.2d 1024, 1027 (1976); and Hinson v. Cameron, 742 P.2d 549, 551 n. 3 (1987). A defendant's course of conduct is privileged only if its "primary focus" was protection of its own legitimate economic interests rather than interference. The privilege is lost when the defendant's underlying motive is principally to harm the plaintiff. See Green Bay Packaging, Inc. v. Preferred Packaging, Inc., 932 P.2d 1091, 1096 (Okla. 1996).

If it is determined for some reason that Ms. Macouzet, or some other former employee of Plaintiff, has in fact breached her employment contract with Plaintiff, and

that Phillips was in some way responsible for inducing that breach, Phillips' argues that, under the second element discussed above, it had a "privilege" to do so because it was protecting its own legitimate business interests and it was not acting principally to harm Plaintiff. Plaintiff argues that Phillips had no legitimate business interest, and that it just wanted to take advantage of well-qualified instructors which Plaintiff had trained. The undersigned need not address this issue in detail because Plaintiff cannot satisfy the first element of its tortious interference claim. If, however, this element were relevant, the undersigned would not recommend granting summary judgment on this element. There are disputed questions of fact regarding Phillips' principal motivation.

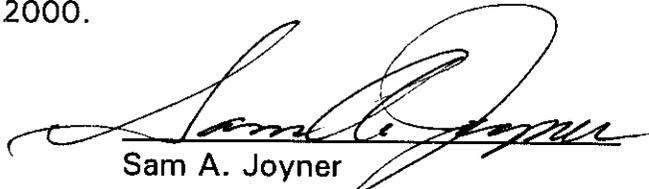
RECOMMENDATION

Plaintiff has failed to present sufficient evidence that Ms. Macouzet or Phillips misappropriated Plaintiff's trade secrets. Plaintiff has failed to present evidence which would establish a breach by Ms. Macouzet of her employment contract. Plaintiff has failed to present evidence which would establish that Phillips interfered with a contractual relationship between Plaintiff and its former employees. Plaintiff has, therefore, failed to present evidence to satisfy at least one element of each of the claims asserted in its Amended Complaint. Consequently, the undersigned recommends that Defendants' motions for summary judgment be **GRANTED** and that all claims currently pled in the Amended Complaint be dismissed. [Doc. Nos. 24 and 27].

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 17 day of March 2000.


Sam A. Joyner
United States Magistrate Judge

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

CLAREMORE AUTOMALL, L.L.C.)
d/b/a/ GLOVER-HARRISON BUICK)
PONTIAC, GMC, an Oklahoma)
Limited Liability Company,)

Plaintiff,)

vs.)

GENERAL MOTORS CORPORATION,)
A Delaware Corporation,)

Defendant.)

FILED

MAR 17 2000 *SR*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No.98-CV-922-Bu(J) ✓

ENTERED ON DOCKET

DATE MAR 20 2000

REPORT AND RECOMMENDATION

Defendant filed a Motion for Summary Judgment on December 3, 1999. [Doc. No. 33-1]. By Minute Order dated December 7, 1999, Defendant's Motion was referred to the undersigned United States Magistrate Judge. [Doc. No. 36-1]. The undersigned has reviewed the pleadings in the case, reviewed the briefs and exhibits filed by the parties, and reviewed the applicable case law. For the reasons discussed below, the undersigned Magistrate Judge recommends that Defendant's Motion for Summary Judgment be **GRANTED** with respect to all of Plaintiff's causes of action and Defendant's counterclaim for declaratory relief.

I. STANDARD: MOTION FOR SUMMARY JUDGMENT

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986).

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

Celotex, 477 U.S. at 317 (1986). "[T]he burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id. at 325. See also Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

To survive a motion for summary judgment, the nonmovant "must establish that there is a genuine issue of material fact. . . ." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585 (1986). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 248. The substantive law determines which facts are material. Id. The nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 585. In addition, the evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the moving party can

demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

In Campbell, the Tenth Circuit Court of Appeals summarized the standard for summary judgment.

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." The movant need only point to those portions of the record which demonstrate an absence of a genuine issue of material fact given the relevant substantive law.

A movant is not required to provide evidence negating an opponent's claim. Rather 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.

Campbell, 962 F.2d at 1521 (citations and footnotes omitted).

II. FACTUAL BACKGROUND

The facts summarized in this section are uncontroverted. On June 22, 1998, Plaintiff entered into agreements with Defendant for purchase and operation of an automobile dealership in Claremore, Oklahoma. That dealership is located within Defendant's Kansas City Zone of operations. Although that transaction involved various agreements, the parties primarily disagree over the effect of the Relocation

Agreement on Plaintiff's ability to relocate the purchased dealership to Catoosa, Oklahoma.

For purposes of the motion for summary judgment, the undersigned views the evidence in the light most favorable to Plaintiff as the non-moving party. See Sims v. Oklahoma ex rel. Dept. of Mental Health, 165 F.3d 1321, 1326 (10th Cir. 1999). Plaintiff asserts that in early June 1998, one of its partners, James Glover ("Glover"), who had prior experience in the ownership and operation of car dealerships, learned that the Buick Pontiac GMC dealership located in Claremore was available for purchase. Glover inquired of Defendant about purchasing the dealership. Affidavit of James E. Glover, Appendix to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, Doc. No. 40-1, Exhibit A (hereinafter referred to as "Glover Affidavit"), ¶ 2 and 5. The parties agree that the present location of the Claremore dealership was considered undesirable, and Defendant intended that the purchaser of the dealership would relocate the business to a new site in the Claremore, Oklahoma area. Id., ¶ 2. Plaintiff alleges that Glover viewed acreage available in Catoosa, Oklahoma as a desirable place to relocate the dealership. Id., ¶ 3 and 4.

Glover's affidavit states that he continually mentioned the relocation of the dealership to the Catoosa site to Defendant's representatives when discussing the purchase of the Claremore dealership, and that "I told both Ms. Cunningham and Mr. Ray that I was interested in purchasing the dealership on the condition that I could relocate the dealership to Catoosa, Oklahoma and that if such a relocation could not occur, I was not interested in purchasing the dealership". Id., ¶ 3-7. However, neither

Plaintiff or Defendant has referred to any deposition testimony, including Glover's deposition, indicating a desire to move the dealership to Catoosa before the June 22 meeting. At that meeting, Glover's own deposition states that he pulled out a map and showed the Catoosa location after the agreements were signed. Deposition of James Glover, Appendix to Defendant's Motion for Summary Judgment, Doc. No. 35-1, Exhibit B, p. 41, lines 7-10 (hereinafter cited as "Glover deposition"). There is also no deposition testimony designated by the parties, including Glover's, that he did not want to buy the dealership if he couldn't move it to Catoosa.

On June 22, 1998, the parties met in Overland Park, Kansas to execute the various documents necessary to complete Plaintiff's purchase of the dealership, including the Relocation Agreement. Glover stated that representatives from Defendant's Kansas City Zone told him, at that meeting, that he could relocate the dealership to the Catoosa site if it were within the area of primary responsibility of the Claremore dealership. Glover showed Defendant's representatives a map of the Catoosa area to indicate where he wished to relocate the dealership and the parties determined the site was within the dealership's area of primary responsibility. Glover also stated that when Defendant's representatives indicated that Plaintiff could not relocate to the Catoosa site if the intention was merely to remodel an abandoned gas station, Glover assured Defendant's representatives that he did not have that intention. Glover stated that while the Kansas City Zone representatives indicated to him that they did not have a problem with the relocation site, he knew he had to obtain final approval of the relocation from "Detroit." Glover stated that he viewed the Kansas

City Zone's acceptance of the relocation as significant, with the approval from "Detroit" as providing merely the formality of a signature. Id., ¶ 8 and 9.

The Relocation Agreement contains the following pertinent provisions:

GM wishes to enhance its representation in the Claremore, Oklahoma, area in a manner consistent with customer demands and future product plans. Dealer [Plaintiff] wishes to obtain the right to own and operate a Buick, Pontiac and GMC dealership in the Claremore, Oklahoma, area pursuant to Dealer Sales and Service Agreements executed by the Buick and Pontiac-GMC Divisions (the "Divisions") of GM

(Amended Complaint, Doc. No. 12-1, Exhibit J, p.1, ¶ A).

Dealer [Plaintiff] has agreed to temporarily locate its Buick, Pontiac and GMC dealerships operation at the Temporary Site and to acquire a new site in the Claremore, Oklahoma, area to which Dealer would permanently locate its Buick, Pontiac and GMC dealership (the "New Site").

(Amended Complaint, Doc. No. 12-1, Exhibit J, p. 1, ¶ C).

Covenant to Acquire New Site. Dealer shall diligently seek to purchase the New Site, which New Site shall be acceptable to GM and the Divisions. Dealer shall confer and consult with GM and the Divisions concerning its acquisition of the New Site.

(Amended Complaint, Doc. No. 12-1, Exhibit J, p. 2, ¶ 5).

Investigations. GM and its employees, agents and contractors shall have the right to enter the New Site and investigate the New Site and all matters relevant to its acquisition, development, usage, operation or marketability. Such right of investigation shall include, without limitation, the right to have made at GM's expense, any studies or inspections of the New Site as GM may deem necessary or appropriate, including without limitation, soils and environmental tests and inspections. Dealer shall cooperate with any such investigations, inspections, or studies made by or at GM's direction. Prior to the closing of the purchase of the New Site, Dealer shall cause the current owner of the New Site to provide GM and its employees, agents, and contractors with access to the New Site to conduct such investigations.

(Amended Complaint, Doc. No. 12-1, Exhibit J, p. 2, ¶ 6).

11. GM's Obligations Conditional. GM shall have no obligation under this Agreement unless:

(c) the transactions contemplated in this Agreement shall have been approved in writing by the Divisions;
(Amended Complaint, Doc. No. 12-1, Exhibit J, p. 3, ¶ 11).

The Notice of Area of Primary Responsibility describes the area to be served by the Claremore, Oklahoma dealership as including specified zip codes in Nowata, Washington and Wagoner Counties, and all of Rogers County, with the exception of an area covered by a specified zip code. See Amended Complaint, Exhibits C and H. Catoosa is within the Claremore dealership's Area of Primary Responsibility. See Glover Deposition, p. 79, lines 6-9; Affidavit of Debra Cunningham, Doc. No. 40-1, Exhibit B, ¶ 6.

After executing the agreements with Defendant, Plaintiff took steps to acquire the Catoosa acreage for relocation of the Claremore dealership. Plaintiff's realty acquisition agreements, however, specifically conditioned the purchase of the acreage upon Defendant's approval of the relocation of the dealership to the Catoosa site. See "Contract for Sale of Real Estate," Doc. No. 35-1, Exhibit E, p. 4, ¶ 9(c). In July 1998, Plaintiff submitted to Defendant a formal, written proposal to relocate the Claremore dealership to the Catoosa site. Glover Affidavit, ¶ 12.

In October 1998, Defendant's "Dealer Contractual Group" reviewed Plaintiff's relocation proposal with a statistical market analysis of the area surrounding the Claremore, Oklahoma area. The Dealer Contractual Group recommended that Plaintiff's proposal be rejected because the Catoosa site's proximity to the market area

of the Tulsa metro dealers carrying the Buick, Pontiac and GMC lines of vehicles would make the proposed Catoosa dealership detrimentally competitive with those Tulsa dealers. The Group's recommendation also noted Defendant's desire to maintain representation of the Buick, Pontiac and GMC vehicle lines in the Claremore area. The Group's recommendation was sent to personnel within the Buick and Pontiac GMC Divisions who concurred in the decision to reject Plaintiff's proposal to relocate the Claremore dealership to Catoosa. See Affidavit of A.F. Dries, Jr., Doc. No. 35-1, Exhibit F, ¶ 3-5 (hereinafter referred to as the "Dries Affidavit").

Plaintiff contends that several years prior to its purchase of the Claremore dealership, Defendant generated a document called "Plan 2000" in which Defendant stated its intention to keep a Buick, Pontiac GMC dealership and a Chevrolet-Oldsmobile dealership in Claremore. Plaintiff contends that Defendant purposely did not bring Plan 2000 to Plaintiff's attention because Defendant knew that Plaintiff would not purchase the dealership if it was aware of Plan 2000's intention to keep the Buick, Pontiac GMC dealership in the Claremore area. However, Glover stated that he was aware that Defendant had a Plan 2000 before he acquired the Claremore dealership, although he was unaware of the Plan's details. Glover Affidavit ¶ 10. Glover testified in his deposition that he did not ask about Plan 2000's provisions, because he thought Defendant would tell him about it if it were important. Glover deposition, p. 97, lines 4-10.

Defendant's Dealer Organization Manager, Mr. A.F. Dries, Jr., stated in his affidavit that Defendant's Plan 2000 document does not mandate an automatic

approval or rejection of a dealership relocation proposal because of its conformity or lack of conformity with the Plan 2000 provisions. Dries Affidavit, ¶ 6. David Lee is Defendant's area manager for leader development in Kansas City, and was one of Defendant's representatives from the Kansas City Zone, who met with Glover on June 22, 1998 to sign the Claremore dealership purchase agreements. Mr. Lee testified in his deposition that Plan 2000 provided for consolidation of Pontiac vehicles with the Buick GMC line of vehicles at the Claremore dealership, and that objective had been accomplished before Plaintiff purchased the dealership. Deposition of David Lee, Doc. No. 35-1, Exhibit D, p. 29, lines 4-16.

III. ANALYSIS OF ISSUES

Plaintiff's Amended Complaint, filed on March 1, 1999, alleged three causes of action against Defendant. [Doc. No. 12-1]. Plaintiff's first cause of action alleged that Defendant's refusal to allow Plaintiff to relocate the Claremore dealership to the proposed Catoosa site breached the Relocation Agreement. Plaintiff's second cause of action sought a declaratory judgment as to its rights to relocate the dealership to Catoosa under the terms of the Relocation Agreement. Plaintiff's third cause of action alleges fraud stemming from Defendant's failure to advise Plaintiff that Defendant would not approve the Catoosa site, prior to Plaintiff's purchase of the Claremore dealership.

Defendant filed its answer on March 25, 1999, with a counterclaim seeking a declaratory judgment as to Plaintiff's rights to relocate the dealership to Catoosa under the terms of the Relocation Agreement. [Doc. No. 18-1].

Defendant filed its motion for summary judgment on December 3, 1999, alleging an absence of controverted facts and the presence only of questions of law in the case. [Doc. No. 33-1]. Plaintiff alleges in response that various questions of fact prevent entry of summary judgment against it. [Doc. No. 39-1] The issues are discussed separately below.

A. BREACH OF CONTRACT

Plaintiff contends that it has complied with the Relocation Agreement which required Plaintiff to relocate the Claremore dealership. Plaintiff contends that Defendant breached the Relocation Agreement by unreasonably refusing to approve relocation of the dealership to the proposed Catoosa site.

Since diversity is the basis of jurisdiction in this case, the substantive law of the forum state, Oklahoma, applies. Black v. Baker Oil Tools, Inc., 107 F.3d 1457, 1460-61 (10th Cir. 1997). In Oklahoma, a breach of contract is a material failure of performance of duty arising under or imposed by agreement. Lewis v. Farmer's Insurance Company, Inc., 681 P.2d 67, 68 (Okla. 1983). Defendant's duties of performance regarding the relocation of the dealership are determined by the Relocation Agreement. The Relocation Agreement only specifies that the new site for the dealership is to be acceptable to Defendant and its divisions. No conditions are

placed upon Defendant regarding its approval of the site. Nothing in the express terms of the Relocation Agreement suggests that Defendant had a duty to approve the Catoosa site for relocation of the dealership.

Plaintiff contends that Glover continually sought and received assurances from Defendant's representatives in the Kansas City Zone that the Catoosa site was an acceptable site for relocation of the Claremore dealership. Plaintiff contends that Defendant's representatives verbally "accepted" the Catoosa site at the June 22, 1998 meeting at which the parties signed the Relocation Agreement and other agreements for the purchase of the Claremore dealership.

"The language of a contract governs its interpretation if the language is clear and unambiguous, and does not involve an absurdity. " Okla. Stat. tit.15 § 154. Under Oklahoma law, the interpretation of an unambiguous contract is a question of law for the courts, with the intent of the parties to be determined from the terms of the contract itself. Public Service Co. v. Burlington Northern R. Co., 53 F.3d 1090, 1097 (10th Cir. 1995); Mercury Investment Company v. F.W. Woolworth Co., 706 P.2d 523, 529 (Okla. 1985). The intention of the parties to a contract must be deduced from the four corners of the instrument. McEvoy v. First Nat. Bank and Trust Co., 624 P.2d 559 (Okla. Ct. App. 1980). The execution of a written contract supercedes all oral negotiations or stipulations concerning its terms and subject matter in the absence of accident, fraud or mistake of fact in its procurement, and any representations made are inadmissible to contradict, change or add to the terms of the written contract. See In Re Continental Resources Corp., 799 F.2d 622, 626 (10th

Cir. 1986) (no error in court's refusal to consider parol evidence of intent when language of note was clear and unequivocal).

Plaintiff asserts its purchase of the Claremore dealership was contingent upon Defendant's approval of the Catoosa relocation site. See Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, Doc. No. 39-1, p. 9. The Relocation Agreement makes no mention of Plaintiff's asserted contingency requiring the ability to move the dealership to the Catoosa site. Under Oklahoma's parol evidence rule, Glover's testimony regarding discussion of terms which were not included in the parties' written agreements is inadmissible to vary the terms of the Relocation Agreement. See Okla. Stat. tit. 15, § 137; First Nat. Bank and Trust v. Kissee, 859 P.2d 502, 506-07 (Okla. 1993)(parol evidence of prior representations, contemporaneous agreements or understanding tending to change, contradict or enlarge the plain terms of written contract is inadmissible).

Plaintiff's argument that Defendant's Kansas City Zone representatives gave a verbal "acceptance" of the Catoosa site at the June 22, 1998 meeting is contradicted by the Relocation Agreement, which provides that Defendant's Divisions' acceptance of Plaintiff's relocation proposal had to be in writing.^{1/} The Relocation Agreement also

^{1/} Plaintiff contends that "acceptance" of the relocation site is ambiguous because the Relocation Agreement does not specify to whom at "GM and its Divisions" the relocation site must be "acceptable." A contract term is ambiguous only if it can be interpreted as having two different meanings, and the court cannot create an ambiguity by using a forced or strained construction, by taking a provision out of context, or by narrowly focusing on a single contractual provision. Osprey L.L.C. v. Kelly-Moore Paint Co., 1999 OK 50, 984 P.2d 194, 199. The undersigned does not find the "acceptance" of the relocation site provision in the Relocation Agreement to be ambiguous, but rather, undefined. The significance of that term being undefined is reduced by the Relocation Agreement's provision that the acceptance had to be in writing.

provides that Defendant had the right to inspect the proposed "New Site" and conduct soil and environmental testing and otherwise investigate that site. Defendant's reservation of the ability to perform such tests and other investigations implies an ability to reject the proposed site, contradicting Plaintiff's argument of a binding "verbal acceptance" of the proposed site at the time the agreements were signed.

There is no evidence in the record which supports Plaintiff's argument that it had a binding "verbal acceptance" of the relocation site from Defendant. Debra Cunningham was Defendant's Dealer Development Coordinator and was present at the meeting with Glover on June 22, 1998 to sign the dealership purchase agreements. Cunningham testified in her deposition that, at the meeting, Glover provided Defendant's representatives with the Catoosa site's address, city, county and state. Deposition of Debra Cunningham, Doc. No. 35-1, Exhibit C, p. 97, lines 21-22 (hereinafter cited as "Cunningham deposition"). Alan Ray was one of the Kansas City Zone representatives who met with Glover on June 22, 1998 and to whom Glover made the request to move the dealership to Catoosa. Cunningham stated in her affidavit that at the meeting, Glover "asked if it would be a problem [to relocate the dealership to Catoosa] to which Alan Ray stated 'as long as it is in your area of primary responsibility and not in a gas station.'" Affidavit of Debra Cunningham, Doc. No. 40-1, Exhibit B, ¶ 7. Ray testified in his deposition that he did not recall Glover saying he wanted to move the dealership to Catoosa, but that Glover's question was "would you consider us moving to Catoosa, and the answer to that question is, yes, you would consider it." Deposition of Alan Ray, Doc. No. 40-1, Exhibit C, p. 117, lines

18-19, 23-25 (hereinafter cited as "Ray deposition"). Ray testified that before the June 22 meeting, he had no idea that Glover wanted to move the dealership from Claremore to Catoosa and that Glover's question about moving was asked in a "rather casual manner," so that Ray answered "yes, we'll consider it." Ray deposition, p. 118, lines 18-20; p. 119, lines 4-7. Ray further testified that when Glover asked about moving to Catoosa, "I did not do a thorough evaluation right then and there of all of the facts and didn't make what would be our final decision right there that day. I told him we would consider it." Ray also testified that "to me that wasn't a simple yes or no, it involved people other than myself and I didn't feel empowered to approve or deny a relocation request. . . ." Ray deposition, p. 119, lines 8-11, 22-25. Cunningham testified in her deposition that Glover knew that the formality of a proposal and following the proper procedures for sending in the relocation proposal were required. Cunningham deposition, p. 98, lines 3-12. Glover himself testified in his deposition that he knew the relocation proposal had to go to "Detroit to get the sign-offs" no matter what the Kansas City Zone said. Glover deposition, p. 41, lines 23-25; p. 42, lines 1-6.

Plaintiff alleged in its Amended Complaint that Defendant's refusal to approve the Catoosa site was "arbitrary and capricious." As an initial matter, the Relocation Agreement places discretion to approve the relocation site solely with Defendant. Plaintiff has not cited any authority to support his argument that reliance upon arbitrary and capricious reasons constitutes a breach of the Relocation Agreement. However, even if the undersigned were to accept the arbitrary and capricious standard of liability

for a breach of contract claim, there is no evidence that Defendant's refusal to approve the Catoosa site was arbitrary and capricious. Under the Relocation Agreement, Defendant had the right to investigate "all matters relevant" to the "marketability" of the proposed new site, in determining the suitability of that site. Defendant stated two valid reasons pertaining to "marketability" for its denial of the proposed Catoosa site: the encroachment of the sales area of the Tulsa area dealerships and the need to serve the people in the Claremore area itself. Plaintiff's subjective belief that the Catoosa site was an acceptable relocation site does not render Defendant's rejection of that site improper.

The undersigned determines, as a matter of law, that the Relocation Agreement is unambiguous in providing that the relocation site must be approved by Defendant. Defendant did not approve the Catoosa site, for the reasons it furnished to Plaintiff. The undersigned finds no breach of duty by Defendant regarding the relocation of the Claremore dealership.

The parties are free to bargain as they see fit, absent illegality. Founders Bank and Trust Co. v. Upsher, 830 P.2d 1355, 1362 (Okla. 1992). When the bargained-for contract is in writing, a court may neither make a new contract to benefit a party nor rewrite the existing one. The law will not make a better contract than the parties themselves have seen fit to enter into. Dismuke v. Cseh, 830 P.2d 188, 190 (Okla. 1992).

Here, Plaintiff essentially asks the court to make the purchase agreements for the Claremore dealership contingent upon Defendant's approval of the Catoosa

relocation site.^{2/} Although Plaintiff contends that Glover talked to Defendant's representatives in the Kansas City Zone about the need to condition the deal upon receiving that approval, no deposition testimony has been designated by either party which demonstrates that Glover would not buy the dealership if he couldn't move it to the Catoosa site. The evidence demonstrates that Plaintiff signed the purchase agreements without having that condition specifically included in the Relocation Agreement. Plaintiff demonstrated its awareness of the importance for including such a condition when it made the contracts to acquire the realty for the Catoosa site contingent upon the Defendant's approval of the relocation site. Plaintiff cannot use this lawsuit as a means now to obtain a better contract than it saw fit to make for itself.

The undersigned recommends that Defendant's motion for summary judgment be granted as to Plaintiff's first cause of action for breach of contract.

B. DECLARATORY JUDGMENT

Plaintiff's Amended Complaint sought a declaratory judgment pursuant to 28 U.S.C. § 2201, regarding its rights under the Relocation Agreement to relocate the Claremore dealership to the proposed Catoosa site. Defendant counterclaimed for a declaratory judgment regarding its rights under the Relocation Agreement to approve or disapprove Plaintiff's proposed relocation site.

^{2/} Debra Cunningham, Defendant's Dealer Development Coordinator in the Kansas City Zone, testified in her deposition that if Glover had insisted on moving the dealership to Catoosa as a prerequisite to acquiring the dealership, Defendant would have considered the issue at that time. Ms. Cunningham testified that Defendant's investigation and review of the relocation site then would have delayed Glover's acquisition of the dealership. Cunningham deposition, p. 99, lines 1-25; p. 100, lines 1-17.

In its motion for summary judgment, Defendant contends that a failure to find that it breached the Relocation Agreement necessitates a finding that Plaintiff was not entitled to the declaration of rights it sought under the Relocation Agreement. Defendant contends that summary judgment in favor of Defendant is appropriate on Plaintiff's request for declaratory relief.

Having found that Defendant's refusal to approve the proposed Catoosa site for relocation of the dealership did not breach the Relocation Agreement, the undersigned finds that Plaintiff's rights to relocate the Claremore dealership are specifically set out in the Relocation Agreement, and no other terms can be added to change the rights of Plaintiff under that Agreement. "Clear and unambiguous contracts should be enforced as written." Armstrong v. Federal Nat'l Mortgage Ass'n, 796 F.2d 366, 371 (10th Cir. 1986). The undersigned recommends that Defendant's motion for summary judgment be granted as to Plaintiff's second cause of action for declaratory relief and Defendant's counterclaim for declaratory relief.

C. FRAUD

For its third cause of action in the Amended Complaint, Plaintiff alleged that Defendant concealed or failed to disclose to Plaintiff that it would not approve the Catoosa relocation site. Plaintiff alleged that Defendant intentionally withheld that information in order to give Plaintiff a false impression that the Catoosa site would be acceptable to Defendant. Plaintiff contends that it would not have purchased the

Claremore dealership if it had known that Defendant would not approve the Catoosa site.

Defendant's motion for summary judgment characterizes Plaintiff's third cause of action as one of fraudulent concealment of facts. Defendant argues that Plaintiff has failed to demonstrate all necessary elements of fraud under Oklahoma law, and summary judgment is therefore appropriate for Defendant on Plaintiff's third cause of action.

A claim of fraud, premised upon a failure to inform, must first establish that a duty to inform existed. "[S]ilence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation; there must have been an obligation to speak." Silk v. Phillips Petroleum Co., 1988 OK 93, 760 P.2d 174, 179. The duty of one contracting party to disclose material facts to the other party depends upon the relationship of the parties, the nature of the subject-matter of the contract, or any other peculiar circumstances presented by the case. Barry v. Orahoad, 132 P.2d 645, 647 (Okla.1942).

Nothing in the evidence suggests that Defendant had a fiduciary relationship with Plaintiff, or any other special relationship, from which a duty to speak can be attributed to Defendant. The evidence does not suggest a great disparity of bargaining power between the parties. In fact, Plaintiff characterized its partner Glover as having experience and knowledge of the car dealership business. See Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, Doc. No. 39-1, p. 1, 12. The evidence demonstrates that Plaintiff's purchase of the Claremore

dealership is nothing more than a normal business transaction, in which the parties were dealing at arms-length.

Plaintiff contends that Defendant fraudulently withheld information from Plaintiff regarding Defendant's Plan 2000 because Defendant knew that Plaintiff would not otherwise purchase the dealership if it could not be relocated outside the Claremore, Oklahoma area. Plaintiff contends that Plan 2000 mandated that the Claremore dealership would not be moved out of the city of Claremore. There is, however, no evidence suggesting that Defendant had a duty to speak regarding the provisions of its Plan 2000. From the evidence submitted, Plan 2000 contemplated only that a Buick, Pontiac GMC dealership would be consolidated and maintained in the Claremore, Oklahoma area. This same fact was stated in the parties' agreements, including the Relocation Agreement. The Plan 2000 document does not add any more information than what appeared in the parties' agreements. See Attachment to Deposition of David Lee, Doc. No. 35-1 Exhibit D. Glover stated that he knew about Plan 2000's existence, but did not ask about it because he believed Defendant would tell him about that document's contents if he needed to know.

Whether a contracting party owed a duty to inform can be determined as a matter of law. ENI v. Samson Inv. Co., 1999 OK 21, 977 P.2d 1086, 1089. The undersigned finds Defendant owed no duty to inform Plaintiff of Plan 2000, given the arms-length nature of their business transaction. However, even if Defendant did have such a duty, nothing in the evidence produced by Plaintiff regarding Plan 2000 indicates that it contained any information differing from the parties' agreements

which specified that the dealership would remain in the Claremore, Oklahoma area. Plaintiff failed to rebut Defendant's evidence that Plan 2000's intention was to consolidate the Buick and Pontiac GMC lines of vehicles in one dealership in Claremore. Plaintiff also failed to rebut Defendant's evidence which stated that Plan 2000's provisions were not an automatic disapproval of relocation sites outside the Plan. This is confirmed by the fact that Defendant's Dealer Contractual Group reviewed Plaintiff's formal relocation proposal with a statistical market analysis of the Claremore and surrounding market areas in reaching the decision to reject Plaintiff's proposal. See Dries Affidavit, ¶ 3-4.

The undersigned recommends that Defendant's motion for summary judgment be granted as to Plaintiff's third cause of action for fraud.

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **GRANT** Defendant's Motion for Summary Judgment and that judgment be entered in favor of Defendant General Motors Corporation on all causes of action alleged by Plaintiff and on Defendant's counterclaim for declaratory relief, consistent with this Report and Recommendation.

OBJECTIONS

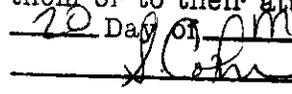
The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written 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 17 day of March 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 20 Day of March, 2000, at 12.


UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADA L. TURNER,
SSN: 438-58-1510,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0493-EA

ENTERED ON DOCKET

DATE MAR 17 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 16th day of March, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

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ORDER

Claimant, Ada L. Turner, 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 Administrative Law Judge (“ALJ”) and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES and REMANDS** the Commissioner’s decision.

Social Security Law and Standard 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

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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, 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 she 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 she has a medically severe impairment or combination of impairments that significantly limit her 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 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 6, 1943, and was 53 years old at the time of ALJ's decision. She has a 12th grade education. Claimant previously worked part-time in a cafeteria, but that work was not considered “past relevant work” under Social Security regulations. Her husband died on December 25, 1987, and claimant received benefits as the mother of the deceased worker's minor children. She now seeks benefits based on her own disability. Claimant alleges an inability to work beginning September 1, 1992, due to chronic back and leg pain, hypertension, and other impairments that include high blood pressure and kidney problems.

Procedural History

On September 26, 1994, claimant protectively filed for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.) On October 3, 1994, claimant applied for disabled widow disability insurance benefits under Title II (42 U.S.C. § 401 et seq.). Claimant's applications for benefits were denied in their entirety initially and on reconsideration. A hearing before ALJ W. Thomas Bundy was held September 12, 1995, in Monroe, Louisiana. Claimant then moved to Houston, Texas. By decision dated May 31, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. Claimant's copy of the decision was mailed to her former address in Louisiana and she did not receive it. On September 12, 1996, the Commissioner notified claimant of the decision and granted additional time for her to appeal.

In September 1997, claimant moved to Tulsa, Oklahoma, and notified the Commissioner of her change of address. On March 3, 1998, 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. The Appeals Council mailed its decision to claimant's former address in Louisiana, and she did not receive it until May 8, 1998. Her filing in this court, 60 days after her receipt of the decision, is timely.

Decision of the Administrative Law Judge

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform the exertional demands of light work, and she had no significant non-exertional impairments which would narrow the range of work she can perform. The ALJ determined that claimant had no past relevant work. Based on her RFC, age, education, and work experience, he found that the Medical-Vocational Guidelines, Table 2, Appendix 2, Subpart P, Regulations No. 4 (the "grids"), direct a conclusion of "not disabled." The ALJ thus concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision.

Review

Claimant asserts as error that "[t]he ALJ breached his heightened duty to develop the record for a *pro se* SSI claimant by failing to obtain available records and failing to order a consultative examination, rendering his finding that the claimant retained the capacity to perform the full range of light work not supported by substantial evidence, especially in light of his conclusion that her testimony was credible." (Pl. Br., Docket # 9, at 2-3.)

Duty to Develop the Record

The ALJ has a basic duty of inquiry to fully and fairly develop the record as to material issues. Baca v. Department of Health & Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993).

However, a claimant must show "the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation. Isolated and unsupported comments by the claimant are insufficient, by themselves, to raise the suspicion of the existence of a nonexertional impairment." Hawkins v. Chater, 113 F.3d 1162, 1167 (10th Cir. 1997) (citations omitted). Further, an ALJ is to explore the facts of a case, but is not under a duty to act as counsel for the claimant. Musgrave v. Sullivan, 966 F.2d 1371, 1377 (10th Cir. 1992).

There is objective evidence that claimant has, or had, hypertension, lumbar strain, and chronic pelvic inflammatory disease. When claimant filed her disability report, she stated that she had a blackout in August 1994, her blood pressure was high, her back hurts, and "drs [sic] say its [sic] not kidneys but I think it is - no blood in urine. . . ." (R. 60) She had seen Dr. W.C. Reeves at Tri-Ward Clinic every six months since the mid-1980's for treatment of her high blood pressure. He prescribed medication to control it. (R. 61) She also reported that she had seen Dr. Allen J. Herbert once on July 3, 1993 for treatment of her blood pressure, back pain, swollen legs, and swollen feet. He prescribed a medication that she could not take, and she went back to her doctor for a different type of medication. (Id.) She stated that she shopped for groceries and cleaned weekly. Her recreation activities and hobbies were sewing, reading, and watching television. She visited friends once per month and attended church. She could also drive, although sometimes she did not "feel like it." (R. 63)

When she filled out her reconsideration disability report, she stated that her left arm felt numb and she had a "fever at all times, every time I go to the Doctor's office." (R. 66) She complained that her left arm was weak, she was dizzy more, and her eyes hurt with her glasses on.

(Id.) She indicated that her doctor changed her blood pressure medication on October 7, 1994, but that she had seen no other physician and had not been hospitalized since she filed her application.

(R. 67) On a supplemental report, claimant indicated that she could groom herself, cook, and clean.

(R. 72) She also stated that she could do laundry, vacuum, wash dishes, take out the trash, shop, and drive. (R. 73)

The medical record is sparse and incomplete. It shows that claimant was diagnosed in November 1993 with uncontrolled high blood pressure and her doctor prescribed medication.² In July 1994, she was diagnosed with cervical erosion, uncontrolled high blood pressure, and lumbar strain. Again, her doctor prescribed medication. (R. 78) In October, 1994, the diagnosis was, again, uncontrolled high blood pressure. (R. 78) There is no mention of cervical erosion or lumbar strain.

One page of a medical report from Allen J. Herbert, M.D., indicates that Dr. Herbert saw claimant on August 3, 1993, when claimant complained of “orange coloured [sic] urine, back ache, and back of thighs painful” for a two week duration. (R. 82) Dr. Herbert’s diagnosis and treatment plans are illegible.

Claimant saw Loren D. Boersma, M.D., on January 9, 1995. (R. 88) Claimant stated that she wanted something for her blood pressure. She also reported that she had gone to the emergency room on December 25, 1994, after she had awakened to find that her hands were numb and swollen. She was in the emergency room for about 3 hours and a “Dr. Gray” gave her a shot. She was also breathing too fast, but Dr. Gray “never likened that to her nerves.” (Id.) Dr. Boersma told claimant that she may have had a bad dream. Claimant thought that it was a reaction to the blood pressure medication. She reported that she had taken Procardia, Norvasc, Hydroserpine, and Tenex. Dr.

² Some of the progress notes from Tri-Ward Clinic are illegible.

Boersma prescribed Tenex and asked her to return to see him in a month. (Id.) When she returned, on February 9, 1995, Dr. Boersma reported:

Ms. Turner brought in some outside readings and these are uniformly good. Ours today are higher and I tried to explain to her how that could be. She says that she has swelling in her hips and thighs and she is sure that it is her kidneys. Urinalysis is normal. I will see her again in 3 months.

(R. 87)

After the ALJ issued his decision, Dr. D.H. Hilty filled out an employability status report on May 24, 1996, indicating that claimant had pelvic inflammatory disease and could not stand for more than 2 ½ hours a day for a period of 12 weeks. He scheduled an appointment for her to see him on August 3, 1996, and he indicated that she could return to work full duty on August 4, 1996. Claimant submitted a letter to the Appeals Council in which she explained that “I was living at a Shelter at the time I was forced to get this work statement because they made me do Kitchen Duty an[d] it was Killing my back that was the only way I could get off of it.[sic]” (R. 93)

Claimant appeared *pro se* at the hearing on September 14, 1995. She testified that she went to the emergency room at a hospital because her back ached, but “they didn’t wait on me because I didn’t have no [sic] insurance.” (R. 98) She said she had seen a doctor twice in that year, but she did not have the money to pay the doctors to find out what why she had weakness and burning pain in her back and legs. (Id.) She stated that she could not stand up for eight hours to work, she tired easily, she smoked, and took her medication as directed. However, she was sometimes dizzy, and she was no longer able to drive. (R. 99)

She claimed that another hospital kept her on December 26, 1994, and put a heart machine on her because she told them she was having a heart attack. (R. 100) She said that she had seen Dr.

Boersma twice since then. (Id.) She lived alone in a mobile home where she could clean, cook, sweep, and mop. (R. 101) She took her medication and napped during the day. She no longer went to church because she had “no way to go,” and she no longer sewed because “money got tight and I couldn’t buy no material.” (R. 101-02) She stated that her feet and legs still swelled but Dr. Boersma could not “catch it” because it was “cleared up” whenever she saw him. (R. 102). The ALJ did not question a vocational expert.

The ALJ wrote that “no evidence has been submitted establishing that significant end-organ damage has occurred as a result of the claimant’s hypertension, nor has any evidence been presented establishing significant musculoskeletal limitations. (R. 16) Hypertension is evaluated by reference to the specific organ system involved (heart, brain, kidneys, or eyes). 20 C.F.R. Pt. 404, Subpt. P, App. 1, §§ 4.00 (E)(2); 4.03.³ Dizziness is not caused by uncomplicated hypertension. The Merck Manual 1633 (17th ed. 1999). The ALJ evaluated claimant’s subjective complaints under the criteria in 20 C.F.R. §§ 404.1529, 416.929, and he concluded that claimant could perform light work. Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. 20 C.F.R. §§ 404.1567, 416.967.

Claimant argues that the ALJ should have obtained progress records from Dr. Gray and Dr. Hilty, and any records from her treatment for her blackouts. The Court doubts that Dr. Gray or Dr.

³ The Commissioner’s citation to 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 4.00(C) for the proposition that hypertensive vascular diseases do not result in a severe impairment unless they cause “...severe damages to one or more of four end organs: heart, brain kidneys, or eyes” is misplaced. That quotation is from 20 C.F.R. Pt. 220, App. 1, §4.00(C) relating to regulations under the Railroad Retirement Act.

Hilty have any progress records, given the very limited purpose for which claimant saw them and the limited contact they had with her. Dr. Gray gave her a shot in an emergency room setting from which she was apparently released without being admitted to the hospital. Dr. Hilty filled out a perfunctory work-release form so that claimant would not have to perform kitchen duty at a shelter where she was staying. His assessment that she could not stand for more than 2 ½ hours per day does not indicate that she can not perform light work. There is no indication that claimant had more than one blackout, that she was treated for it, or that it was related to any of the ailments that she claims is disabling.

Nonetheless, the Court recognizes that an ALJ has a heightened duty to develop the record when a claimant is unrepresented. See Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992). He cannot rely on the absence of contraindication in the medical records to support his findings, nor can he rely on evidence that a claimant engages in limited activities. Thompson v. Sullivan, 987 F.2d 1482, 1491 (10th Cir. 1993). Even where claimant has not established that the missing evidence would have been important in resolving the claim, at the very least the ALJ should have exercised his discretion to order a consultative examination. See Hawkins, 113 F.3d at 1169. There is objective evidence that claimant's problems could have a material impact on the disability decision requiring further investigation.

The hearing in this matter was very short. While the length of the hearing is not dispositive by itself, the questions asked and the answers given are. Thompson, 987 F.2d at 1492. The ALJ asked claimant perfunctory questions about her last job, her attempts to seek medical attention, her treatment, her condition, her limitations as a result, her smoking habit, her medications, where she lived, and her daily activities, but he did not adequately explore the facts. (R. 94-103) No other

witnesses testified. Given the sparse and incomplete nature of the medical record, the testimony of a vocational expert could have provided invaluable assistance.

Consultative Examination

When a claimant's medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled, a consultative examination may be ordered. 20 C.F.R. §§ 404.1517, 416.917. However, the ALJ does not have a duty to order a consultative examination in all cases. 20 C.F.R. §§ 404.1512(f), 404.1519a, 416.912(f), 416.919a.

The Tenth Circuit has stated:

where there is direct conflict in the medical evidence requiring resolution, . . . or where the medical evidence in the record is inconclusive, . . . a consultative examination is often required for proper resolution of a disability claim. Similarly, where additional tests are required to explain a diagnosis already contained in the record, resort to a consultative examination may be necessary.

Hawkins, 113 F.3d at 1166 (citations and footnote omitted). The ALJ has broad latitude in ordering a consultative examination. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 778 (10th Cir. 1990).

The medical evidence regarding claimant's problems is inconclusive. As claimant points out, more than a year had elapsed between the last record of medical treatment and the ALJ's decision. (Cl. Br., Docket # 9, at 4.) Claimant's failure to seek treatment during that year, or to provide documentation of such treatment, would seem to indicate that she was not disabled. Claimant argues that she is unable to afford such treatment (id., at 1-2); however, claimant has not shown that she sought medical treatment or that she was denied medical care because of her financial status. In fact, the record indicates the contrary, given her emergency room visit, her treatment at the Tri-Ward Clinic, Dr. Boersma's notes, and the form completed by Dr. Hilty. Nonetheless, there is no

indication in the record by any doctor of the limitations, if any, accompanying claimant's ailments, or even an RFC form completed by a Social Security Administration staff physician.

"[T]he ALJ should order a consultative exam when evidence in the record establishes the reasonable possibility of the existence of a disability and the result of the consultative exam could reasonably be expected to be of material assistance in resolving the issue of disability." Hawkins, 11 F.3d at 1169. Although that possibility, in this instance, appears more remote than reasonable, the Court feels constrained to reverse and remand in the unlikely event that the documents obtained or a consultative examination would provide a basis for a different outcome than the determination reached by the ALJ in Louisiana. Claimant, in this instance, deserves the benefit of the Court's doubt.

Credibility and Reliance on the Grids

The ALJ found the claimant credible, but did not find that her impairments precluded light work. (R. 18) Credibility determinations made by an ALJ are generally entitled to great deference. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz, 898 F.2d at 777; Social Security Ruling 82-59, 1982 WL 31384. Nonetheless, "the credibility determination is just a step on the way to the ultimate decision." Thompson, 987 F.2d at 1491. Without additional documentation, vocational expert testimony, or a consultative examination, the ALJ's ultimate decision is not supported by substantial evidence.

As in Thompson, the ALJ clearly erred in relying conclusively on the grids because the required underlying findings were not supported by substantial evidence. Id. Claimant testified that

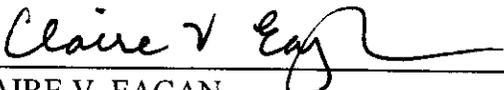
she had pain, and the ALJ found her credible. He then concluded that she could perform light work and that she had no significant non-exertional limitations which narrow the range of work she can perform. (R. 18) His statements are inconsistent. If he found her credible, he could not find that she had no significant non-exertional limitations. Pain is a non-exertional impairment. “Where exertional limitations prevent the claimant from doing the full range of work specified in [her] assigned residual functional capacity, or where nonexertional impairments are also present, the grids alone cannot be used to determine the claimant’s ability to perform alternative work.” Thompson, 987 F.2d at 1492 (citations omitted). Instead, the ALJ could use the grids only as “a framework for consideration of how much the individual’s work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations.” Id. (citations omitted). The record does not provide substantial support for findings of how many jobs claimant can perform despite her impairments. At the very least, the ALJ should have obtained testimony from a vocational expert. His reliance on the grids, after finding claimant’s testimony regarding her pain credible, is reversible error.

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, 987 F.2d at 1487 (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 16th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

ROSE A. WADE,
SSN: 444-68-7402,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

MAR 16 2000 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-0705-EA ✓

ENTERED ON DOCKET
DATE MAR 17 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 16th day of March, 2000.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROSE A. WADE,
SSN: 444-68-7402,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0705-EA

ENTERED ON DOCKET

DATE MAR 17 2000

ORDER

Claimant, Rose A. Wade, 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 Administrative Law Judge (“ALJ”) and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **AFFIRMS** the Commissioner’s decision.

Social Security Law and Standard 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, 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 she 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 she has a medically severe impairment or combination of impairments that significantly limit her 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 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 and Medical History

Claimant was born on April 10, 1960, and was 36 years old at the time of the ALJ’s decision. She completed the ninth grade and has not obtained a high school general equivalency diploma (GED). She received some vocational training through the Department of Human Services Office in Bartlesville, Oklahoma, and has been a licensed certified nurse’s aide for twelve years. She has also been employed cleaning motel rooms, and she has operated a day care center out of her home. Claimant alleges an inability to work beginning January 2, 1996, when she was involved in a motor vehicle accident. She claims to suffer from fibromyalgia, osteoarthropathy of the cervical and lumbosacral spines, and bronchial asthma. Her symptoms include pain, weakness, headaches, sleep disturbance, depression, and nervousness.

An x-ray of claimant’s cervical spine taken after the motor vehicle accident was negative, indicating normal vertebral body heights, disc spaces, and vertebral alignment, no evidence of fracture or dislocation, unremarkable prevertebral soft tissue shadows, intact predental space, and normal odontoid process. (R. 75) A chiropractor treated her with moist heat, massage, intersegmental traction, and manipulative procedures from January 23 through February 8, 1996, when claimant was released after unsuccessful conservative treatment. (R. 77-100) X-rays of claimant’s cervical and thoracic spine taken by the chiropractor were also negative. (R. 99)

Progress notes from claimant’s treating physician, Michael L. Bumpus, M.D., indicate that Dr. Bumpus saw claimant beginning in January 1990 for bronchitis, pneumonitis, menorrhagia, headache, right carpal tunnel, ankle sprain, metatarsal pain, insomnia, situational stress, sinusitis,

cervical strain, and headaches prior to her injury on January 2, 1996. On January 5, 1996, Dr. Bumpus examined claimant and prescribed medication for claimant's "thoracic spine spasm, perispinal type, secondary to MVA," "headaches, improved," and "sinusitis, improved." The last notes from Dr. Bumpus are dated February 15, 1995, when he diagnosed her solely with "[h]istory of headache, multi component." (R. 102) He prescribed Xanax and noted: "Patient states she is going to a specialist in Tulsa for etiology of her headaches, not the chiropractor any longer. See sooner only if have to or need." (R. 102) There is no evidence in the record that claimant saw a specialist in Tulsa.

In April 18, 1996, claimant appeared for a consultative examination by David B. Dean, M.D.

(R. 112-18). Dr. Dean reported:

There is mild limitation of range of motion of the lumbosacral spine due to pain. However, no motor, sensory or reflex deficit is noted in either lower extremity. There is no motor, sensory, or reflex deficit noted in either upper extremity, and grip in both hands is full, and fine motor movements are intact in both hands. There is no limitation of range of motion of the cervical spine noted. . . . Gait is safe and stable, without the use of an assistance device.

(R. 114) He diagnosed claimant with osteoarthropathy of the cervical and lumbosacral spine, tension headaches, without complication, and "bronchial asthma, under good medical control currently, without complication." (Id.)

Claimant was initially diagnosed with fibromyalgia, chronic back pain, and neck pain by Mark Troxler, D.O., in July 1996, at a clinic affiliated with the University of Oklahoma Health Sciences Center in Tulsa. (R. 128-33) Dr. Troxler treated her conservatively with muscle relaxants.

(R. 133) He noted, among other things, negative straight leg raises and good range of motion in her neck and back. (R. 130) She saw Dr. Troxler again in August 1996, when he added anxiety to her

diagnosis and deleted neck pain from it. (R. 124-27) He noted that she needed to exercise and “no activity is worst.” (R. 125) In September 1996, he deleted fibromyalgia and indicated her diagnosis as cephalgia (headache) secondary to back pain. (R. 122-23) His final diagnosis in October 1996 was headache, anxiety and chronic back pain. (R. 120-21). There is no mention of fibromyalgia.

Procedural History

On February 7, 1996, claimant applied for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.), and on February 22, 1996, she applied for disability benefits under Title II (42 U.S.C. § 401 et seq.). Claimant’s applications were denied in their entirety initially and on reconsideration. A hearing before ALJ Stephen C. Calvarese was held November 20, 1996, in Tulsa, Oklahoma. By decision dated January 2, 1997, the ALJ found that claimant was not disabled at any time through the date of the decision. On July 22, 1998, 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 fourth step of the sequential evaluation process. According to him, the medical evidence establishes that claimant has severe fibromyalgia, osteoarthropathy of the cervical and lumbosacral spines, and bronchial asthma, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in, Appendix 1, Subpart P, Regulations No. 4. He found that the testimony of claimant and her mother regarding her alleged pain, weakness, headaches, sleep disturbance, depression, and nervousness were credible only to the extent consistent with a residual functional capacity (RFC) for a wide range of medium work. He determined that claimant had the RFC to perform work-related activities except for work involving

more than the occasional lifting up to 50 pounds and more than occasional bending or stooping. He concluded that claimant's impairments do not prevent her from performing her past relevant work, and thus, she was not disabled under the Social Security Act at any time through the date of the decision.

Review

Claimant asserts as error that the ALJ: (1) breached his special duty to assist in developing the case for an unrepresented claimant; and (2) failed to complete step three of the sequential evaluation process when he neglected to investigate, evaluate, and determine whether claimant's severe fibromyalgia met or equaled 20 C.F.R. Pt. 404, Subpart P, App. 1, Listing § 14.06.

Duty to Develop the Record

The ALJ has a basic duty of inquiry to fully and fairly develop the record as to material issues. Baca v. Department of Health & Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993). However, a claimant must show "the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation. Isolated and unsupported comments by the claimant are insufficient, by themselves, to raise the suspicion of the existence of a nonexertional impairment." Hawkins v. Chater, 113 F.3d 1162, 1167 (10th Cir. 1997) (citations omitted). An ALJ has a heightened duty to develop the record when a claimant is unrepresented. See Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992). However, the ALJ is not under a duty to act as counsel for the claimant. Id. at 1377.

Claimant argues that the ALJ should have obtained additional medical records from Dr. Bumpus and Dr. Troxler. Claimant testified that she had seen Dr. Bumpus six or seven times since

February 15, 1996, the last date in the record, and that she planned to see him again a month after the hearing. (R. 158-59) She testified that Dr. Bumpus told her not to lift anything heavier than her cat, to stay on her medication, and try to do her exercises. (R. 161) However, she did not submit any records of any visit she had with him after February 15, 1996. She told the ALJ that she could obtain the records from Dr. Bumpus and from the Dr. Troxler. (R. 160, 171-72) The ALJ explained that she could probably obtain the records much faster than the Social Security Administration, but that "if they won't give them to you, whatever, just give me a little note to that affect [sic] and I'll try to obtain records . . . anything you can't get, through your own methods, we'll try to get ourselves." (R. 171) Claimant submitted thirteen pages of records from Dr. Troxler, but she submitted no additional records from Dr. Bumpus, or any note indicating that she requested records from Dr. Bumpus and was unable to obtain them.

Claimant's argument that the ALJ failed to fully and fairly develop the record as to material issues is not well-founded. Claimant was able to obtain records from the clinic in Tulsa regarding her treatment by Dr. Troxler, whom she was no longer seeing for treatment. Without some indication that she was unable to obtain records from Dr. Bumpus, who practiced in Bartlesville where she lived, and whom she was to see within a month after the hearing, the ALJ was entitled to assume that no records existed, or that those records would not have been important in resolving the claim. Cf. Hawkins at 1169. The Court notes that the ALJ obtained a consultative examination and vocational expert testimony which, together with the medical record, adequately support his decision.

Step Three Analysis

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listing of Impairments (20 C.F.R. Pt. 404, Subpt. P, App. 1). If claimant has an impairment, or

a combination of impairments, which meets or equals an impairment in the Listing of Impairments, claimant is presumed disabled without considering his age, education, and work experience. 20 C.F.R. §§ 404.1511(a); 404.1520(d). Equivalence is determined “on medical evidence only.” Id. § 404.1526(b). A claimant has the burden of proving that a Listing has been equaled or met. Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988). Yet, the ALJ is “required to discuss the evidence and explain why he found that [claimant] was not disabled at step three.” Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996).

The ALJ stated that “claimant’s osteoarthropathy and fibromyalgia have not resulted in the arthritis, the osteoporosis, or the muscle spasm, significant motor loss with muscle weakness, and neurologic deficit lasting for any continuous 12-month period despite three months of prescribed therapy as specified in Section 1.05.” (R. 16) He then reiterated the findings recorded by the consultative examiner and the hospital where claimant was taken after her motor vehicle accident. He stated that “claimant’s additional impairments do not remotely approach a listed impairment. The undersigned has examined the record of claimant’s impairments in combination and does not find that they meet or equal the severity of a listed impairment.” (Id.)

Claimant argues that the ALJ neglected to investigate, evaluate, and determine whether her severe fibromyalgia met or equaled Listing § 14.06. “Fibromyalgia indicates pain in fibrous tissues, muscles, tendons, ligaments and other sites.” The Merck Manual of Diagnosis and Therapy 481 (17th ed. 1999). It may occur in the absence or presence of other conditions such as rheumatoid arthritis, or systemic lupus erythematosus, and it may be diagnosed in patients with widespread musculoskeletal pain and multiple tender points. The American College of Rheumatology 1990 Criteria for the Classification of Fibromyalgia requires the presence of pain in 11 of 18 tender point

sites on digital palpation. See National Fibromyalgia Research Association, Fibromyalgia Syndrome Diagnostic Criteria, (visited March 15, 2000) <<http://www.teleport.com/~nfra/Diagnost.htm>>.

Courts have recognized that fibromyalgia is potentially disabling. See, e.g., Weiler v. Shalala, 922 F. Supp. 689, 698 n. 11 (D. Mass. 1996) (noting several appellate court decisions). It is often associated with chronic fatigue syndrome and diagnosed or treated by rheumatologists. See, e.g., Sarchet v. Chater, 78 F.3d 305, 306 (7th Cir. 1996). As set forth in Sarchet, one of the few cases to address fibromyalgia in depth, fibromyalgia is

a common, but elusive and mysterious, disease, much like chronic fatigue syndrome, with which it shares a number of features. . . . Its cause or causes are unknown, there is no cure, and of greatest importance to disability law, its symptoms are entirely subjective. There are no laboratory tests for the presence or severity of fibromyalgia. The principal symptoms are "pain all over," fatigue, disturbed sleep, stiffness, and -- the only symptom that discriminates between it and other diseases of a rheumatic character -- multiple tender spots, more precisely 18 fixed locations on the body (and the rule of thumb is that the patient must have at least 11 of them to be diagnosed as having fibromyalgia) that when pressed firmly cause the patient to flinch. All these symptoms are easy to fake, although few applicants for disability benefits may yet be aware of the specific locations that if palpated will cause the patient who really has fibromyalgia to flinch. . . . Some people may have such a severe case of fibromyalgia as to be totally disabled from working . . . , but most do not and the question is whether [claimant] is one of the minority.

Id., at 306-07 (citations omitted).

Fibromyalgia is not mentioned in any Listing under 20 C.F.R. Pt. 404, Subpt. P. App. 1. Listing § 14.06 provides: "Undifferentiated connective tissue disorder. Documented as described in 14.00B5, and with impairment as described under the criteria in 14.02A, 14.02B, or 14.04." Id. Listing § 14.00 addresses the criteria for disorders of the immune system. Listing § 14.02 specifically addresses systemic lupus erythematosus, and Listing § 14.04 addresses systemic sclerosis and scleroderma. There is no requirement that claimant's fibromyalgia be evaluated under Listing

§ 14.06, especially since claimant was not diagnosed with any of the connective tissue disorders specifically addressed under in Listing § 14.00.

Indeed, her diagnosis of osteoarthropathy suggests that her fibromyalgia was more appropriately addressed in the section for musculoskeletal system, Listing § 1.00, given her osteoarthropathy. “For a claimant to qualify for benefits by showing that his combination of impairments is ‘equivalent’ to a listed impairment, he must present medical findings equal in severity to all the criteria for the one most similar listed impairment.” Sullivan v. Zebley, 493 U.S. 521, 531 (1990); see also 20 C.F.R. §§ 404.1526(a), 416.926(a). The ALJ evaluated her fibromyalgia, along with her osteoarthropathy, under the criteria applicable to Listing § 1.05, disorders of the spine. There is nothing to suggest that his analysis was error.

Curiously, the disorders listed within Listing § 1.05C, like those listed within Listing § 14.00, require a clinical record of at least 3 months demonstrating certain signs and symptoms indicative of active disease despite prescribed treatment or therapy and with the expectation that the disorder or disease will remain active for 12 months. Id. The ALJ noted this requirement with respect to Listing § 1.05 in his decision. (R. 16) Claimant was diagnosed with fibromyalgia on July 5, 1996 (R. 131-33), but, as of September 18, 1996, Dr. Troxler no longer included fibromyalgia as his diagnosis. (R. 120-23) Accordingly, claimant’s record does not satisfy the criteria for either Listing.

Pain and Credibility

A claimant’s impairment does not equal the Listing merely because an individual was diagnosed with a listed impairment. 20 C.F.R. §§ 404.1525(d), 416.925(d). It is undisputed that claimant was diagnosed with fibromyalgia for less than a three-month period. The ALJ found that her fibromyalgia, osteoarthropathy, and bronchial asthma were severe impairments that did not meet

any Listing. Thus, the critical issue before the ALJ was whether her fibromyalgia and other impairments prevented her from retaining the RFC to work. Because her complaints of pain were subjective, the ALJ was presented with a credibility determination concerning the impact of her pain, if any, on her ability to work.

Claimant testified that she washes dishes, makes the bed, and sweeps the floor daily, although these activities take an hour each, and she has to rest for five or six hours between activities. (R. 152-53) She is the primary care giver for her five-year-old asthmatic son, but she cannot pick him up or play with him as she did prior to the accident. (R. 153) She can cook meals for him and do the laundry. (Id.) She testified that she can lift only ten pounds. (R. 154) She handles the money she receives from an AFDC check and food stamps, and she shops once a month. (R. 154) She does back exercises, as directed by her doctor, for 15 minutes at a time. (R. 155) She can still drive, but the farthest she had driven in the previous year was four miles. (R. 155) She puts Proventil in the nebulizer machine for her son. (R. 156) She receives visitors once a day. (R. 156) She sleeps only three hours a night since her doctor changed her medication. (R. 157)

Claimant testified that she could only stand for an hour, walk 15 to 20 feet, and sit for 5 to 10 minutes before she started hurting. She does not use a cane or crutch to walk. She could climb a flight of stairs, but not without pain. (R. 162) She cannot bend or stoop unless someone helps her back up. (R. 162-63) She has no problem using her arms and legs. (R. 163) She has headaches that last for 3 to 4 hours, but medication will provide relief after 30 minutes and will work for 4 to 5 hours. (R. 163-64, 166) She stated that her headaches began with the accident. (R. 165) (The records from Dr. Bumpus indicate otherwise.) The vocational expert testified that, with the

Conclusion

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this 16th day of March, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

FILED

MAR 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOSEPH P. COLLINS,)
SSN: 446-68-3778,)

Plaintiff,)

v.)

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

Defendant.)

CASE NO. 99-CV-316-M ✓

ENTERED ON DOCKET
DATE MAR 17 2000

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 16th day of MARCH, 2000.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOSEPH P. COLLINS,
SSN: 446-68-3778,

PLAINTIFF,

vs.

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

DEFENDANT.

CASE No. 99-CV-316-M ✓

ENTERED ON DOCKET

DATE MAR 17 2000

ORDER

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

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

¹ Plaintiff's November 2, 1995 applications for Disability Insurance and Supplemental Security Income benefits were denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held July 8, 1997. By decision dated September 23, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on February 24, 1999. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born September 12, 1965 and was 31 years old at the time of the hearing. [R. 39, 73, 76]. He holds a Bachelor of Science degree in Business Administration and has worked in the past as a substitute teacher, sales representative, technical support specialist and office helper. [R. 39, 67, 106]. He asserts he has been unable to work since November 1, 1991 due to attention deficit disorder (ADD) and obsessive compulsive disorder. [R. 44, 102].

The ALJ determined that Plaintiff has severe impairments consisting of attention deficit disorder and obsessive compulsive disorder but that he retained the residual functional capacity (RFC) to perform the complete range of heavy work with a moderate limitation on his ability to understand, remember and carry out any detailed instruction and a moderate limitation on the ability to maintain attention and concentration for extended periods of time. [R.21]. He determined that Plaintiff's past relevant work (PRW) as an office helper did not require performance of these restricted

activities and also found, alternatively, that there were other jobs in the economy in significant numbers that Plaintiff could perform with those restrictions. He found, therefore, that Plaintiff was not disabled as defined by the Social Security Act. [R. 23]. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing the five-step evaluative sequence for determining whether a claimant is disabled).

Plaintiff asserts the ALJ's determination is not supported by substantial evidence. Specifically, he claims: 1) the ALJ's RFC finding was not based upon the "entire time relevant to this claim;" 2) the ALJ failed to perform a proper step four analysis; and 3) the ALJ did not properly consider the vocational impact of Plaintiff's impairments upon his ability to work. For the reasons discussed below, the Court affirms the decision of the Commissioner.

Plaintiff's First Statement of Error

Plaintiff claims the ALJ erred in finding Plaintiff was not disabled prior to March 1997 when he began receiving "effective treatment" for his mental disorder. He contends the ALJ failed to evaluate the severity of his condition "as it existed prior to Dr. Dodson's treatment" asserting that his condition was "much more debilitating" during that time.

Contrary to Plaintiff's argument, the ALJ addressed the objective medical evidence from the time period which Plaintiff asserts he was disabled. The ALJ explained in his decision that Plaintiff had not established mental limitations through medical test results and that the only evidence presented by Plaintiff of mental limitations were his subjective complaints which he disbelieved. [R. 19]. The

Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining disability. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990).

There is substantial evidence in the record to support the ALJ's determination in this regard. None of Plaintiff's treating or examining therapists or psychiatrists indicated that Plaintiff was not capable of engaging in any gainful activity during any time period for which he seeks benefits. Plaintiff admits he has suffered from attention problems for many years, including the years he attended Oklahoma State University. [Plaintiff's Brief, R. 39, 45-46, 125, 138]. Plaintiff also admits he did not undertake treatment for ADD until 1997 [R. 62], that he abused drugs until two years before the hearing [R. 51] and that he abused alcohol until a year before the hearing [R. 50].² Plaintiff acknowledges his attention deficit disorder and obsessive-compulsive disorder "were finally brought under some control" with treatment by William W. Dodson, M.D. in March 1997. He claims, however, that it was necessary for the ADD to be treated before he could successfully abstain from substance abuse and so, he was entitled to benefits for the time period between November 1991 and March 1997. [R. 65]. The medical record does not support this contention.

² Recent amendments to the Social Security Act eliminate alcoholism as a basis for obtaining disability insurance and supplemental security income benefits. See *Contract with America Advancement Act of 1996*, Pub.L. No. 104-121, 110 Stat. 847, 852-53 (amending 42 U.S.C. §§ 423(d)(2) & 1382(c)).

Treatment records from 1994 through 1995 reveal Plaintiff was informed by his treating physicians in San Diego, California, that his alcohol and drug addictions had to be treated first before testing for ADHD (attention deficit hyperactivity disorder). [R. 121, 123]. He was offered help in getting "off the alcohol under supervision" and medication refills were denied. [R. 116, 123]. On December 12, 1995, Plaintiff's case at the UCSD Outpatient Psychiatric Services Center in San Diego, California, was closed because he "did not follow through." [R. 123]. And, contrary to Plaintiff's characterization of Dr. Dodson's opinion, the doctor wrote in his report that he had "made it clear to Mr. Collins [he] will not prescribe medication for his other diagnoses unless he is in active treatment with someone and going to 12-Step meetings." [R. 161]. Plaintiff has failed to show he was precluded from receiving treatment for ADD prior to that time by anything other than his own refusal to follow the recommended treatment regimen. When an impairment can be reasonably controlled with medication or is reasonably amenable to treatment, it cannot serve as a basis for a finding of disability. See *Pacheco v. Sullivan*, 931 F.2d 695, 698 (10th Cir. 1991); *Teter v. Heckler*, 775 F.2d 1104, 1107 (10th Cir. 1985); 20 C.F.R. § 404.1530.

The Court finds the ALJ adequately considered all the evidence relating to the relevant time period and properly concluded Plaintiff was not disabled for any time period under consideration. Plaintiff's first allegation of error is therefore without merit.

Plaintiff's Second Statement of Error

Plaintiff challenges the ALJ's decision at step four, contending he failed to make specific findings regarding the mental demands of Plaintiff's PRW as an office helper and that he failed to make function-by-function comparisons of his PRW with his RFC. See *Winfrey*, 92 F.3d at 1023 (outlining the three phases of the step four sequential analysis). Defendant responds that the VE's testimony regarding the skill and exertional level of Plaintiff's prior jobs is sufficient to fulfill the ALJ's obligation in this regard. The Court agrees the ALJ did not make the underlying findings required by *Winfrey*, without which there can be no meaningful review as to the correctness of the ALJ's determination that Plaintiff could return to his PRW as office helper. However, the Court concludes the step five alternative finding by the ALJ is based upon substantial evidence and was properly reached. So, even though the Court finds the step four evaluation was insufficient, there is sufficient evidence to support a step five determination of no disability. See *Berna v. Chater*, 101 F.3d 631, 632-33 (10th Cir. 1996)(subsidiary findings necessary for alternative disposition were included in body of ALJ's decision, were sufficient basis for denial of benefits and were unchallenged, therefore success on appeal is foreclosed -- regardless of the merits of arguments relating to the challenged alternative). See also *Murrell v. Shalala*, 43 F.3d 1388, 1390 (10th Cir. 1994). The Court, therefore, declines to remand this case upon Plaintiff's second allegation of error.

Plaintiff's Third Allegation of Error

Plaintiff states: "[t]he ALJ failed to properly consider the vocational impact of the claimant's mental impairments on his ability to do his past work or alternative work." This is an extension of Plaintiff's complaint regarding the ALJ's assessment of Plaintiff's RFC. Plaintiff complains the mental limitations set forth by the ALJ in the hypothetical he relied upon in his decision did not provide a precise description of his impairments for the period between 1995 and 1997. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). As discussed earlier in this order, the Court finds that the RFC determination reached by the ALJ was based upon substantial evidence and properly reached. The Court concludes, therefore, that the restrictions expressed by the ALJ in the hypothetical posed to the VE and upon which the disability determination is based, are supported by substantial evidence. In light of this Court's conclusion, this contention is without merit. Likewise, Plaintiff's argument that the ALJ should have accepted the VE's response to the hypothetical propounded by his attorney at the hearing fails, as the law is clear that mere diagnosis of a mental impairment is not sufficient to sustain a finding of disability. 20 C.F.R. § 404.1528(a); *Bernal v. Bowen*, 851 F.2d 297, 301 (10th Cir. 1988).

Finally, Plaintiff argues that the ALJ's decision was not supported by substantial evidence because the hypothetical failed to set forth impairments that even the ALJ himself accepted as existing. To constitute substantial evidence, a hypothetical must set forth the impairments accepted as true by the ALJ. See *Hargis* 945 F.2d at 1492; *Talley*, 908 F.2d at 588; *Roberts v. Heckler*, 783 F.2d 110, 112 (8th Cir.1985). On the "Psychiatric Review Technique Form" (PRT)³ filled out by the ALJ and attached to his decision, the ALJ indicated on the multiple choice form that Plaintiff would "Often" manifest "Deficiencies of Concentration, Persistence or Pace Resulting in Failure to Complete Tasks in a Timely Manner." [R. 27]. Plaintiff contends that the hypothetical did not take into account these impairments.

Plaintiff cites *Newton v. Chater*, 92 F.3d 688, 695 (8th Cir.1996) as support for this contention. In *Newton*, the 8th Circuit ruled that when an ALJ states that a claimant has impairments of concentration, persistence or pace, the hypothetical must include those impairments. In that case, the ALJ stated on the PRT form that the claimant "often" had deficiencies of concentration, persistence or pace, but the hypothetical presented to the VE merely limited the claimant's capabilities to simple jobs. The hypothetical did not specifically include impairments regarding concentration,

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

persistence or pace. The Court held that the reference to simple jobs in the hypothetical was not enough to constitute inclusion of such impairments. The case was remanded with instructions to include the impairments of concentration, persistence or pace in the hypothetical.

That same Court, however, reached a different conclusion in a case with facts similar to the case at hand. See *Brachtel v. Apfel*, 132 F.3d 417 (8th Cir. 1997). In that case, the Court said:

As a preliminary matter, it is significant to note that the ALJ did not necessarily attribute all three impairments--deficient concentration, persistence, and pace--to Brachtel. The classification is written in the disjunctive: "Deficiencies of Concentration, Persistence or Pace." Admin. Tr. at 488 (emphasis added). This language suggests that when an ALJ puts a check mark in this block, he is not necessarily making a finding that the claimant has all three of these impairments. In fact, in this case the ALJ wrote in his report that "various examinations indicate that the claimant demonstrates few concentration deficits and has a very good memory." *Id.* at 465 (ALJ Decision Upon Remand). The fact that the ALJ checked the "often" box for the "concentration, persistence or pace" category, yet acknowledged examination reports that did not regard Brachtel as being deficient in concentration, indicates that the ALJ read the classification in the disjunctive; the ALJ did not necessarily attribute all three impairments to Brachtel.

Id., at 420-21. The *Brachtel* Court held that the hypothetical upon which the ALJ relied included the ability "to do only simple routine repetitive work, which does not require close attention to detail" and included a restriction that "[Brachtel] should not work at more than a regular pace," was more than what was included in the *Newton* hypothetical, and was "enough." *Id.*

In the present case, the ALJ's hypothetical included a moderate limitation in the ability to understand, remember and carry out detailed instructions. In addition, the ALJ's hypothetical specifically limited the ability to maintain attention and concentration for extended periods of time. These specific limitations are supported by the record, and their inclusion in the hypothetical is enough to distinguish this case from *Newton*. Plaintiff's argument that this case should be remanded on this basis is rejected.

Conclusion

The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 16th day of MARCH, 2000.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

MAR 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM,)
INC., an Oklahoma corporation,)

Plaintiff,)

vs.)

TRANSPORTATION ONE LLC.)
a Michigan Limited Liability Company,)
Fred P. Smith, Jr., an individual, and)
Mikhail G. Kheykson, an individual)

Defendants.)

Case No. 99 CV 0707E(E)

ENTERED ON DOCKET

DATE ~~MAR 17 2000~~

DEFAULT JUDGMENT

The Court, being fully advised, hereby grants judgment in favor of Thrifty and against Defendant, Transportation One, LLC, in the amount of \$180,303.00. As part of this judgment, Thrifty is entitled to recover its costs and attorney fees, as well as post-judgment interest.

IT IS SO ORDERED.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

F I L E D

MAR 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD G. ROYER, an individual,)

Plaintiff,)

vs.)

Case No. 99-CV-1118-B

RREPAIR KAR, INC., an Iowa corporation, and)
J&J RAILCAR PARTS & MANUFACTURING,)
INC., an Iowa corporation.)

Defendants.)

ENTERED ON DOCKET

DATE MAR 17 2000

ORDER

Comes on for consideration Plaintiff's Motion for Default Judgment following entry by the Court Clerk of default on February 17, 2000, and the Court, following evidentiary hearing on the issue of damages at which testimony and documentary evidence was presented, enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff is a resident of Kansas and was previously employed by Defendants.
2. Defendants are both Iowa corporations registered to do business in Oklahoma and are residents of Oklahoma.
3. This Court has jurisdiction pursuant to 28 U.S.C. §1332 because the parties are citizens of different states and the matters in controversy exceed the jurisdictional amount of \$75,000.
4. Plaintiff was employed for approximately six weeks as a welder. He is qualified

for this position by twenty years' work experience but does not hold any certificates in welding. This position is "at will" under Oklahoma law, however Plaintiff had an expectation of continued employment which would have included increases in pay and employee benefits.

5. Plaintiff performed his assignments competently and in a satisfactory manner and was told by his supervisor that he was doing a good job.

6. Plaintiff was never reprimanded and did not receive any unfavorable reviews or evaluations.

7. On April 28, 1999, Plaintiff was called into the office of J&J Railcar Parts & Manufacturing, Inc., by Vick Brickshire, who advised Plaintiff he was being terminated because he was accused of sexual harassment.

8. Defendants had not conducted any investigation with regard to any sexual harassment complaint and Plaintiff had not been questioned about any sexual harassment and was never given any opportunity to answer, explain or respond to the alleged complaint of sexual harassment.

9. Plaintiff was never provided findings of fact or conclusions regarding any complaint of sexual harassment even though he requested them and the employee handbook states they will be provided if requested.

10. At the time of his termination, Plaintiff was earning \$8.13 per hour. He was scheduled to receive a fifty cent per hour raise within one month of his termination plus being added to the company benefit plan at the same time.

11. Plaintiff had not sexually harassed anyone; for some inexplicable reason, Defendants erroneously characterized Plaintiff's reason for termination as "sexual harassment." (Being an at-will employee, Plaintiff could have been terminated for any reason, as long as it was not contrary to law or the employment manual.)

12. Plaintiff has been unable to secure permanent employment since his termination but has worked part to full-time in at least three jobs spanning over an approximate eleven month time period. Plaintiff's current employment is with Bentley Construction as a concrete finisher earning \$9.00 an hour. He has worked there for approximately six months, however, he has never worked over twenty-five hours in one week.

13. Plaintiff attributes his inability to secure full-time employment as a welder to the fact he must truthfully provide potential employers with the reason for his termination or face termination from new employment for falsifying his employment application should they learn of the sexual harassment allegations.

14. Plaintiff has been forced to apply for welfare and has been evicted from his home, along with his wife and teenage daughter, as a result of his termination.

CONCLUSIONS OF LAW

1. Any Finding of Fact which might be properly characterized a Conclusion of Law is incorporated herein.

2. At default hearing, Plaintiff stated he intended to proceed for default primarily

under the Title VII theory.¹ Plaintiff has failed to establish a cause of action under Title VII.²

3. Plaintiff also seeks damages under a breach of contract theory based upon the "Policy Manual For Hourly Employees" of J&J Railcar Parts & Manufacturing, Inc., Pl. Ex. 4., which provides as follows concerning complaints of harassment:

"All complaints of harassment will be investigated promptly and in an impartial and confidential manner by the supervisor. If an employee is not satisfied with the handling of the complaint or the action taken, then the employee should bring the complaint to the attention of the President. If requested, the employee will be advised of the findings and conclusion. Any employee, supervisor, or manager who is found, after appropriate investigation, to have engaged in harassment of another employee will be subject to disciplinary action up to and including termination."

The Court concludes Plaintiff has stated a cause of action for implied breach of contract pursuant to the provisions of the manual. *Williams v. Maremont Corp.*, 875 F.2d 1476 (10th Cir. 1989).

4. The Plaintiff is not entitled to an award of punitive damages for implied breach of contract.

5. Plaintiff has suffered damages in the amount of \$1400 per month for six months

¹Plaintiff acknowledged that his Title VII claim was poorly plead.

²Plaintiff's citation to *Malik v. Carrier Corp.*, 202 F.3d 97 (2nd Cir. 2000) in support of establishing the basis for a Title VII claim against Defendants for failure to investigate a sexual harassment claim is misleading. *Malik* is not a Title VII case but was brought under Connecticut state law claims. *Malik* addresses the duty of an employer to investigate a sexual harassment claim when a victim requests the matter be dropped. The Court found no authority cited by Plaintiff or through independent review which allows the Title VII cause of action urged by Plaintiff under the facts of this case.

in wages and benefits since his wrongful termination and is awarded \$8400 for that time period.

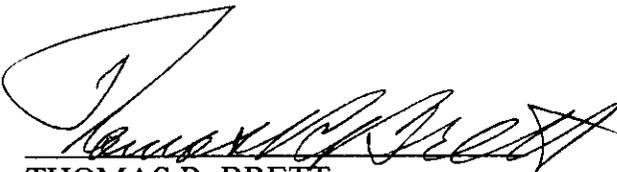
6. Plaintiff had a continued expectation of employment which this Court finds is compensable for a period of six months in the amount of \$1400 per month for a total of \$8400 in future damages.

7. Plaintiff is entitled to a reasonable attorney fee in the amount of \$5,602 pursuant to Okla. Stat. tit. 12, §936 (1991).

8. Plaintiff has established that no sexual harassment by Plaintiff was established by Defendants as to any employee of the Defendants and Plaintiff is entitled to entry by this Court of a permanent injunction against Defendants ordering Defendants to purge from their records any reference to sexual harassment as being the cause of termination of Plaintiff's employment, and to advise any persons making inquiry as to the cause of Plaintiff's employment termination, only that Plaintiff's employment ceased on April 28, 1999, and that Plaintiff had a good work record and met all job expectations while employed by Defendants.

9. A separate Judgment in keeping with the Findings of Fact and Conclusions of Law shall be entered contemporaneously herewith.

DATED this 16th day of March, 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

MAR 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THREE THOUSAND SEVEN HUNDRED
DOLLARS AND NO/100 (\$3700.00) IN
UNITED STATES CURRENCY,
et al.,

Defendants.

No. 99-CV-840-B

ENTERED ON DOCKET

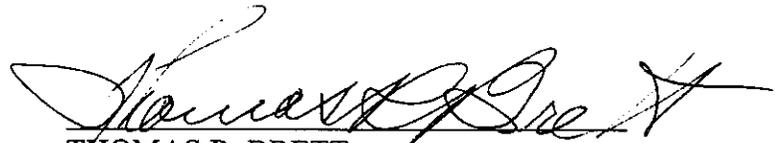
DATE MAR 17 2000

ORDER

Before the Court are Motion to Withdraw filed by Claimant Jerry Fuentez (Docket #51) and Motion to Withdraw Claim filed by Claimant Gary R. Thompson (Docket #45), to which no objections have been filed. Both motions seek to dismiss any claim previously asserted by these named Claimants to the defendant currency.

IT IS THEREFORE ORDERED that Motion to Withdraw filed by Claimant Jerry Fuentez (Docket #51) and Motion to Withdraw Claim filed by Claimant Gary R. Thompson (Docket #45) are granted.

DONE THIS 16TH OF MARCH, 2000.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

60

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

F I L E D

MAR 16 2000

RICHARD G. ROYER, an individual,)
)
Plaintiff,)
)
vs.)
)
RREPAIR KAR, INC., an Iowa corporation, and)
J&J RAILCAR PARTS & MANUFACTURING,)
INC., an Iowa corporation.)
)
Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-1118-B

ENTERED ON DOCKET
DATE MAR 17 2000

J U D G M E N T

In keeping with the Court's Findings of Fact and Conclusions of Law entered this date, judgment is hereby entered in favor of the Plaintiff, Richard G. Royer, and against the Defendants, Repair Kar, Inc., and J&J Railcar Parts & Manufacturing, Inc., in the amount of Sixteen Thousand, Eight Hundred Dollars (\$16,800.00) on Plaintiff's implied breach of contract claims. Post-judgment interest is to run on this amount from the date of this Judgment until paid at the rate of 6.197%.

Further, Plaintiff Richard G. Royer is hereby awarded attorney's fees against the Defendants, Repair Kar, Inc., and J&J Railcar Parts & Manufacturing, Inc., in the amount of Five Thousand, Six Hundred and Two Dollars (\$5,602.00) with post judgment interest to run on this amount from the date of Judgment until paid at the rate of 6.197%. Costs of this action are assessed against Defendants, Repair Kar, Inc., and J&J Railcar Parts &

Manufacturing, Inc., upon timely application pursuant to N.D. LR Rule 54.1.

Plaintiff, Richard G. Royer, is further granted a permanent injunction against Defendants, Repair Kar, Inc., and J&J Railcar Parts & Manufacturing, Inc., which companies are ordered to purge from their records any reference to sexual harassment as being the cause of termination of Plaintiff Richard G. Royer's employment, and to advise any persons making inquiry as to the cause of Plaintiff Richard G. Royer's employment termination, only that Plaintiff Richard G. Royer's employment ceased on April 28, 1999, and that Plaintiff had a good work record and met all job expectations while employed by Defendants.

DATED this 16th day of March, 2000.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

F I L E D

MAR 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

RAE CORPORATION, an Oklahoma)
corporation,)
Plaintiff,)
vs.)
BURLEY'S RINK SUPPLY, INC.,)
Defendant.)

Case No. 99-CV-0382-B(E)

ENTERED ON DOCKET
MAR 17 2000
DATE _____

ORDER GRANTING APPLICATION FOR DISMISSAL

Before the Court is the Stipulation and Application for Dismissal executed and filed by the Plaintiff and counterdefendant, RAE Corporation, and the Defendant and counterclaimant, Burley's Rink Supply, Inc. The Court notes, upon stipulation of the parties, that a settlement has been reached of all claims asserted herein; that the parties desire to dismiss their respective claims herein with prejudice; that the parties have requested that the Court enter an order dismissing those claims; that the parties, and each of them, indicate by their counsels' signatures, their consent to the dismissal of the claims asserted herein; and that the parties have agreed that each party shall bear its own attorney fees and costs.

Accordingly, it is ordered that the captioned action is dismissed with prejudice.

Dated this 16th day of Mar, 2000.



THOMAS BRETT
SENIOR U.S. DISTRICT JUDGE

F I L E D

MAR 16 2000

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

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALLYSON L. FURR,

Plaintiff,

v.

No. 99-CV-0344B (M)

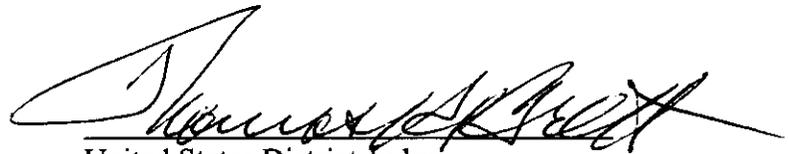
**ICON HEALTH & FITNESS, INC.,
formerly known as HEALTHRIDER,
CORPORATION and JANE DOE,**

Defendants.

ENTERED ON DOCKET
DATE MAR 17 2000

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 16th day of Mar, 2000, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.


United States District Judge

Gregory D. Nellis, OBA #6609
1500 ParkCentre
525 South Main
Tulsa, OK 74103-4524
Telephone: (918) 582-8877
Facsimile: (918) 585-8096

NOTE: This Order is to be immediately delivered to opposing counsel upon receipt.

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FILED

MAR 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

CHARLES SMITH AND DONNA SMITH,

Plaintiffs,

vs.

LATCO, INC.

Defendant and Third
Party Plaintiff,

vs.

RANDALL FIDLER d/b/a FIDLER ELECTRIC,

Third Party Defendant.

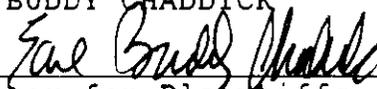
No. 98-CV-667 E (J)

ENTERED ON DOCKET
DATE MAR 17 2000

STIPULATION OF DISMISSAL

COME NOW the Plaintiffs, Charles Smith and Donna Smith, the Defendant and Third Party Plaintiff, Latco, Inc., and the Third Party Defendant, Randall Fidler d/b/a Fidler Electric, 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, including post and pre-judgment interest.

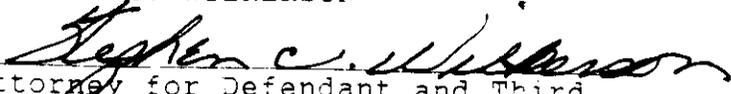
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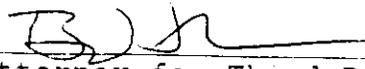
Attorney for Plaintiffs

c/s

STEPHEN C. WILKERSON


Attorney for Defendant and Third
Party Plaintiff

BRADLEY A. JACKSON


Attorney for Third Party Defendant

FILED

MAR 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
) Case No. 99CV1073BU(E) ✓
)
 TOMMY G. MAXEY,)
)
 Defendant.)

ENTERED ON DOCKET
DATE MAR 17 2000

NOTICE OF DISMISSAL

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

Dated this 17th day of March, 2000.

UNITED STATES OF AMERICA

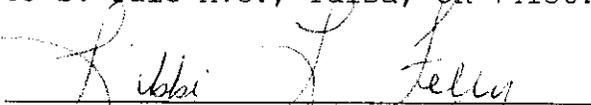
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 17th day of March, 2000, a
true and correct copy of the foregoing was mailed, postage prepaid
thereon, to: Tommy G. Maxey, 7365 S. Yale Ave., Tulsa, OK 74136.



Libbi L. Felty
Paralegal Specialist

CLB

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

LEE ANN ORRELL,)
)
 Plaintiff,)
)
 vs.)
)
 CASE & ASSOCIATES PROPERTIES,)
 INC.,)
)
 Defendant.)

ENTERED ON DOCKET
DATE MAR 16 2000

No. 98-CV-361-K ✓

F I L E D

MAR 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AMENDED JUDGMENT

In accordance with the rulings made on the parties' post-trial motions, the following amended judgment is hereby entered.

Regarding plaintiff's claim under the Oklahoma Workers' Compensation Act, the Plaintiff Lee Ann Orrell shall recover of the Defendant Case & Associates Properties, Inc., the sum of 40,000.00 in actual damages, along with prejudgment interest as described in the contemporaneous order granting same, with interest thereon at the rate provided by law.

Further, pursuant to jury verdict and the Court's previous granting in part of defendant's motion for judgment as a matter of law, judgment is hereby entered in favor of defendant and against plaintiff regarding plaintiff's claim under the Americans with Disabilities Act and plaintiff's claim under the Family and Medical Leave Act.

ORDERED this 16 day of MARCH, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

JAMES SHACKELFORD,)
)
Petitioner,)
)
vs.)
)
STEVE HARGETT, Warden,)
)
Respondent.)

ENTERED ON DOCKET
DATE MAR 16 2000

Case No. 97-CV-267-K ✓

F I L E D

MAR 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner filed his original petition (Docket #1) on March 24, 1997, challenging his convictions entered in Tulsa County District Court, Case No. CRF-92-4250. On June 2, 1997, Petitioner filed his Second Amended Petition (#9). Respondent has filed a Rule 5 response to the second amended petition (#15) to which Petitioner has replied (#16). As more fully set out below, the Court concludes that this petition should be denied.

BACKGROUND

According to the state court records provided by Respondent, Petitioner entered a plea of guilty to two counts of Child Abuse on April 12, 1993 in Tulsa County District Court, Case No. CF-92-4250. On May 24, 1993, in accordance with the plea agreement, Petitioner was sentenced to two life sentences. Throughout the criminal proceedings in state district court, Petitioner was represented by retained counsel. Petitioner did not move to withdraw his guilty plea and otherwise failed to perfect a direct appeal. See #15, Ex. A.

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On August 28, 1995, Petitioner filed an application for post-conviction relief alleging the following three claims: (1) that Petitioner wanted to appeal, but after his sentencing his attorney failed to contact him within ten days, (2) Counsel was ineffective for failing to contact Petitioner after his sentencing, and (3) the information was defective for failing to relate sufficient facts to charge the crime. (#15, Ex. A). On October 12, 1995, the trial court denied relief, finding that Petitioner's plea was voluntarily and knowingly made, and that Petitioner failed to demonstrate that he had received ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). (#15, Ex. A). The trial court further stated that despite having been advised of his appeal rights, Petitioner failed to seek or perfect an appeal, "nor has the Petitioner offered any sufficient reason for the petitioner's failure to file a timely direct appeal of petitioner's convictions . . . [t]herefore, the Court finds that the petitioner has waived any remaining issues and petitioner's Application is denied." (#15, Ex. A).

Petitioner appealed the denial of post-conviction relief to the Oklahoma Court of Criminal Appeals ("OCCA"). The state appellate court refused to review any claim that had not been presented to the state district court and ruled that "[a]ny issue which was raised, or which could have been raised, in a timely direct appeal is now procedurally barred absent sufficient reason explaining why it was not so raised." (#15, Ex. B at 2, citations omitted). In determining whether Petitioner had stated a sufficient reason for his failure to file a direct appeal, the OCCA considered Petitioner's claims relating to ineffective assistance of counsel and subject matter jurisdiction. See #15, Ex. B. The state appellate court rejected the arguments, concluding that "Petitioner's claim of a defective information does not go to the District Court's subject matter jurisdiction and therefore Petitioner has not asserted sufficient reason for failing to previously raise this issue." (#15, Ex. B at 3). As to Petitioner's ineffective assistance of counsel claim, the OCCA determined that "[a]ny alleged failure

on the part of Petitioner's counsel to initiate contact, during the period when he could have filed a motion to withdraw guilty plea, does not constitute sufficient reason explaining why the issues presented in the Application for Post-Conviction relief were not asserted in a timely, direct appeal." (Id.) Therefore, on May 15, 1996, the OCCA affirmed the denial of post-conviction relief (#15, Ex. B).

On March 24, 1997, Petitioner filed his habeas corpus petition in this Court. After the Court addressed a dispute between the parties concerning verification of the petition, Petitioner filed his second amended petition (#9) raising three claims, as follows:

Ground One: Trial court lacked subject matter jurisdiction; information faulty and no wavor (sic) of right to Grand Jury Ind. Petitioner was not indicted by a grand jury and did not waive his rights to one: Trial court proceeded on an information that was faulty under Ok. Stat. 22 § 401; Trial court NEVER established HOW it claimed to have jurisdiction over acts out side its jurisdiction.

Ground Two: Petitioner was denied effective assistance of counsel, and due process and equal protection of law. Trial counsel did not file a timely motion to withdraw plea, or appeal, failed to conduct an investigation as required under NEW holdings of law.

Ground Three: NEW LAW holdings mandating sentence modification: UNDER NEW law petitioner is entitled to have his sentences RAN together as one sentence, and UNDER NEW LAW he had ineffective (sic) assistance of counsel and was denied due process and equal protection rights.

(#9). Respondent has filed a response (#15) to the second amended petition asserting that this Court is barred from considering Petitioner's claims based on the expiration of the 28 U.S.C. § 2244(d) limitations period. In the alternative, Respondent argues that Petitioner's claims are either procedurally barred or that Petitioner has failed to show he is entitled to federal habeas corpus relief premised upon the state court's resolution of the issues. Petitioner has replied to Respondent's response (#16).

ANALYSIS

A. Exhaustion/Evidentiary Hearing

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law.

The Court also finds that an evidentiary hearing is not warranted as Petitioner has not met his burden of proving entitlement to an evidentiary hearing. See Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998). In denying Petitioner's application for post-conviction relief, the state trial court stated that "petitioner's Application for Post-Conviction Relief presents only issues of law and not of fact; therefore, no counsel need be appointed, nor does a hearing need to be held." (#15, Ex. A at 4). The OCCA affirmed the trial court's opinion. Thus, the state courts denied an evidentiary hearing on Petitioner's claims and he shall not be deemed to have "failed to develop the factual basis of a claim in state court." Id. Therefore, his request is governed by pre-AEDPA standards rather than by 28 U.S.C. § 2254(e)(2). Id. Under pre-AEDPA standards, in order to be entitled to an evidentiary hearing, Petitioner must make allegations which, if proven true and "not contravened by the existing factual record, would entitle him to habeas relief." Id. In this case, Petitioner has not made allegations which, if proven true, "would entitle him to habeas relief." Therefore, the Court finds that an evidentiary hearing is not necessary.

B. Timeliness of petition

Petitioner originally filed this habeas petition on March 24, 1997, or eleven (11) months after

the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court reviews this petition under the amended provisions of 28 U.S.C. § 2254. See Lindh v. Murphy, 117 S.Ct. 2059, 2068 (1997); Richmond v. Embry, 122 F.3d 866, 870 (10th Cir. 1997), cert. denied 118 S.Ct. 1065 (1998).

In his response to the petition, Respondent argues that this petition is time-barred under the 1-year statute of limitations imposed by the AEDPA. See 28 U.S.C. § 2244(d). Section 2244(d), as amended by the AEDPA, provides that:

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

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

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

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

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

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

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

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

In the instant case, because Petitioner failed to perfect a direct appeal, his conviction became final ten (10) days after pronouncement of his Judgment and Sentence, or on or about June 4, 1993. See Rule 4.2, Rules of the Court of Criminal Appeals (requiring the defendant to file an application to withdraw guilty plea within ten (10) days from the date of the pronouncement of the Judgment and Sentence in order to commence an appeal from any conviction of a plea of guilty). Therefore, his conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner filed his petition on March 24, 1997, well within the one-year grace period. Simmonds, 111 F.3d at 744-46. Therefore, the Court finds that this petition is not time-barred.

C. Procedural Bar

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501

U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

In this case, Petitioner procedurally defaulted all of his claims when he failed to withdraw his plea of guilty and otherwise perfect a direct appeal. In affirming the trial court's denial of post-conviction relief, the OCCA specifically found that Petitioner had waived his claims by failing to raise them in a direct appeal as required by Oklahoma procedural rules and that he had failed to provide the court sufficient reason for his failure to file a direct appeal. (#15, Ex. B). As discussed below, the Court finds that as a result of Petitioner's procedural default, his first and third claims are procedurally barred. However, Petitioner's ineffective assistance of counsel claims are not procedurally barred from this Court's consideration but are without merit and should be denied.

1. Petitioner's first and third claims are procedurally barred

Petitioner's first and third claims, challenging the sufficiency of the Information and requesting sentence modification, respectively, are procedurally barred. Petitioner's first claim appears to have two components: (1) that the "defective information"¹ deprived the trial court of subject matter jurisdiction, and (2) that he never waived his right to a Grand Jury. Petitioner raised his "subject matter claim" to the OCCA on post-conviction appeal. The state appellate court determined that

¹Petitioner fails to allege facts indicating how the Information was defective.

under state law, Parker v. State, 917 P.2d 980, 986 (Okla. Crim. App. 1996), Petitioner's claim of a defective Information raised due process concerns but did not affect the trial court's jurisdiction. The OCCA further found that Petitioner could have raised his due process challenge to the sufficiency of the Information on direct appeal and had not presented "sufficient reason" for failing to raise the issue on direct appeal. Citing Okla. Stat. tit. 22, § 1086, the OCCA found Petitioner had waived his claim.

As noted by Respondent, Petitioner's claim concerning a Grand Jury has never been raised previously. As a result, that claim is procedurally barred from this Court's review because Petitioner failed to raise it in his initial post-conviction proceeding and any effort to return to state court to raise the claim now would be futile. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991) (noting that while the exhaustion requirement is satisfied if it would be futile to return to state court to present a claim, such claim has been procedurally defaulted and is subject to a procedural bar).

Petitioner also raised his third claim, challenging his sentence, on post-conviction appeal. See #15, Ex. C at C-9 -- C-14. However, apparently because Petitioner did not raise the claim in the state district court, the OCCA barred the claim, refusing to review it on post-conviction appeal.

The state court's procedural bar as applied to these claims was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the OCCA has consistently declined to review claims which could have been but were not raised on direct appeal absent a showing of a sufficient reason. Okla. Stat. tit. 22, § 1086.

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

fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause for his procedural default by arguing that his attorney "abandoned defendant and failed to protect (sic) a timely appeal." (#9 at 5). Ineffective assistance of counsel may serve as "cause" excusing a procedural bar, Murray v. Carrier, 477 U.S. at 488, and to establish ineffective assistance of counsel a petitioner must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); Hickman v. Spears, 160 F.3d 1269, 1273 (10th Cir. 1998). There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Strickland, 466 U.S. at 688. In making this determination, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. To establish the prejudice prong of the Strickland test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy

for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

Petitioner claims he was unable to perfect an appeal because his retained trial counsel "failed to contact the defendant to even see if that defendant wanted to timely withdraw his plea, or appeal his conviction or sentence" (#16 at 2). However, counsel is not required to contact a defendant following entry of a guilty plea regarding an appeal unless the defendant inquires about an appeal right or a claim of constitutional error which could result in setting aside the plea made. See Laycock v. New Mexico, 880 F.2d 1184 (10th Cir. 1989). Petitioner's allegations concerning his attorney's performance are conclusory and self-serving. In addition, as indicated above, Petitioner has not indicated how the Information was defective. The Court finds Petitioner's conclusory, unsupported efforts to demonstrate ineffective assistance of counsel are insufficient to satisfy either the performance or prejudice prong of Strickland and do not constitute "cause" sufficient to excuse the procedural default of Petitioner's first and third claims.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 506 U.S. 390, 403-404 (1993); Sawyer v. Whitley, 505 U.S. 333, 339-341 (1992). However, Petitioner does not allege that he is actually innocent of the crimes for which he was convicted. Therefore, the Court finds that the "fundamental miscarriage of justice" exception to the procedural default doctrine has no application to this case.

As a result of Petitioner's failure to demonstrate "cause and prejudice" or that a fundamental miscarriage of justice would occur if his claims are not considered, this Court is procedurally barred from considering Petitioner's first and third claims, challenging the sufficiency of the Information and

his sentence, respectively.

2. *Petitioner's claims of ineffective assistance of counsel*

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

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

Id. at 1264 (citation omitted). In addition, the Tenth Circuit Court of Appeals has held that an ineffective assistance of counsel claim will not be procedurally barred in federal court where, as in the instant case, the petitioner entered a guilty plea in state court, failed to perfect a direct appeal, but raised the ineffective assistance of counsel claim in a first post-conviction proceeding. Miller v.

Champion, 161 F.3d 1249, 1252 (10th Cir. 1998).

After reviewing the record in the instant case in light of English, 146 F.3d at 1264, and Miller, 161 F.3d at 1252, the Court concludes Petitioner's claims of ineffective assistance of counsel are not procedurally barred. Nonetheless, after liberally construing the claims in light of Petitioner's *pro se* status, Haines v. Kerner, 404 U.S. 519 (1972), the Court finds that for the reasons discussed below, Petitioner's claims are without merit.

As stated above, a habeas corpus petitioner must satisfy the two-prong standard announced in Strickland v. Washington, 499 U.S. 668, 689 (1984), in order to prevail on an ineffective assistance of counsel claim. Where a guilty plea is challenged on ineffective assistance of counsel grounds, the petitioner may satisfy the performance prong of the Strickland standard by demonstrating his attorney failed to provide "reasonably effective assistance." See Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989). The prejudice prong of the Strickland standard is met where the petitioner shows a reasonable probability that but for counsel's errors, he would not have entered a guilty plea and would have insisted on trial. Id. (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

In this case, Petitioner sets forth only conclusory and meritless allegations of ineffectiveness and he has completely failed to demonstrate prejudice. Petitioner claims that he was denied effective assistance of counsel because his attorney failed to contact him during the ten (10) period following entry of his guilty plea to determine whether he wanted to withdraw his plea. However, following entry of a guilty plea, counsel is required to advise a defendant of his appeal right only if (1) the defendant inquires about it, or (2) a claim of error is made on constitutional grounds which could set aside the plea and about which counsel knew or should have known. Hardiman v. Reynolds, 971 F.2d 500, 506 (10th Cir. 1992); Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989).

Petitioner in this case does not claim that he contacted his attorney during the relevant ten (10) day period to inquire about an appeal or that his attorney knew or should have known of a constitutional claim which could have set aside the plea. The Court concludes this claim fails.

Petitioner also claims that his counsel provided ineffective assistance because he failed to "conduct an investigation as required under NEW holdings of law." (#9 at 6). However, Petitioner fails both to identify what relevant facts his attorney would have discovered had he conducted an investigation, and to identify the "NEW holdings of law" to which he refers. As a result, the Court concludes this claim fails. The Court further notes that nowhere in his pleadings does Petitioner satisfy the prejudice prong of the Strickland standard. Petitioner fails to allege, much less demonstrate, that but for counsel's alleged errors, he would not have entered a guilty plea and would have insisted on going to trial. As a result, the Court finds Petitioner's claims of ineffective assistance of counsel to be without merit.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes Petitioner's first and third claims, challenging the sufficiency of the Information and Petitioner's sentence, respectively, are procedurally barred. Petitioner's ineffective assistance of counsel claims are without merit. Therefore, Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States and his petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus, as amended (#9), is **denied**.

SO ORDERED THIS 16 day of March, 2000.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

JAMES SHACKELFORD,)
)
 Petitioner,)
)
 vs.)
)
 STEVE HARGETT, Warden,)
)
 Respondent.)

ENTERED ON DOCKET

DATE MAR 16 2000

Case No. 97-CV-267-K ✓

FILED

MAR 17 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

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

SO ORDERED THIS 16 day of March, 2000.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 16 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ZACHARY S. KEETER,)

Plaintiff,)

vs.)

PARAMEDICS PLUS, L.L.C.,)

Defendant.)

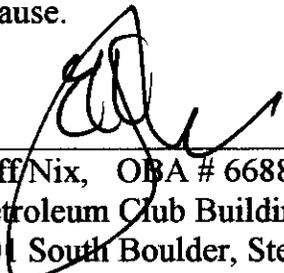
Case No. 99-CV-1067-BU (J)

ENTERED ON DOCKET

DATE MAR 16 2000

STIPULATION OF DISMISSAL

COMES NOW Jeff Nix, counsel for Plaintiff, Zachary S. Keeter, and hereby dismisses with prejudice, the above styled cause.



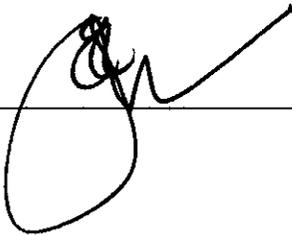
Jeff Nix, OBA # 6688
Petroleum Club Building
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Tulsa, Oklahoma 74119
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(918) 587-3491 - fax

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 14 day of March, 2000, a true and correct copy of the above and foregoing document was mailed via U. S. Mail, with proper postage prepaid thereon to:

Scott B. Wood, Esq.
Whitten, McGuire, Wood, Terry,
Roselius & Dittrich
3600 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103



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

FILED

BETTY L. MOORE,

Plaintiff,

vs.

SOUTHWESTERN BELL
TELEPHONE COMPANY,

Defendant.

MAR 16 2000 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-915K ✓

ENTERED ON DOCKET

DATE MAR 16 2000

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1), Fed.R.Civ.P., the parties hereby stipulate that the above-captioned case be dismissed with prejudice with each party bearing its own costs and attorney's fees incurred.

Respectfully submitted,

Kimberly Lambert Love

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

IN RE:)
)
DONNIE E. HENDERSON,)
)
Debtor,)
)
THE STATE OF OKLAHOMA, ex rel.,)
OKLAHOMA TAX COMMISSION,)
)
Appellant,)
)
v.)
)
DONNIE E. HENDERSON,)
)
Appellee.)

FILED
MAR 15 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-518-H(M) ✓

ENTERED ON DOCKET
MAR 16 2000
DATE _____

ORDER

This matter comes before the Court on appeal from the United States Bankruptcy Court for the Northern District of Oklahoma. The appeal was referred to a United States Magistrate Judge for report and recommendation. Magistrate Judge McCarthy's Report and Recommendation (Docket # 9) and Appellant Oklahoma Tax Commission's ("OTC's") Objection To Report and Recommendation of Magistrate (Docket # 10) are before the Court.

On appeal, OTC asserts that the Bankruptcy Court erred in holding that Okla. Stat. tit. 68, § 2375(H) does not require the filing of an amended return, as required to except tax liability from discharge pursuant to § 523 of the Bankruptcy Code. OTC argues that § 2375(H), which directs a taxpayer, upon an adjustment to income by the Internal Revenue Service ("IRS"), either to file an amended return or to notify the OTC in writing, requires a return within the meaning of § 523.

In his Report and Recommendation, the magistrate judge found that the Bankruptcy Court correctly held that, because the duty to notify imposed by § 2375(H) may be satisfied by either a letter or an amended return, the statute does not “require” a return as contemplated by § 523 of the Bankruptcy Code. The magistrate judge therefore recommended that this Court affirm the decision of the Bankruptcy Court.

In accordance with 28 U.S.C. § 636 and Fed.R.Civ.P. 72(b), the Court has reviewed the Bankruptcy Court’s conclusions of law and the magistrate judge’s report and recommendation de novo. The Court finds that the Bankruptcy Court erred in holding that notification pursuant to § 2375(H) is not a “required return” within the meaning of 11 U.S.C. § 523, and therefore rejects the report and recommendation of the magistrate judge.

In its opinion, the Bankruptcy Court held that a failure to notify OTC of changes in taxable income by letter is not the same as a failure to file an amended return, citing in support several decisions based on California and Virginia law. Accordingly, the Bankruptcy Court concluded that because Appellee was not required to file an amended return for 1990, the additional taxes assessed by OTC for that year were not excepted from discharge under 11 U.S.C. § 523(a)(1).

OTC appeals from the decision of the Bankruptcy Court, arguing that the Oklahoma Supreme Court has held that Okla Stat. tit. 68 § 2375(H) “imposes a duty upon Oklahoma tax reporters to notify the Oklahoma Tax Commission, by amended state income tax return or by letter, of any adjustment or correction in the returned federal net income or taxable income within one year after the federal adjustment or correction has been finally determined.” In re

O'Carroll, 952 P.2d 45 (Okla. 1998). OTC further asserts that judges in the Bankruptcy Court for the Northern District of Oklahoma have repeatedly held that § 2375's requirement of either an amended return or a letter substitute constitutes a required return for the purposes of determining the applicability of 11 U.S.C. § 523(a)(1). See, e.g., In re Lamborn, 181 B.R. 98, 103 (Bankr. N.D. Okla. 1995); In re Herring, No. 96-01317-M (Bankr. N.D. Okla. May 21, 1999).

Based upon a careful review of the opinion of the Bankruptcy Court, the submissions of the parties, and the relevant case law, the Court finds that the Bankruptcy Court in Lamborn and Herring correctly analyzed this issue. The Oklahoma Supreme Court has established that § 2375(H) imposes upon taxpayers an affirmative duty to notify the OTC of a change in taxable income, either by letter or amended return. See O'Carroll. The Court finds that, because the letter notification serves as the functional equivalent of an amended return, § 2375 (H) requires a return within the meaning of § 523(a)(1) of the Bankruptcy Code. See Lamborn. Accordingly, Appellee's failure to meet this statutory duty excepts his tax liability from discharge under § 523 of the Bankruptcy Code.

For the reasons set forth above, the Court finds that the Report and Recommendation granting Appellees' motions to dismiss (Docket # 7) should be rejected, and the decision of the Bankruptcy Court is hereby REVERSED and REMANDED.

IT IS SO ORDERED.

This 15th day of March, 2000.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BOBBIE G. DICKERSON,

Defendant.

ENTERED ON DOCKET

DATE MAR 16 2000

No. 99CV1123K(M)

F I L E D

MAR 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 15 day of March, 2000, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Bobbie G. Dickerson, appearing not.

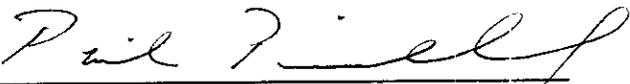
The Court being fully advised and having examined the court file finds that Defendant, Bobbie G. Dickerson, was served with Summons and Complaint on February 9, 2000. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Bobbie G. Dickerson, for the principal amount of \$3,121.81 and \$2,825.79,

plus accrued interest of \$2,568.90 and \$2,127.51, plus interest thereafter at the rate of 12 percent per annum and 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.197 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

PEP/alh

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

(1)MINERAL RESOURCE TECHNOLOGIES,)
L.L.C., a Delaware limited)
liability company,)

Plaintiff,)

MINERAL SOLUTIONS, INC., a)
Delaware corporation,)

Plaintiff/Intervenor,)

v.)

(1)GRAND RIVER DAM AUTHORITY, a)
governmental agency of the)
State of Oklahoma,)
body politic and corporate,)

Defendant.)

FILED

MAR 15 2000 *FL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

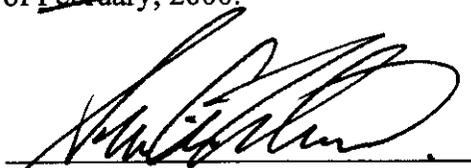
Case No. 99-CV-0501-H(M) ✓

ENTERED ON DOCKET
DATE MAR 16 2000

ORDER OF DISMISSAL

This matter comes before the Court on consideration of the joint motion of Plaintiff, Mineral Resource Technologies, L.L.C. and Defendant, Grand River Dam Authority, to dismiss the remaining claims for relief in this case. Upon consideration of the motion, the remaining claims for relief in this case are dismissed.

IT IS SO ORDERED this 15TH day of MARCH, 2000.


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

of any occupation. Therefore, her LTD benefits were terminated.

Summary judgment is appropriate if, after reviewing all of the evidence submitted in the light most favorable to the non-movant, no genuine issue of material fact survives to merit a trial. UMLIC-Nine Corp. v. Lipan Springs Dev. Corp., 168 F.3d 1173, 1176 (10th Cir.1999). Fed.R.Civ.P. 56(c).

Initially, the parties have a considerable dispute over the appropriate standard of review for this Court to employ. In Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989), the Supreme Court held that courts should review benefit eligibility determinations de novo, unless the ERISA plan "gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." If the plan accords such discretion, however, the administrator's eligibility determination will be overturned only if it is arbitrary and capricious. Id. at 109-11; Chambers v. Family Heath Plan Corp., 100 F.3d 818, 825-27 & n.1 (10th Cir.1996).

In its reply brief, defendant claims plaintiff is inaccurate in declaring that defendant acted as plan administrator. Defendant contends that it acted as "claim review fiduciary"¹ and not administrator because the plan document did not specifically designate defendant as plan administrator. This argument is confusing, because in its opening brief defendant stated that,

¹Defendant simply recites this phrase without pointing to the ERISA authority from which it derives. As best the Court can determine, 29 C.F.R. §2560.503-1(g)(2) is the pertinent provision.

pursuant to plan provisions, "[defendant] as the plan administrator has the authority and discretion to determine an individual's eligibility for benefits." (Defendant's Brief at 3) (emphasis added).

In addition to this contradiction, defendant never makes clear what effect on the standard of review its purported and belated distinction would have. In any event, it appears that the Fifth Circuit has rejected a similar argument by examining which party functioned as the plan administrator, despite the specific designation within the plan. Vega v. Nation Life Ins. Serv., Inc., 145 F.3d 673, 677 n.24 (5th Cir.1998). A similar functional analysis in this case leads to the conclusion that defendant was both fiduciary and administrator.

The plan language clearly grants defendant sufficient discretion to make applicable the arbitrary and capricious standard of review. However, plaintiff argues in the alternative a conflict of interest exists when the insurer processes and pays claims while also acting as plan administrator. In Jones v. Kodak Medical Assistance Plan, 169 F.3d 1287 (10th Cir.1999), the Tenth Circuit refused to find a per se conflict of interest based on the single fact that the insurer also acted as administrator, but rather employed a four part test to determine a conflict of interest: (1) the plan is self-funded; (2) the company funding the plan appointed and compensated the plan administrator; (3) the plan administrator's performance reviews or level of compensation were linked to the denial of benefits; and (4) the provision of benefits

had a significant economic impact on the company administering the plan. When the court finds that the dual role of the plan administrator jeopardized his impartiality, his decisions are reviewed with less deference. Id. at 1291.

However, even concluding a conflict exists does not mean an automatic reversion to de novo review. The standard always remains arbitrary and capricious, but the amount of deference present may decrease on a sliding scale in proportion to the extent of conflict present, recognizing the arbitrary and capricious standard is inherently flexible. Kimber v. Thiokol Corp., 196 F.3d 1092, 1097 (10th Cir.1999). Ordinarily, the standard is quite deferential. An interpretation of the plan will be upheld under the arbitrary and capricious standard if it is reasonable and made in good faith. Rademacher v. Colo. Ass'n of Soil Cons. Med. Plan, 11 F.3d 1567, 1569 (10th Cir.1993). A decision need not be the only logical one or even the best one, but will be upheld unless it is not grounded on any reasonable basis. Kimber, 196 F.3d at 1098.

In the case at bar, the Court is unable to conclude that a sufficient conflict exists to invoke the sliding scale described by the Tenth Circuit. Plaintiff has presented no evidence regarding the four factors described in the Jones decision. Plaintiff's argument is simply that an insurer acting as plan administrator requires application of the de novo standard of review. The Tenth Circuit has ruled to the contrary.

The Court has reviewed the decision-making record presented by the parties. The Court affirms the decision under the arbitrary

and capricious standard. Indeed, even under a sliding scale the decision would be affirmed and perhaps even under the de novo standard which plaintiff seeks. Dr. Neal Mask, who conducted the independent medical examination of plaintiff, concluded that she "should be able to function in an office environment which does not require significant physical exertion and is clean of respiratory irritants such as cigarette smoke, fumes and dust." (Exhibit H to Defendant's motion). Dr. Mask further stated on the Physical Capacities Form that plaintiff was capable of performing sedentary work. The plaintiff required a demonstration that plaintiff could not perform any occupation before LTD benefits could be continued beyond sixty months. The conclusion by defendant that such a demonstration was not made is affirmed by this Court under ERISA.

It is the Order of the Court that the motion of the defendant for summary judgment (#9) is hereby GRANTED.

ORDERED this 15 day of March, 2000.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RAE CORPORATION, an Oklahoma corporation,
Plaintiff,

vs.

BURLEY'S RINK SUPPLY, INC.,
Defendant.

Case No. 99-CV-0382-B(E)

ENTERED ON DOCKET

DATE MAR 15 2000

STIPULATION AND APPLICATION FOR DISMISSAL

The Plaintiff and counterdefendant, RAE Corporation, and the Defendant and counterclaimant, Burley's Rink Supply, Inc., respectfully request that the Court dismiss their respective claims filed herein, with prejudice to refiling. In support of this Stipulation and Application, the parties show the Court as follows:

1. A settlement has been reached of all claims asserted herein.
2. The parties desire to dismiss their respective claims herein with prejudice, and request that the Court enter an order dismissing those claims.
3. The parties, and each of them, indicate by their counsels' signatures, their consent to the dismissal of the claims asserted herein.
4. The parties have agreed that each party shall bear its own attorney fees and costs.

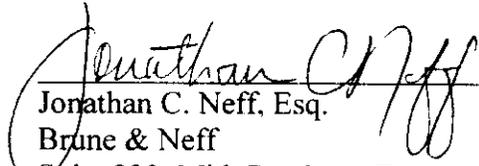
CONCLUSION

The parties herein, RAE Corporation and Burley's Rink Supply, Inc., respectfully request that the Court dismiss their respective claims in the instant action *with prejudice* to the refiling of same.

OK

DATED THIS 14 day of ^{MARCH}~~February~~, 2000.

Charles S. Plumb, OBA No. 7194
James C. Milton, OBA No. 16697
Doerner, Saunders, Daniel & Anderson, L.L.P.
320 South Boston Ave., Ste. 500
Tulsa, Oklahoma 74103-3725
918-582-1211; fax 918-591-5362
ATTORNEYS FOR PLAINTIFF RAE CORPORATION


Jonathan C. Neff, Esq.
Brune & Neff
Suite 230, Mid-Continent Tower
401 South Boston Ave.
Tulsa, Oklahoma 74103-4032
ATTORNEYS FOR DEFENDANT BURLEY'S RINK SUPPLY, INC.

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

FILED

MAR 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALLYSON L. FURR,)

Plaintiff,)

v.)

ICON HEALTH & FITNESS, INC.,)

formerly known as HEALTHRIDER,)

CORPORATION and JANE DOE,)

Defendants.)

No. 99-CV-0344B (M)

ENTERED ON DOCKET

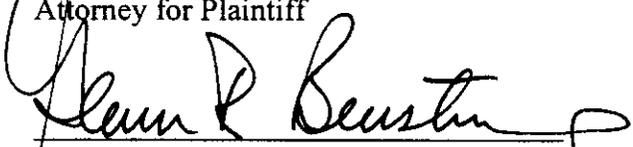
DATE MAR 15 2000

STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE

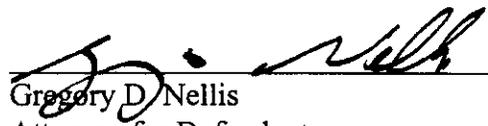
COMES NOW the Plaintiff, by and through her attorneys of record, and Defendant's counsel, and would show the Court that this matter has been compromised and settled and, therefore, move the Court for an Order Of Dismissal With Prejudice.



Randall Gill
Attorney for Plaintiff



Glenn Beustring
Attorneys for Plaintiff



Gregory D. Nellis
Attorney for Defendant

015

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,)

v.)

DAVID STEPHENS EDDINGS)
aka David S. Eddings;)

LINDA J. EDDINGS aka Linda J. Casey;)

DAVID LEE EDDINGS aka David L. Eddings)
aka David Eddings;)

NOMA J. BRUTON;)

LAWRENCE A. MARTIN;)

STATE OF OKLAHOMA ex rel.)

Oklahoma Tax Commission;)

COUNTY TREASURER, Pawnee County,)
Oklahoma;)

BOARD OF COUNTY COMMISSIONERS,)

Pawnee County, Oklahoma,)

Defendants.)

CIVIL ACTION NO. 99-CV-0506-K (M)

FILED

MAR 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE MAR 15 2000

ORDER OF SALE

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

On February 22, 2000, the United States of America recovered
judgment in rem against the Defendants, David Stephens Eddings aka David S.
Eddings and Linda J. Eddings aka Linda J. Casey, in the above-styled action to
enforce a mortgage lien upon the following described property:

Lots 1, 2, 3, 10, 11 and 12, Block 28 in the Original Town of
Blackburn, Pawnee County, State of Oklahoma.

The amount of the in rem judgment is the sum of \$4,758.11, plus
administrative charges in the amount of \$617.00, plus penalty charges in the amount
of \$73.80, plus accrued interest in the amount of \$638.65 as of March 24, 1998, plus

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CF

interest accruing thereafter at the rate of 8 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If Defendant, David Stephens Eddings aka David S. Eddings and Linda J. Eddings aka Linda J. Casey, should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisalment and to apply the proceeds to the payment of the costs of the sale; the judgment of the Plaintiff, United States of America; and the judgment of the Defendant, County Treasurer, Pawnee County, Oklahoma. Any residue is to be paid to the Court Clerk to await further order of this Court.

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 15th day of March, 2000.

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

By K. Rain
Deputy

Order of Sale
Case No. 99-CV-0506-K (M) (Eddings)
CDM:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

v.)

DAROLD G. PHILLIPS)
aka Darold Gene Phillips;)
SPOUSE, if any, OF DAROLD G. PHILLIPS)
aka Darold Gene Phillips;)
TRACY M. PHILLIPS aka Tracy Smithwick)
aka Tracy M. Smithwick;)
SPOUSE, if any, OF TRACY M. PHILLIPS)
aka Tracy Smithwick aka Tracy M. Smithwick;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)

Defendants.)

FILED

MAR 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAR 15 2000

CIVIL ACTION NO. 99-CV-0688-K (E)

ORDER OF SALE

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

On February 22, 2000, the United States of America recovered judgment in rem against the Defendants, Darold G. Phillips aka Darold Gene Phillips and Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick, in the above-styled action to enforce a mortgage lien upon the following described property:

The West 101.5 feet of Lot One (1), HOME GARDENS ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded Plat thereof.

The amount of the judgment is the sum of \$28,048.17, plus administrative charges in the amount of \$165.00, plus penalty charges in the amount of \$23.52, plus accrued interest in the amount of \$4,300.10 as of September 11,

12
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judgment, plus interest thereafter at the current legal rate of 6.287 percent per annum until paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If Defendants, Darold G. Phillips aka Darold Gene Phillips and Tracy M. Phillips aka Tracy Smithwick aka Tracy M. Smithwick, should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisal and to apply the proceeds to the payment of the costs of the sale and the Plaintiff's judgment. Any residue is to be paid to the Court Clerk to await further order of this Court.

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 15th day of March, 2000.

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

By K. Rain
Deputy

Railroad Right of Way of Section 24; all in Township 25 North, Range 20 East of Indian Meridian; AND, the South 20.49 acres of Lot 2; and the SW/4 SE/4 NW/4; and the N/2 NE/4 SW/4; and all that part of Lots 3 and 4 and the SE/4 SW/4 lying West of the Little Cabin Creek and North of the railroad; and all that part of the S/2 NE/4 SW/4 lying North and East of the Little Cabin Creek of Section 18; and all that part of Lot 1, lying North of the St. Louis and San Francisco Railroad right of way, of Section 19; all in Township 25 North, Range 21 East of Indian Meridian, according to the United States Government Survey thereof.

The amount of the judgment is the sum of \$174,041.09, plus accrued interest in the amount of \$59,393.43 as of August 27, 1998, plus interest accruing thereafter at the rate of \$23.8974 per day until judgment, plus interest thereafter at the current legal rate of 6.287 percent per annum until paid, plus the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens), plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If Defendant, Kenneth P. McDonald aka Kenneth McDonald, should fail to satisfy the money judgment to the Plaintiff, the judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisalment and to apply the proceeds to the payment of the costs of the sale and the Plaintiff's judgment. Any residue is to be paid to the Court Clerk to await further order of this Court.

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 15th day of March, 2000.

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

By K. Rain
Deputy

Order of Sale
Case No. 99-CV-0735-K (M) (McDonald)

LFR:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TOMMY COHEA and DELRENE COHEA,
husband and wife,

Plaintiffs,

v.

ARTHUR L. BURDETTE, JR., et al.,

Defendants.

and

UNITED STATES OF AMERICA,
on behalf of the Small Business Administration,

Third-Party Plaintiff,

v.

ARTHUR L. BURDETTE, JR., et al.,

Third-Party Defendants.

FILED

MAR 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
MAR 15 2000
DATE _____

) CIVIL ACTION NO. 98-CV-825-H (M) ✓
) Case No. CJ-98-290
) (Osage County District Court)

ORDER

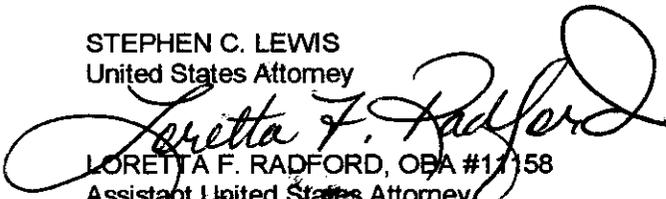
Upon the Motion of the United States of America, acting on behalf of the Small Business Administration, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed without prejudice.

Dated this 15th day of MARCH, 2000.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #17158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:css

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

F I L E D

MAR 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HOWARD LEE CAMRON,)

Petitioner,)

vs.)

RON WARD,)

Respondent.)

Case No. 97-CV-275-B

ENTERED ON DOCKET
DATE MAR 15 2000

JUDGMENT

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

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

SO ORDERED THIS 15th day of Mar, 2000.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

FILED

MAR 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) No. 99CV1035B(M)
)
 JUDY RYAN SPEARS, A/K/A JUDY)
 C. SPEARS, A/K/A JUDY CAROL)
 SPEARS,)
)
 Defendant.)

ENTERED ON DOCKET
DATE MAR 15 2000

DEFAULT JUDGMENT

This matter comes on for consideration this 15th day of Mar., 2000, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Judy Ryan Spears, a/k/a Judy C. Spears, a/k/a Judy Carol Spears, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Judy Ryan Spears, a/k/a Judy C. Spears, a/k/a Judy Carol Spears, filed herein her Waiver of Service of Summons on December 16, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Judy Ryan Spears, a/k/a Judy C. Spears, a/k/a Judy Carol Spears, for the

principal amount of \$2,564.06, plus accrued interest of \$2,177.63, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.197 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3880
(918)581-7463

PEP/dlo

FILED

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

MAR 14 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**BRANDY PETERMAN, in her individual
capacity,**)
)
 Plaintiff,)
 vs.)
)
 PURE WATER TECHNOLOGIES, INC.,)
 in their professional capacity; RAINSOFT)
 INC., in their professional capacity; and,)
 CRYSTAL OASIS, INC., in their professional)
 capacity.)
 Defendants.)

CASE NO: 99-CV-0780-B (E)

ENTERED ON DOCKET

DATE MAR 15 2000

**ORDER GRANTING PLAINTIFF'S DISMISSAL WITHOUT PREJUDICE
ONLY AS TO DEFENDANT, PURE WATER TECHNOLOGIES, INC.**

NOW ON THIS 14th DAY OF FebRUARY, 2000, and after being fully advised in the premises, does hereby enter an Order granting Plaintiff's Motion to Dismiss without Prejudice only as to Defendant, Pure Water Technologies, Inc., with each party bearing responsibility for their own respective costs and fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that Plaintiff's Motion to Dismiss only as to Defendant, Pure Water Technologies, Inc., is hereby granted.

IT IS SO ORDERED ON THIS 14th DAY OF FebRUARY, 2000.



Judge of the U.S. District Court

John M. Butler, OBA #1377
Aundrea R. Smith, OBA #18470
John Mack Butler & Associates
6846 South Canton, Suite 150
Tulsa, Oklahoma 74136
(918) 494-9595
(918) 494-5046 Facsimile

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

FILED
MAR 14 2000
C. Lombardi, Clerk
DISTRICT COURT

CLARK BURBANK,)
)
 Plaintiff,)
)
 v.)
)
 WORLDCONNECT)
 TELECOMMUNICATIONS, INC.,)
)
 Defendant.)

Case No. 98-CV-0926E (J)

ENTERED ON DOCKET
DATE MAR 15 2000

**STIPULATION OF DISMISSAL WITH PREJUDICE AND
RELEASE AND SATISFACTION OF JUDGMENT**

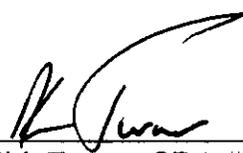
Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, Plaintiff, Clark Burbank, and Defendant, WorldConnect Telecommunications, Inc., jointly stipulate and agree that this action, should be and is hereby dismissed with prejudice. In addition, Defendant hereby releases its judgment for Nine Hundred Sixty-Seven Dollars (\$967.00) awarded as costs by the Court.

Each party has agreed to bear its own attorneys fees and costs.

Dated this 13th day of March, 2000.



R. Scott Scroggs, OBA #
THE SCROGGS LAW FIRM
403 S. Cheyenne
Suite 1100
Tulsa, OK 74103
Attorneys for Clark Burbank



W. Kirk Turner, OBA #13791
NEWTON, O'CONNOR, TURNER & AUER P.C.
2700 NationsBank Building
15 West Sixth Street
Tulsa, Oklahoma 74103
Attorneys for WorldConnect
Telecommunications, Inc.

WK
3-11-00

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

F I L E D

MAR 15 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE TRAVELERS INDEMNITY)
COMPANY OF CONNECTICUT,)

Plaintiff,)

v.)

DETRICK REALTY, INC., d/b/a)
PRUDENTIAL/DETRICK REALTY,)

Defendant.)

CASE NO. 98-CV-507(E) M ✓

ENTERED ON DOCKET
MAR 15 2000

JOURNAL ENTRY OF JUDGMENT

DATE _____

This declaratory judgment action arose out of an insurance coverage dispute between the insured, Detrick Realty, Inc., d/b/a Prudential /Detrick Realty ("Detrick") and its insurer, The Travelers Indemnity Company of Connecticut ("Travelers"). The trial of this matter came on for jury trial on the 12th day of July, 1999 before the Court, Honorable James O. Ellison, Senior Judge, presiding. The Plaintiff appeared by and through its corporate representative, Bradley Smolkin, and attorneys Brian Dittrich and Linda Szuhly. The Defendant appeared by and through its corporate representative, Sheldon Detrick, and its attorney of record, Jon D. Starr. The parties announced ready for trial, a jury panel of (7) jurors was sworn, and the Court proceeded to hear the evidence and arguments of counsel.

Plaintiff concluded presentation of its case in chief on the 13th day of July, 1999, at which time the Defendant moved for judgment as a matter of law on Plaintiff's claim for declaratory judgment. Defendant's motion was overruled by the Court and Defendant then presented its case in chief and rested.

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On the 13th of July, 1999, Plaintiff's attorney moved for judgment as a matter of law on its claim for declaratory judgment, and Defendant's Counterclaim for bad faith and punitive damages. The Court granted Plaintiff Traveler's motion as to the issue of punitive damages only. Defendant then moved for judgment as a matter of law on Plaintiff's claim for declaratory judgment, which was overruled by the Court.

Following a hearing regarding Jury Instructions, closing arguments were given and the Court instructed the jury as to the law. After due deliberation, the jury advised the Court of its verdict and trial of this matter was concluded. Subsequently, Defendant's Motion for Attorney's Fees and Pre-Judgment and Post-Judgment Interest was granted in part. Defendant was awarded costs pursuant to its Bill of Costs submitted to the Court. Defendant Detrick Realty and Plaintiff Travelers have agreed that appeal will not be taken on the issues litigated in this matter and the following Order of the Court is the final resolution of this matter.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that judgment is entered in favor of the Defendant, Detrick Realty, Inc., and against the Plaintiff, The Travelers Indemnity Company of Connecticut for damages in the amount of \$23,180.20.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, Detrick Realty, is awarded \$32,292.50 as a reasonable attorney fee, plus costs in the amount of \$1,428.65, plus pre-judgment interest in the amount of \$2,648.26.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that post-judgment interest shall accrue on the jury verdict portion of the judgment totaling \$23,180.20, and pre-judgment interest of \$2,648.26 from July 14, 1999, on the judgment for costs totaling \$1,428.65,

and on the judgment for attorney's fees totaling \$32,292.50 at the rate of 5.670% per annum from December 29, 1999 until paid in full.

IT IS SO ORDERED this 15TH day of March, 2000.

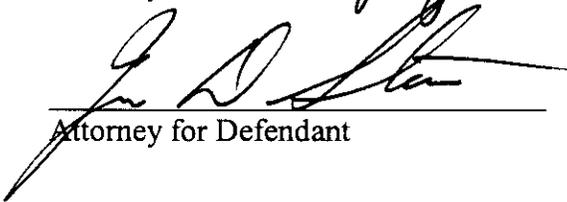


HONORABLE JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPROVED AS TO FORM:



Attorney for Plaintiff



Attorney for Defendant

Third Assignment of Error: Ineffective assistance of counsel

Fourth Assignment of Error: Improper jury instructions

Fifth Assignment of Error: Improper closing argument

Sixth Assignment of Error: Excessive punishment

(#26, Ex. A). On March 23, 1992, the OCCA affirmed the judgement and sentence in a published opinion, Camron v. State, 829 P.2d 47 (Okla. Crim. App. 1992). (#26, Ex. C).

Petitioner originally filed his federal petition for writ of habeas corpus (#1-2) in the United States District Court for the Eastern District of Oklahoma on March 13, 1997. The petition was transferred to this district court on March 24, 1997 where Petitioner paid the filing fee required to commence a habeas corpus action. In response to the Court's Order to show cause why the writ should not issue, Respondent filed his motion to dismiss for failure to exhaust state remedies (#4). Petitioner responded to the motion to dismiss by filing a motion to amend his petition to delete the unexhausted claims. By Order filed February 2, 1998, the Court granted Petitioner's motion to amend. Thereafter, on February 24, 1998, Petitioner filed the amended petition (#9) presently before the Court. In response to the Court's second Order to show cause why the writ should not issue, Respondent filed his motion to dismiss the amended petition as time barred by the statute of limitations (#15). By Order filed February 8, 1999 (#18), the Court denied Respondent's motion to dismiss and again directed Respondent to respond to the amended petition. On April 19, 1999, Respondent filed his response to the amended petition (#26), asserting that because Petitioner has failed to satisfy the § 2254(d) standard of review, habeas corpus relief cannot be granted on Petitioner's claims. Petitioner filed his reply to Respondent's response (#27) on May 4, 1999.

ANALYSIS

A. Exhaustion/Evidentiary Hearing

Respondent concedes, and this Court finds, that Petitioner presented each of his instant habeas claims on direct appeal and that, therefore, Petitioner has satisfied the exhaustion requirement of 28 U.S.C. § 2254(b). The Court also finds that an evidentiary hearing is not warranted because Petitioner has not demonstrated that the claims before the Court rely on either a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or a factual predicate that could not have been previously discovered through the exercise of due diligence and that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found Petitioner guilty of the underlying offense. 28 U.S.C. § 2254(e)(2).

B. Standard of Review

The Antiterrorism and Effective Death Penalty Act (“AEDPA”), enacted April 24, 1996, amended the standard of review in habeas corpus cases as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). As stated above, Petitioner raised each of his claims on direct appeal. After considering Petitioner’s arguments, the OCCA rejected each claim and affirmed Petitioner’s

conviction and sentence. Thus, the § 2254(d) standard of review governs this Court's review of Petitioner's claims.

After careful review of the record in this case, including the trial transcript, the Court finds Petitioner has failed to demonstrate that the decision of the OCCA was contrary to clearly established federal law as set forth by the Supreme Court or that there was an unreasonable application of Supreme Court law to the facts of this case. The Court will address each claim in the order presented by Petitioner.

C. Petitioner's claims

1. Sufficiency of the evidence

The felony information filed against Petitioner alleged that Petitioner committed the offense of first degree manslaughter in a cruel and unusual manner by beating the deceased to death with a shotgun. Camron, 829 P.2d at 51. As his challenge to the sufficiency of the evidence, Petitioner claims that the State failed to carry its burden of proving each of the elements of First Degree Manslaughter as alleged in the information. Specifically, Petitioner alleges that (1) only circumstantial evidence contradicted his claim that he acted in self-defense, (2) his acts were not willful as supported by evidence produced at trial, (3) only circumstantial evidence supported the State's assertion that Petitioner acted feloniously.

Sufficiency of the evidence claims are evaluated based on the following standard established by the Supreme Court:

. . . the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (citations omitted). Although the Oklahoma Court of Criminal Appeals did not cite Jackson in its analysis rejecting Petitioner's challenge to the sufficiency of the evidence, the state appellate court did state, after reviewing the critical evidence, that "[w]e find this sufficient, competent evidence from which the jury could reasonably conclude that the Appellant committed the offense of first degree manslaughter in a cruel and unusual manner by beating the deceased to death with the shotgun. See Phillips v. State, 641 P.2d 556, 560 (Okl.Cr.1982); Dandridge v. State, 519 P.2d 529, 536 (Okl.Cr.1974)." Camron, 829 P.2d at 51-52. Thus, the state appellate court effectively applied the Jackson standard in considering Petitioner's challenge to the sufficiency of the evidence. Under § 2254(d), Petitioner must demonstrate that the Oklahoma Court of Criminal Appeals's decision amounted to an unreasonable application of Jackson or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In evaluating the evidence presented at trial, the Court does not weigh conflicting evidence or consider witness credibility. Wingfield v. Massie, 122 F.3d 1329, 1332 (10th Cir. 1997); Messer v. Roberts, 74 F.3d 1009, 1013 (10th Cir. 1996). Instead, the Court must view the evidence in the "light most favorable to the prosecution," Jackson, 443 U.S. at 319, and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir. 1993).

Under Oklahoma law, the crime of first degree manslaughter may be committed when

perpetrated without a design to effect death either (1) in a heat of passion but in a cruel and unusual manner or (2) by means of a dangerous weapon. See Okla. Stat. tit. 21, § 711. Viewing the evidence in the light most favorable to the prosecution, a rational jury could have found beyond a reasonable doubt that Petitioner in this case caused the victim's death without a design to effect her death in a heat of passion but in a cruel and unusual manner. The jury was entitled to weigh the inferences from these facts and could have concluded beyond a reasonable doubt that petitioner committed the crime as charged. The medical examiner testified that the deceased died of a subdural hematoma due to a blunt injury to the head (Trans. at 338). The medical evidence also showed that the deceased had sustained numerous bruises, lacerations and abrasions on her face, head, arms, legs and torso (Trans. at 328-39), and that 15 -- 20 different points of impact were found on the body with 7 of those points of impact on the face and head (Trans. at 328 and 339). In contrast to the injuries sustained by the deceased, testimony presented at trial indicated that Petitioner suffered only a small cut on his toe. (Trans. at 139).

The State introduced into evidence Exhibit No. 17 (Trans. at 294), a sawed off shotgun recovered from Petitioner's home during the search following the altercation between Petitioner and the deceased. (Trans. at 194). The shotgun was covered in human blood (Trans. at 196, 290) and a fingerprint expert testified that he was able to identify on Exhibit 17 a latent fingerprint matching Petitioner's print (Trans. at 262-63). Blood was found in several rooms of Petitioner's home, including the bedroom, the bathroom, the front room and hallway. (Trans. at 184, 185). In addition, blood was found in a garage adjoining the home and splattered on vehicles parked in the garage. (Trans. at 177). A witness for the State testified that upon his arrival at Petitioner's home, the deceased was conscious (Trans. at 121) but that she "passed out" while he assisted her into his truck and did not regain consciousness thereafter (Trans. at 137-138).

Petitioner testified in his own defense at trial. (Trans. at 484-553). According to Petitioner, the altercation with his wife began when he and a female companion were awakened by a shotgun blast that came through his bedroom window from outside his home. Within seconds, the victim was in his bedroom holding a shotgun. As Petitioner struggled to get the shotgun, the deceased began attacking his companion. Once Petitioner separated the deceased from his companion, he proceeded to try to get her out of his house. Petitioner admitted that he struck the deceased three or four times during the scuffle (Trans. at 535, 540) and that he was able to disarm the deceased several times (Trans. at 538, 541, 547). He also stated that she fell several times. (Trans. at 489, 540).

After carefully reviewing the trial transcript in the light most favorable to the prosecution, the Court finds there was sufficient evidence, as summarized above, from which a reasonable jury could have found that Petitioner committed first degree manslaughter. The Court rejects Petitioner's challenge to the sufficiency of the evidence based on its circumstantial nature. It is well established that "[e]vidence supporting guilt may be entirely circumstantial . . . circumstantial evidence may be accorded the same weight as direct evidence . . . the circumstantial evidence required to support a verdict need not conclusively exclude every other reasonable hypothesis and it need not negate all possibilities except guilt." United States v. Alonso, 790 F.2d 1489, 1493 (10th Cir. 1986) (citing United States v. Henry, 468 F.2d 892, 894 (10th Cir. 1972); United States v. Gay, 774 F.2d 368, 373 (10th Cir.1985)). Thus, the Court finds that Petitioner has failed to demonstrate that the OCCA's adjudication of this claim was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court or was based on an unreasonable determination of the facts in light of the evidence presented at trial. 28 U.S.C. § 2254(d). Habeas corpus relief on this claim should be denied.

2. *Introduction of evidence of other crimes*

During the trial after the State had rested, Petitioner took the murder weapon, the sawed off shotgun entered into evidence as State's Exhibit 17, from the courtroom and dismantled it into three pieces, leaving the various pieces in his pickup and at his attorneys' office. (Trans. at 366-375). The trial judge allowed the prosecution to question Petitioner during cross-examination about his actions related to removal of evidence from the courtroom. The trial court also allowed Deputy Sheriff Carl Sloan to testify concerning Petitioner's removal of and tampering with evidence. Petitioner argues that the trial court committed fundamental error in admitting this "other crimes" evidence.

The OCCA considered this claim on direct appeal and concluded that the trial court did not err in admitting the evidence under Oklahoma law. Camron, 829 P.2d at 53 (citing Wills v. State, 636 P.2d 372 (Okla. Crim. App. 1981) and Okla. Stat. tit. 12, § 2403). It is well established that the role of a federal habeas corpus court is not to correct errors of state law. Estelle v. McGuire, 502 U.S. 62 (1991). "Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." Smith v. Phillips, 455 U.S. 209, 221 (1982) (citations omitted). Evidentiary rulings by a state court cannot serve as the basis for habeas corpus relief unless the ruling rendered the petitioner's trial fundamentally unfair resulting in a violation of due process. Fox v. Ward, 200 F.3d 1286, 1296-97 (10th Cir. 2000) (stating that to justify habeas relief, trial court's evidentiary error must be "so grossly prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process"); Duvall v. Reynolds, 139 F.3d 768, 789 (10th Cir. 1997); Nichols v. Sullivan, 867 F.2d 1250, 1253 (10th Cir. 1989) (citing Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir. 1979)).

In the instant case, the Court finds that Petitioner has failed to demonstrate any error in the admission of the evidence, much less that the testimony rendered the trial fundamentally unfair. After reviewing the transcript from Petitioner's entire trial, the Court finds that the admission of the evidence demonstrating Petitioner's removal of evidence from the courtroom, even if improper, was not significant enough to influence the jury's decision in light of the evidence against Petitioner. Thus, the admission of the testimony did not render the trial fundamentally unfair and habeas relief on this claim should be denied.

3. Prosecutorial misconduct

Petitioner alleges that during closing argument, the prosecutor injected his personal opinion thereby rendering his trial unfair. Specifically, Petitioner cites to page 600 of the transcript where the prosecutor stated during his closing argument that "I'll guarantee you that when she got out there and she walked in and she saw them in bed and she was mad. I think I would be if it was my house." In considering this claim on direct appeal, the OCCA found that the prosecutor's comment was not met with any contemporaneous objection by Petitioner. As a result, the OCCA reviewed only for fundamental error. Finding no fundamental error, the OCCA rejected Petitioner's claim.

Habeas corpus relief is available for prosecutorial misconduct only when the prosecution's conduct is so egregious in the context of the entire trial that it renders the trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 642-648 (1974). Inquiry into the fundamental fairness of a trial requires examination of the entire proceedings. Id. at 643. "To view the prosecutor's statements in context, we look first at the strength of the evidence against the defendant and decide whether the prosecutor's statements plausibly could have tipped the scales in favor of the prosecution." Fero v. Kerby, 39 F.3d 1462, 1474 (10th Cir. 1994) (quotations omitted).

After reviewing the entire trial transcript, this Court agrees with the conclusion reached by the OCCA that this isolated comment by the prosecutor was not so egregious as to render Petitioner's trial fundamentally unfair. Petitioner is not entitled to habeas relief on this claim.

4. Challenge to jury instructions

As his fourth allegation of error, Petitioner asserts that the trial court committed error in failing to instruct the jury on second degree manslaughter. Petitioner raised this claim on direct appeal where it was rejected by the OCCA after that court determined that the evidence showed Petitioner intentionally struck the deceased with the shotgun and there was no evidence to support a second degree manslaughter instruction based upon negligence. Camron, 829 P.2d at 56.

The Tenth Circuit Court of Appeals has held that the failure of a state court to instruct on a lesser included offense in a noncapital case never raises a federal constitutional question. Lujan v. Tansy, 2 F.3d 1031, 1036 (10th Cir. 1993). In addition, as stated above, in denying Petitioner's claim on direct appeal, the OCCA concluded that there was no evidence supporting the giving of a second degree manslaughter instruction. Camron, 829 P.2d at 56. That finding is entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1) which Petitioner may rebut with clear and convincing evidence. Petitioner in this case has failed to make the necessary evidentiary showing. Therefore, habeas relief on this claim should be denied.

5. Excessive sentence

As his last proposition of error, Petitioner argues that his sentence of thirty (30) years imprisonment constitutes excessive punishment. Specifically, Petitioner asserts that "improper presenting the jury with testimony of other crimes along with improper joinder of CRF-87-80 with

CRF-87-142 being circumstances which could very well have caused great prejudice to the jury in its determination of punishment . . . The Petitioner feels that the cumulative effect of these errors was to prejudice the petitioner's rights to such a degree that he was deprived of fundamental justice in the determination of his punishment." (#10 at 15).

In refusing to modify Petitioner's sentence on direct appeal, the OCCA weighed mitigating factors presented by Petitioner against factors presented by the State in support of leaving the sentence undisturbed and concluded that Petitioner's sentence was "not an excessive sentence under the particular facts and circumstances of this case." Camron, 829 P.2d at 57-58.

To obtain federal habeas corpus relief based on an allegedly excessive sentence, a petitioner must show that his sentence "exceeds or is outside the statutory limits, or is wholly unauthorized by law." Haynes v. Butler, 825 F.2d 921, 923-24 (5th Cir. 1987); see also Vasquez v. Cooper, 862 F.2d 250, 255 (10th Cir. 1988). "If a sentence is within the statutory limits, the petitioner must show that the sentencing decision was wholly devoid of discretion or amounted to an 'arbitrary or capricious abuse of discretion' . . . or that an error of law resulted in the improper exercise of the sentencer's discretion and thereby deprived the petitioner of his liberty." Haynes, 825 F.2d at 924 (citing United States v. Garcia, 693 F.2d 412, 415 (5th Cir. 1982); Hicks v. Oklahoma, 447 U.S. 343, 346 (1980)). In Vasquez, the Tenth Circuit noted that while incarcerating a defendant beyond a state's maximum applicable sentence "may implicate constitutional concerns, the period of incarceration within that time is necessarily discretionary with the sentencing judge." Vasquez, 862 F.2d at 255.

In the instant case, Oklahoma's first degree manslaughter statute provides no maximum term of years as punishment. See Okla. Stat. tit. 21, § 715 (1983) (providing that "every person guilty of manslaughter in the first degree is punishable by imprisonment in the penitentiary for not less than four (4) years"). Thus, Petitioner's thirty year sentence falls within the limits established by

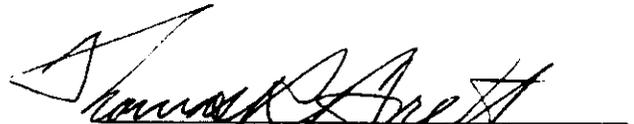
statute. After weighing the factors potentially affecting the sentencing decision, the OCCA determined that under all the facts and circumstances of the case, Petitioner's sentence was not so excessive as to shock the conscience of the Court. Camron, 829 P.2d at 57-58. In the instant action, Petitioner has not demonstrated that the OCCA's adjudication of this claim warrants habeas relief under § 2254(d). The Court concludes, therefore, that Petitioner has failed to show a federal constitutional violation and habeas relief on this claim should be denied.

CONCLUSION

Petitioner has failed to demonstrate that he is in custody in violation of the Constitution or laws of the United States. Therefore, the petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the amended petition for writ of habeas corpus (#9) is **denied**.

SO ORDERED THIS 15th day of March, 2000.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

MAR 15 2000 *AL*

TOM SAGAR,)
)
 Plaintiff,)
)
 v.)
)
 LARRY PARHAM, d/b/a GROVE)
 T.V./RADIO SHACK)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99CV0465H (E)

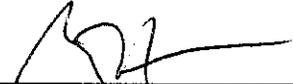
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JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

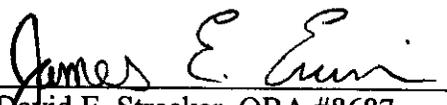
The Plaintiff, Tom Sagar, and the Defendant, Larry Parham, d/b/a Grove TV/Radio Shack, jointly stipulate and agree that this case be dismissed with prejudice, each party to bear his or its own costs, expenses and attorneys' fees.

Attorney for Plaintiff

Attorneys for Defendant



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

FILED

MAR 14 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDA CAROL THOMPSON, AND
JOE THOMPSON, WIFE AND HUSBAND,

Case No. 99 CV 0502H (J)

Plaintiffs,

vs.

AARON RONNIE FORKUM,

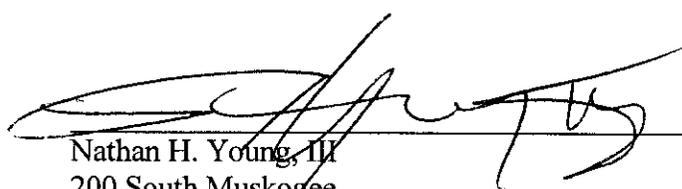
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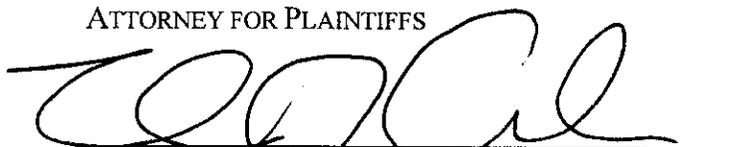
Defendant.

DATE MAR 15 2000

STIPULATED DISMISSAL WITHOUT PREJUDICE

Plaintiffs, Linda Carol Thompson and Joe Thompson, wife and husband, and Defendant, Aaron Ronnie Forkum, jointly and through their counsel of record, pursuant to Fed. R. Civ. P. 41(a)(1), stipulate to the dismissal of all claims and counterclaims in the captioned lawsuit. The dismissal of these claims is without prejudice as to the refiling with each party to bear its own costs and attorneys' fees.


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(918) 456-3648 = Fax
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Imogene Harris for
Defendant *Ottawa city-county Health Department*

Eric J. Begin

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Eric J. Begin, OBA #15671
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& GLADD
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ATTORNEYS FOR DEFENDANT

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

F I L E D

MAR 14 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARTIN J. DAVIS,

Plaintiff,

vs.

KANSAS CITY FIRE & MARINE
INSURANCE COMPANY,

Defendant,

CLESTA DARNABY and
JEFF DARNABY,

Co-Plaintiffs/Intervenors.

CASE NO. 98-CV-0982H ✓

ENTERED ON DOCKET

3-14-00

STIPULATION OF DISMISSAL

COME NOW the parties and hereby stipulate to the dismissal of this action for the reasons set forth below:

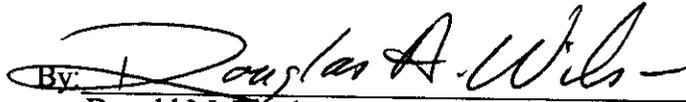
1. Judgment in favor of Martin J. Davis was recently rendered in the underlying state court action brought by the Darnabys against Martin J. Davis; accordingly, Plaintiff's request herein for a declaration of the parties' rights vis-a-vis his insurance policy has been rendered moot.
2. The parties hereby stipulate to this dismissal without prejudice and advise the Court that in so doing the Status Hearing presenting scheduled for 3/15/00 at 10:00 a.m. is no longer necessary.

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ATTORNEYS FOR PLAINTIFF:

Riggs, Abney, Neal, Turpen, Orbison & Lewis

By: 

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ATTORNEYS FOR DEFENDANT:

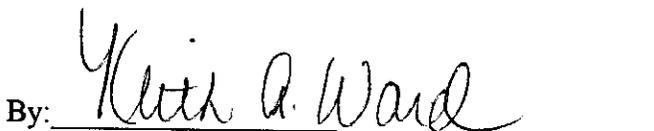
SECRET, HILL & FOLLOU

By: 

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Tulsa, OK 74136-6342

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By: 

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(918) 493-1925 Facsimile

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

ROBERT J. OLSON, M.D.,

Plaintiff,

v.

INTEGRIS HEALTH, INC. d/b/a
INTEGRIS GROVE GENERAL
HOSPITAL; DEE RENSHAW;
NORMAN COTNER, M.D.; DOUGLAS
OLSTROM, D.O.; TOM CROSBY, M.D.;
KAYLA LAKIN, M.D.; JOHN STUCKA,
D.O.; RONALD FORRISTALL, M.D.;
DEAN REED; ROBERT HOPPER, M.D.;
and KAY JENNINGS-JOHNSON,

Defendants.

Case No. 99-CV-970-K (E)

ENTERED ON DOCKET

DATE MAR 14 2000

F I L E D

MAR 14 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Plaintiff's motion to dismiss. Under Fed. R. Civ. P. 41(a)(1)(i), an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or motion for summary judgment. There has been no answer or motion for summary judgment in this case.

IT IS THEREFORE ORDERED that Plaintiff's Application to Dismiss Without Prejudice (# 3) is GRANTED and the above-captioned case is DISMISSED WITHOUT PREJUDICE.

ORDERED this 13 day of March, 2000.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

ROBERT M. BOWERS, JOE L. BOWERS,)
LOIS BOWERS,)

DATE MAR 13 2000

Plaintiffs,)

vs.)

Case No. 98-CV-732-BU(M) ✓

CITY OF TULSA CHIEF OF POLICE,)
RON PALMER, TULSA POLICE)
RESERVE SERGEANT WINFRED L.)
"SKIPPER" BAIN, TULSA COUNTY)
SHERIFF, STANLEY R. GLANZ,)
CAPTAIN ROGER FETTERHOFF, CITY)
OF OWASSO POLICE CHIEF MARIA)
ALEXANDER, LIEUTENANT CLIFFORD)
MOTTO, MARK ADAM TRAILL,)

FILED

MAR 13 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Defendants.)

JUDGMENT

This matter came before the Court upon the Motion for Summary Judgment filed by Defendant, City of Tulsa, and the motion having been duly considered and a decision having been duly rendered and Defendants, Ron Palmer, Winfred L. "Skipper" Bain, Stanley R. Glanz, Roger Fetterhoff, Maria Alexander, Clifford Motto, City of Owasso, and Mark Adam Traill, having been previously dismissed,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendant, City of Tulsa, and against Plaintiffs, Robert M. Bowers, Joe L. Bowers and Lois Bowers.

DATED at Tulsa, Oklahoma, this 13th day of March, 2000.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

39

UK
3-10-00

FILED

MAR 13 2000

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	CIVIL ACTION NO.00CV0119B(M)
)	
MICHAEL C. OTTO,)	
)	
Defendant.)	

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DATE MAR 13 2000

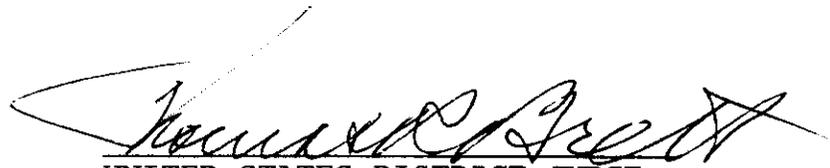
AGREED JUDGMENT

This matter comes on for consideration this 13th day of March, 2000, the Plaintiff, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Michael C. Otto, appearing pro se.

The Court, being fully advised and having examined the court file, finds that the Defendant, Michael C. Otto, acknowledged receipt of Summons and Complaint on February 21, 2000. The Defendant has not filed an Answer but in lieu thereof has agreed that Michael C. Otto is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against Michael C. Otto in the principal amount of \$2,519.92 and \$2,691.84 and 904.73, plus administrative costs in the amount of \$10.00 and \$51.84, plus accrued interest in the amount of \$1,661.92 and \$1,091.22 and \$561.00, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

fees in the amount of \$150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of \$2,519.92 and \$2,691.84 and \$904.73, plus administrative costs in the amount of \$10.00 and \$51.84, plus accrued interest in the amount of \$1,661.92 and \$1,091.22 and \$561.00, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 6.197 until paid, plus the costs of this action.

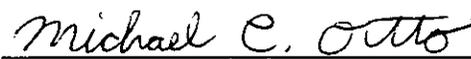

UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


PHIL PINNELL
Assistant United States Attorney


MICHAEL C. OTTO

PEP/alh

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

MAR 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Case No. 85-C-437-E

ENTERED ON DOCKET
DATE MAR 13 2000

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on February 14, 2000, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

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

The Court hereby awards the firm Bullock & Bullock the agreed to attorney fees and expenses in the amount of \$44,076.10.

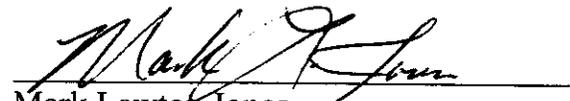
IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$44,076.10, and a judgment in the amount of \$44,076.10 is hereby granted on this day.

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ORDERED this 10th day of March, 2000.

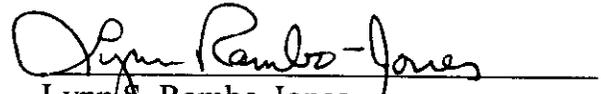

HONORABLE JAMES O. ELLISON
United States District Court


Louis W. Bullock
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- and -

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ATTORNEYS FOR PLAINTIFFS

ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 SABRINA L. MITCHELL,)
)
 Defendant.)

MAR 13 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99CV0998E(E)

ENTERED ON DOCKET
MAR 13 2000
DATE _____

DEFAULT JUDGMENT

This matter comes on for consideration this 10th day of March, 2000, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Sabrina L. Mitchell, appearing not.

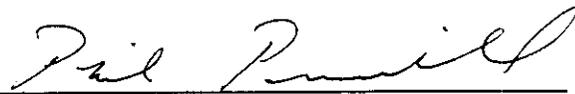
The Court being fully advised and having examined the court file finds that Defendant, Sabrina L. Mitchell, was served with Summons and Complaint on February 2, 2000. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Sabrina L. Mitchell, for the principal amount of \$5,392.70, plus accrued

interest of \$3,897.61, plus interest thereafter at the rate of 9 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.197 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

PEP/11f

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 13 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 DAVID P. KLAWITTER,)
)
 Defendant.)

No. 99CV1056E (M)

ENTERED ON DOCKET
DATE MAR 13 2000

DEFAULT JUDGMENT

This matter comes on for consideration this 10th day of March, 2000, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, David P. Klawitter, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, David P. Klawitter, was served with Summons and Complaint on December 10, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, David P. Klawitter, for the principal amount of \$8,951.43, plus accrued

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interest of \$2,596.97, plus interest thereafter at the rate of 8.25 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.197 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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