

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

FILED

MAY 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KEVIN VANOVER,)
)
 Plaintiff,)
)
 v.)
)
 AMERICAN INTERNATIONAL)
 LIFE ASSURANCE COMPANY)
 OF NEW YORK, a member of)
 The AIG Life Companies (U.S.),)
)
 Defendant.)

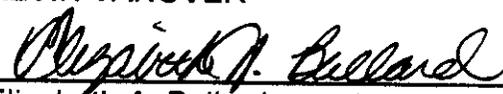
Case No. 99CV0892B (M)

ENTERED ON DOCKET
DATE MAY 10 2000

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties hereto pursuant to F.R.C.P. Rule 41(a) hereby stipulate to the dismissal with prejudice of the above styled and numbered cause.


 Eric S. Gray, OBA#3548
 13401 Railway Drive
 Oklahoma City, OK 73114
 (405) 752-8802
 ATTORNEY FOR PLAINTIFF,
 KEVIN VANOVER


 Elizabeth A. Ballard, OBA#15500
 Barkley, Titus, Hillis & Reynolds
 2700 Mid-Continent Tower
 401 South Boston Avenue
 Tulsa, Oklahoma 74103-4035
 ATTORNEYS FOR DEFENDANT,
 AMERICAN INTERNATIONAL LIFE
 ASSURANCE COMPANY OF NEW
 YORK

CLJ

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing instrument was mailed this 10th day of May, 2000, by United States Mail, postage prepaid, addressed to:

Eric S. Gray, Esq.
13401 Railway Drive
Oklahoma City, OK 73114
Attorney for Plaintiff



11K
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
TULSA DIVISION

FILED

MAY 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DON MARSHALL,

Plaintiff,

v.

WILLIAM HENDERSON,
Postmaster for the
United States Postal Service,

Defendant.

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*
*

* CIVIL ACTION NO. 99-CV-0536-H (M)

ENTERED ON DOCKET
MAY 10 2000
DATE _____

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties having reached full and final settlement of this matter, it is
X hereby stipulated, pursuant to Rule 41(a)(1) (ii) of the Federal Rules of Civil Procedure
that the above-numbered and captioned matter be and is hereby dismissed with prejudice
to the Plaintiff. It is further stipulated that the parties will each bear their own respective
costs and expenses.

Executed this 23rd day of March, 2000.

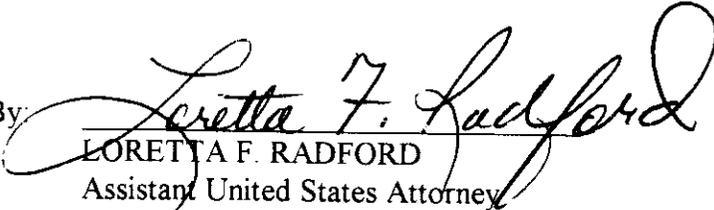
Donald E. Marshall
DONALD E. MARSHALL
Plaintiff

Jean Walpole Coulter
JEAN WALPOLE COULTER
Plaintiff's Attorney
Jean Walpole Coulter and Associates, Inc.
1638 South Carson, Suite 1107
Tulsa, Oklahoma 74119
Tel. 918-583-6394
Fax. 918-583-6398

12
c15

STEPHEN C. LEWIS
United States Attorney

By:

A handwritten signature in cursive script that reads "Loretta F. Radford". The signature is written in black ink and is positioned over a horizontal line that separates it from the printed name below.

LORETTA F. RADFORD

Assistant United States Attorney

Oklahoma State Bar No. 11158

333 West 4th Street, Suite 3460

Tulsa, Oklahoma 74103-3880

Tel. 918-581-7463

Fax. 918-581-7770

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

F I L E D

MAY 9 2000 *plw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOLPHIN MANUFACTURING COMPANY,)
INC., an Oklahoma Corporation,)

Plaintiff,)

vs.)

Case No. 99-C-194-E /

MOVIES & GAMES 4 SALE, L.P., a Texas)
limited partnership, and GTR GROUP, INC.,)
formerly known as GAMES TRADER, INC., a)
Canadian corporation,)

Defendants.)

ENTERED ON DOCKET

DATE MAY 10 2000

ORDER

Now before the Court is the Motion to Dismiss (docket # 48) of the defendant, GTR Group, Inc. ("GTR"), and the Motion to Amend Complaint (docket # 50) of the Plaintiff, Dolphin Manufacturing Company ("Dolphin").

Dolphin contracted with Movies and Games 4 Sale ("Movies") to provide certain fixtures for the display of used video games in Musicland Stores. Movies has an outstanding balance in the amount of \$324,934.26 for those fixtures. Dolphin sued Movies for breach of contract, and GTR for a determination that GTR is liable to plaintiff as a successor to Movies. GTR purchased certain assets of Movies in March of 1999. Dolphin has been granted judgment in its favor against Movies in the amount of \$313,782.98. Movies was subsequently placed in involuntary bankruptcy. Dolphin now seeks to pursue GTR, the Canadian holding company for 1328158 Ontario, Inc, the corporation that purchased certain assets from Movies. GTR argues that this Court has no personal jurisdiction

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over it, and seeks dismissal of Dolphin's claim against it.

Personal jurisdiction is governed by Oklahoma's long-arm statute and the Due Process Clause of the Fourteenth Amendment. Far West Capital, Inc. v. Towne, 46 F.3d 1071, 1074 (10th Cir. 1995). Oklahoma's long-arm statute extends to the limits of constitutional due process. Okla. Stat.tit.12, § 2004(F). A court may exercise personal jurisdiction over a non-resident defendant only if (1) the defendant has sufficient "minimum contacts" with the forum state, and (2) the exercise of personal jurisdiction will not offend traditional notions of fair play and substantial justice. International Shoe Company v. Washington, 326 U.S. 310, 316, 320, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The minimum contacts standard can be met by showing that the non-resident defendant is subject to either "general" or "specific" personal jurisdiction. General jurisdiction exists if the defendant's general business contacts with the forum state are so "continuous and systematic" that the non-resident defendant "should reasonably anticipate being haled into court there" even if the lawsuit is unrelated to those contacts. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-16, 104 S.Ct. 1868, 80 L.Ed. 2d 404 (1984). Specific jurisdiction exists if the defendant has purposefully directed its activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities. Burger King Corporation v. Rudzewics, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed. 2d 528, 540 (1985).

GTR argues that, since both GTR and 1328158 Ontario are incorporated and existing under the laws of Canada, neither of them own property in Oklahoma, neither of them have offices or bank accounts in Oklahoma, neither has employees or agents in Oklahoma, neither is registered to do

business in Oklahoma, and neither has conducted business in Oklahoma¹, general jurisdiction does not exist. Defendant also argues that there is no connection between the State of Oklahoma, Plaintiff's claim against GTR and the asset purchase transaction between 1328158 Ontario and Movies that would give rise to specific jurisdiction. Dolphin argues that jurisdiction exists either as a result of 1328158 Ontario's purchase of specially manufactured goods in Oklahoma, or as a result of the fact that it is a "successor" to Movies.

With respect to 1328158 Ontario's purchase of specially manufactured goods in Oklahoma, Dolphin is apparently making the argument that specific jurisdiction exists. Dolphin argues "[GTR] has had specific contacts with the State of Oklahoma concerning the very business that is at issue in this case. Since acquiring the Musicland business, [GTR] has been an active purchaser of specially manufactured goods from Dolphin in Oklahoma." This assertion apparently goes to the fact that, in July, 1999, GTR contracted with Dolphin for Dolphin to provide labor and materials for the rework of fixtures previously manufactured and installed by Dolphin for Movies in three store locations. In addition, in September, 1999, GTR ordered an additional eight fixtures from Dolphin to be manufactured, delivered, and installed in certain stores. The total amount expended on reworking the old fixtures and purchasing the new ones is approximately \$20,000.00.

GTR argues that specific jurisdiction does not exist because these two transactions which took place in July and September of 1999 do not "relate to or give rise to" plaintiff's claim for approximately \$325,000.00 which remains unpaid from Movies order of fixtures. The Court agrees.

¹ 1328158 Ontario admits that it shipped video games to stores in Oklahoma in 1999, but argues that the sales took place outside of Oklahoma in that the invoices were sent to the stores' headquarters in Alabama and Minnesota from Canada and the checks were sent from Alabama and Minnesota to Canada. 1328158 Ontario also argues that the volume of sales for the video games shipped into Oklahoma was less than \$20,000.00.

The subsequent purchase of fixtures by GTR is not sufficiently related to Dolphin's claim to give rise to specific jurisdiction because Dolphin would have suffered the same injury even if GTR had not purchased the fixtures in July and September of 1999. See Kuenzle v. HTM Sport-Und Freizeitgerate AG, 102 F.3d 453, 456-57 (10th Cir. 1996)(contacts are not sufficient to satisfy the requirement that the action is based upon activities that arise out of or relate to the defendant's contacts with the forum if the plaintiff would have suffered the same injury even if none of the contacts had taken place). Further these two contacts are not the kind of "continuous and systematic" contacts that would give rise to general jurisdiction.

Dolphin also argues that general jurisdiction exists over GTR because it is a "successor" to Movies. Dolphin argues that there is jurisdiction over a foreign corporation when the foreign corporation is alleged to be the successor to a corporation that is subject to the forum state's jurisdiction. International Private Satellite Partners, L.P. v. Lucky Cat LTD., 975 F.Supp. 483 (W.D.N.Y. 1997), Sculptchair, Inc. v. Century Arts, Ltd., 94 F.3d 623 (11th Cir.1996). The present case is distinguishable from those relied on by Dolphin. Sculptchair is based on Florida law, which provides for personal jurisdiction over persons breaching a contract in that state. Id. at p. 629. The court found that the defendant corporation was a successor to the contract and therefore jurisdiction could be asserted under that provision of Florida law. In International Private Satellite, a contract with a forum selection clause existed between plaintiff and the alleged predecessor which was the basis of the exercise of jurisdiction over the successor. Even assuming that GTR is a successor to Movies, Dolphin has no authority for its apparent assertion that simply succeeding a corporation is a sufficient basis over which to exercise personal jurisdiction.

GTR's Motion to Dismiss (Docket #48) is GRANTED. In light of this ruling and the fact

that the Court analyzed the jurisdictional issue using the contacts of both GTR and 1328158 Ontario,
the Motion to Amend (Docket #50) is DENIED as moot.

IT IS SO ORDERED THIS 9th DAY OF MAY, 2000.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DARRELL B. BROWN,

Plaintiff,

vs.

PETE SILVA, Office of the Public Defender,

Defendant.

ENTERED ON DOCKET
DATE MAY 10 2000

Case No. 00-CV-377-BU (E) ✓

FILED

MAY 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, a prisoner appearing *pro se*, has submitted a 42 U.S.C. § 1983 civil rights complaint (Docket #1) and a motion for leave to proceed *in forma pauperis* (Docket #2). Based on the information contained in the prison accounting, the Court finds Plaintiff is currently without funds sufficient to prepay the filing fee required to commence this action. Therefore, the Court concludes that Plaintiff should be allowed to proceed *in forma pauperis*, without prepayment of the filing fee. Nonetheless, for the reasons discussed below, the Court finds Plaintiff's Complaint must be dismissed.

A. Dismissal under § 1915(e)

28 U.S.C. § 1915(e)(2) provides as follows:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court **shall** dismiss the [*in forma pauperis*] case at any time if the court determines that . . . the action . . . fails to state a claim on which relief may be granted

28 U.S.C. § 1915(e)(2)(B)(ii) (emphasis added). The Court finds that, even if the allegations in Plaintiff's Civil Rights Complaint are accepted as true, the Complaint fails to state a claim on which

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relief can be granted under 42 U.S.C. § 1983. See Fed. R. Civ. P. 12(b)(6) and Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (setting forth standards for evaluating the sufficiency of a claim).¹

B. Plaintiff has failed to state a civil rights claim under 42 U.S.C. § 1983

Plaintiff alleges that Defendant violated his civil rights and that pursuant to 42 U.S.C. § 1983, Defendant is liable for those violations. The Defendant in this case is Plaintiff's public defender. Plaintiff complains that "Mr. Pete Silva purposely misconstrued (sic) the interpretation of statutes and case law in hopes to mislead Plaintiff." (#1 at 5). As a result Plaintiff contends as his causes of action that (1) he has been "denied access to courts," and (2) his Fifth and Fourteenth Amendment rights have been violated. As relief, Plaintiff seeks "access to my preliminary hearing transcripts, police reports, any documentation that could assist Plaintiff in his criminal case." See Docket #1 at 8.

The relevant civil rights statute provides as follows:

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

42 U.S.C. § 1983 (emphasis added). The emphasized language establishes that to be liable under § 1983, the Defendant must have acted under color of state law (i.e., he must have been a state

^{1/} When ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must accept all well-pled factual allegations in the complaint as true, and the Court must view all inferences that can be drawn from those well-pled facts in the light most favorable to plaintiff. Viewing the allegations in the complaint through this lens, the Court may grant a Rule 12(b)(6) motion only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. The Court finds that this same standard should be applied when deciding whether to dismiss a claim *sua sponte* under 28 U.S.C. § 1915(e)(2)(B)(i).

actor). See, e.g., Jett v. Dallas Independent School District, 491 U.S. 701, 724-25 (1989); and Harris v. Champion, 51 F.3d 901, 909 (10th Cir. 1995).

Public defenders, like Defendant in this case, are not state actors within the meaning of 42 U.S.C. § 1983. According to the Tenth Circuit,

Public Defenders, whether court appointed or privately retained, performing in the traditional role of attorney for the defendant in a criminal proceeding, are not deemed to act under color of state law; such attorneys represent their client only, not the state, and are not subject to suit in a 42 U.S.C. § 1983 action.

Lowe v. Joyce, No. 95-1248, 1995 WL 495208, at *1 (10th Cir. Aug. 21, 1995) (citing Harris v. Champion, 51 F.3d 901, 910 (10th Cir. 1995)). The United States Supreme Court agrees. See Polk County v. Dodson, 454 U.S. 312, 325 (1981) (holding that “a public defender does not act under color of state law when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding”).

The public defenders in Harris had allegedly asked for numerous and unreasonable extensions of time to file appellate briefs on plaintiff’s behalf, without considering whether the client desired the extension or whether the extension was in the client’s best interest. The Tenth Circuit held that even if the public defenders’ conduct was so egregious that it ultimately deprived their clients of constitutional rights, the actions were still “traditional lawyer functions.” The Court went on to hold that

even if counsel performs what would otherwise be a traditional lawyer function, such as filing an appellate brief on his or her client’s behalf, so inadequately as to deprive the client of constitutional rights, defense counsel still will not be deemed to have acted under color of state law.

Harris, 51 F.3d at 910. The United Supreme Court agrees. See Briscoe v. LaHue, 460 U.S. 325, 329 n.6 (1983). In Briscoe, the Supreme Court held that “even though the defective performance of

defense counsel may cause the trial process to deprive an accused person of his liberty in an unconstitutional manner, the lawyer who may be responsible for the unconstitutional state action does not himself act under color of state law within the meaning of § 1983.” Id.

The Court finds that the Defendant’s actions complained of in this case were actions taken by Defendant in his traditional role as a defense lawyer for Plaintiff. Defendant’s actions were taken on behalf of Plaintiff, not on behalf of the state of Oklahoma. Consequently, Defendant’s conduct was not state action for purposes of 42 U.S.C. § 1983. Plaintiff cannot, therefore, maintain an action against Defendant under § 1983. Pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), Plaintiff’s civil rights complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted. This dismissal constitutes a “prior occasion” for purposes of 28 U.S.C. § 1915(g).²

C. Conclusion

Defendant’s alleged conduct is not state action for purposes of 42 U.S.C. § 1983. Therefore, Plaintiff’s civil rights complaint should be dismissed with prejudice for failure to state a claim upon which relief may be granted.

^{2/} 28 U.S.C. § 1915(g) provides that “[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.”

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for leave to proceed *in forma pauperis* (Docket #2) is **granted**.
2. Plaintiff's civil rights complaint is **dismissed with prejudice** for failure to state a claim upon which relief may be granted.
3. The Clerk is directed to "flag" this dismissal as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).

SO ORDERED THIS 10th day of MAY, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

CARRIE ADKINS,)
)
Plaintiff,)
)
vs.)
)
AKINS FOODS,)
)
Defendant.)

MAY 9 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-0684-K (J)

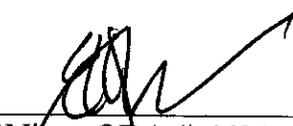
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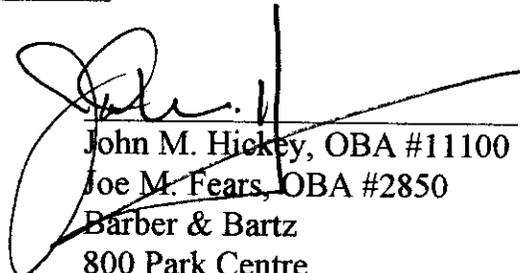
STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Carrie Adkins, and the Defendant, Health Food Associates, Inc. d/b/a Akins Natural Foods, by and through their counsel, and pursuant to Fed. R. Civ. P. 41(a)(1)(i), hereby stipulate to the dismissal of the above captioned and numbered action, with prejudice.

DATED this 9th day of MAY, 2000.



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(918) 587-3491 - fax
Attorney for Plaintiff
Carrie Adkins



John M. Hickey, OBA #11100
Joe M. Fears, OBA #2850
Barber & Bartz
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(918) 599-7755
(918) 599-7756 - fax
Attorneys for Defendant, Health Food
Associates, Inc. d/b/a Akins Natural Foods

**CONFIDENTIAL SETTLEMENT AGREEMENT
AND RELEASE IN FULL OF ALL CLAIMS**

C15

Motion to Quash

Defendant moves the Court to dismiss the action or quash service on the grounds of insufficiency of process and insufficiency of service of process pursuant to Fed.R.Civ.P. 12(b)(4) and 12(b)(5). Defendant alleges that plaintiff misnamed the defendant as EmCare of North Texas, Inc., an entity which does not exist. EmCare, Inc. is the parent corporation of The Gould Group, Inc. ("Gould Group"). Gould Group employed plaintiff. It was doing business as EmCare. Defendant claims that the summons did not address the proper defendant, and that process was improperly served on a former employee of Gould Group and EmCare, Inc. who was not even an officer.

However, as plaintiff avers, these arguments are now moot because, on or about March 9, 2000, plaintiff filed another return of service showing that service was made upon Oklahoma's Secretary of State, which is Gould Group's registered service agent in Oklahoma. As this constitutes proper service, the undersigned recommends that the Motion to Quash be denied. Defendant argues that plaintiff intentionally misnamed defendant and forced defendant to incur the expense of filing a motion to dismiss or quash when plaintiff knew that its process and service of process were defective. While the undersigned does not condone the careless and unprofessional conduct by plaintiff's counsel, the undersigned does not recommend sanctions pursuant to Fed. R. Civ. P. 11, or costs or attorneys fees at this time since plaintiff's counsel has acted (albeit late) to serve defendant and to correct his errors by filing a motion and corrected motion to amend the petition.

Motion to Transfer

Defendant moves the Court to dismiss the action or transfer venue to the Eastern District of Oklahoma pursuant to 28 U.S.C. § 1406 on the ground that venue is not proper in the Northern District of Oklahoma. As defendant notes, the general venue statute provides that venue for an

action based on diversity of citizenship may be brought only in: (1) a judicial district in which defendant resides; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred; or (3) a judicial district in which any defendant is subject to personal jurisdiction.

It is clear that the claims alleged in the complaint (“petition”) did not arise in Tulsa County, but in Hughes County, which is in the Eastern District of Oklahoma -- not the Northern District of Oklahoma. See 28 U.S.C. § 116. Gould Group is incorporated and located in Texas. Victoria Feather, Associate Regional Vice-President of Gould Group’s parent corporation, affirmed that Gould Group has no contracts with any hospitals in Tulsa County, which is in the Northern District of Oklahoma. She also stated that Gould Group has no office, agent, or employee in Tulsa County, and it does no business in Tulsa County.¹ (Declaration of Victoria Feather, attached as Ex. 2 to Def. Br. Dkt. # 8.)

Plaintiff has indicated she has “no major objection”² to this case being transferred to the Eastern District. (Pl. Resp. Br., Dkt. # 16, at 3.) Nonetheless, she argues, in part, that venue is proper because she was a resident in Tulsa County at the time her claims arose. That argument is irrelevant. The time to judge residence is the time the action is commenced. Cf. Freeport-McMoran, Inc. v. KN Energy, Inc., 498 U.S. 426, 428 (1991) (diversity jurisdiction issue). When the action was commenced, plaintiff resided in Missouri.

¹ Although there are eleven counties in the Northern District of Oklahoma and Gould Group addressed only Tulsa County, plaintiff does not argue that any events occurred in the other ten counties of the Northern District of Oklahoma.

² The undersigned assumes that if she had any “minor objection” to transfer, she would have unequivocally objected to transfer.

Further, it matters not where the plaintiff resides, but where the defendant resides or is subject to jurisdiction. It appears that the contract may have been signed by plaintiff in Tulsa County, and defendant may have had some communications or correspondence with plaintiff when she lived in Tulsa County. All other factors point to the Eastern District as the more appropriate venue, especially since all events giving rise to plaintiff's claims occurred at the Holdenville General Hospital in Hughes County, and presumably the majority of the fact witnesses reside and/or work there.

Plaintiff argues that defendant waived its venue objection when the prior action (Case No. 98-CV-0514K) was dismissed. She claims that defense counsel asked and urged her to agree to re-file her action only in this Court and that she agreed. The parties then signed the following stipulation:

Plaintiff, Janet Thornton, and Defendant, EmCare of North Texas, Inc. (f/k/a Gould Group, Inc.), pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of this cause without prejudice. The parties further stipulate that should any claims be refiled, they shall be refiled in this Court only.

(Pl. Resp. Br., Dkt. # 16, Ex. B.) Plaintiff argues that this stipulation, together with defendant's failure to raise the venue issue during the previous action, constitutes implied or express waiver and suggests questionable motives for raising the issue in this suit.

In reply, defendant explains the context in which the previous suit was dismissed, the expenses it incurred, and its concerns when plaintiff filed a related state court action (which, incidentally, was transferred to Hughes County for venue reasons). Defendant contends that the stipulation does not waive its right to insist upon proper venue in this case, but was intended to ensure that any refiling was in federal court. Defendant also points out that plaintiff did not plead

the stipulation as a venue fact and that plaintiff made several statements in her First Amended Petition in an effort to establish venue, and plaintiff later admitted that such statements were false, as evidenced by plaintiff's proposed Second Amended Petition.

In any event, the Court need not resolve the waiver issue because the statute permits the Court to transfer the action to the Eastern District "[f]or the convenience of parties and witnesses [and] in the interest of justice." 28 U.S.C. § 1404(a). Accordingly, the undersigned recommends that the matter be transferred to the Eastern District of Oklahoma.

Remaining Motions

Defendant moved the Court to dismiss the action on the ground that plaintiff's "First Amended Petition" fails to state a claim upon which relief can be granted. Defendant moved, in the alternative, for a more definite statement because plaintiff's complaint is so vague and ambiguous the defendant cannot reasonably be required to frame a responsive pleading. Plaintiff filed a motion and a corrected motion to amend "petition." These motions would be more appropriately addressed by the transferee court if the Court adopts the recommendation that this action be transferred. Accordingly, the undersigned recommends that the Court not address them at this time.

CONCLUSION

Based upon the foregoing, the undersigned recommends that the Motion to Quash (Dkt. # 8-2) be **DENIED** and that the Motion to Transfer Venue (Dkt. # 8-3) be **GRANTED**. The undersigned recommends that the Motions to Dismiss (Dkt. # 8-1), Motion for a More Definitive Statement (Dkt. # 8-4), Motion to Amend Petition (Dkt. # 5-1), and Corrected Motion to Amend Petition (Dkt. # 15-1) would be more appropriately decided by the transferee court. Further, the

undersigned recommends that defendant's requests for costs, attorneys' fees, and Rule 11 sanctions in connection with its Motion to Quash and Motion to Transfer be **DENIED**.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1); see also Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See *Thomas v. Arn*, 474 U.S. 140 (1985); *Haney v. Addison*, 175 F.3d 1217 (10th Cir. 1999).

DATED this 9th day of May, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 10 Day of May, 2000, at _____.

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

BE BILINGUAL, INC.,)
a Texas Corporation,)
)
Plaintiff,)
)
vs.)
)
PHILLIPS PETROLEUM COMPANY,)
a Delaware Corporation and)
CLAUDIA MACOUZET, an)
individual,)
)
Defendants.)

ENTERED ON DOCKET
DATE MAY 10 2000

Case No. 99-CV-206-BU(J) ✓

FILED

MAY 9 - 2000 *AL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon the motions for summary judgment of the parties and the issues having been duly considered and a decision have been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, Phillips Petroleum Company and Claudia Macouzet, and against Plaintiff, Be Bilingual, Inc., and that Defendants recover of Plaintiff their costs of action, if any.

DATED at Tulsa, Oklahoma, this 9th day of May, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL READ,)
)
 Plaintiff,)
)
 v.)
) 98-CV-937-H(M) ✓
 HONORABLE ALLEN KLEIN,)
 Associate District Judge; HONORABLE)
 RUSSELL P. HASS, Associate District)
 Judge; CHUCK RICHARDSON, District)
 Attorney; SHAWNA READ, now DUNN;)
 and SHANNON DAVIS,)
)
 Defendants.)

FILED
MAY 8 2000
P. M. Leathers, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAY 10 2000

JUDGMENT

This matter comes before the Court on Defendant Shannon Davis' Motion for Sanctions against Plaintiff's Attorney (Docket # 17). The Court duly considered the issues and rendered decisions in accordance with the orders filed on February 8, 1999 and May 2, 2000.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendant Shannon Davis and against Plaintiff's Attorney David Sanders on the Motion for Sanctions in the amount of \$2,282.50 in fees.

IT IS SO ORDERED.

This 8TH day of May, 2000.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL READ,)
)
Plaintiff,)
)
v.)
)
HONORABLE ALLEN KLEIN,)
)
Associate District Judge; HONORABLE)
RUSSELL P. HASS, Associate District)
Judge; CHUCK RICHARDSON, District)
Attorney; SHAWNA READ, now DUNN;)
and SHANNON DAVIS,)
)
Defendants.)

98-CV-937-H(M)

ENTERED ON DOCKET
DATE MAY 10 2000

FILED
MAY 8 2000
PHI LINDSEY, CLERK
U.S. DISTRICT COURT

JUDGMENT

This matter comes before the Court on Defendant Shawna Dunn's Motion for Sanctions against Plaintiff's Attorney (Docket # 11). The Court duly considered the issues and rendered decisions in accordance with the orders filed on February 8, 1999 and May 2, 2000.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendant Shawna Dunn and against Plaintiff's Attorney David Sanders on the Motion for Sanctions in the amount of \$2,218.75 in fees and \$27.60 in costs.

IT IS SO ORDERED.

This 8TH day of May, 2000.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL READ,)
)
Plaintiff,)
)
v.)
)
HONORABLE ALLEN KLEIN,)
Associate District Judge; HONORABLE)
RUSSELL P. HASS, Associate District)
Judge; CHUCK RICHARDSON, District)
Attorney; SHAWNA READ, now DUNN;)
and SHANNON DAVIS,)
)
Defendants.)

98-CV-937-H(M) ✓

FILED
MAY 8 2000
W. L. LORBERG, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAY 10 2000

JUDGMENT

This matter comes before the Court on Defendant Shawna (Read) Dunn's Motion for Attorney Fees and Costs (Docket # 8). The Court duly considered the issues and rendered decisions in accordance with the orders filed on February 8, 1999 and May 2, 2000.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendant Shawna Dunn and against Plaintiff on the Motion for Attorney Fees and Costs in the amount of \$2,218.75 in fees and \$27.60 in costs.

IT IS SO ORDERED.

This 8TH day of May, 2000.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 9 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN COLLINS, et al.)
)
 Plaintiffs,)
)
 v.)
)
 DEPUY INC., et al.,)
)
 Defendants.)

CASE NO. 4:00-CV-000124 B (S) ✓

ENTERED ON DOCKET
MAY 09 2000
DATE _____

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO PLAINTIFF WHITE**

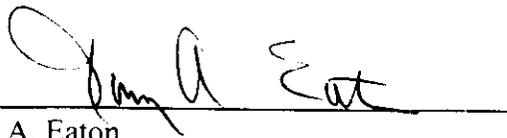
Plaintiff Rodney White, by counsel, and defendants DePuy Inc., DePuy Motech, Inc., and Johnson & Johnson, by counsel, stipulate as follows:

1. All claims and controversies between plaintiff Rodney White and all defendants have been compromised and settled.
2. The claims of plaintiff Rodney White are dismissed with prejudice as to all defendants.
3. The claims of other plaintiffs are not affected by this stipulation.

11

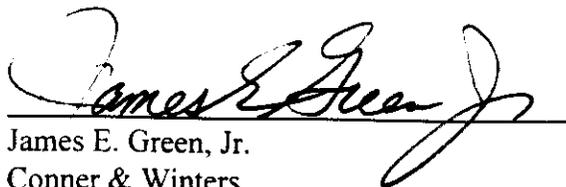
c/15

4. No costs are awarded.



Gary A. Eaton
Eaton & Sparks
1717 East 15th Street
Tulsa, OK 74104

Attorney for Plaintiff
Rodney White



James E. Green, Jr.
Conner & Winters
3700 First Mace Tower
15 East Fifth Street
Tulsa, OK 46601

Michael R. Fruehwald
Barnes & Thornburg
11 South Meridian Street
Indianapolis, IN 46204

Attorneys for Defendants DePuy Inc.,
DePuy Motech, Inc., and Johnson & Johnson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 9 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN COLLINS, et al.)
)
 Plaintiffs.)
)
 v.)
)
 DEPUY INC., et al.,)
)
 Defendants.)

CASE NO. 4:00-CV-000124 B(JS) ✓

ENTERED ON DOCKET
DATE MAY 09 2000

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO PLAINTIFF SELLERS**

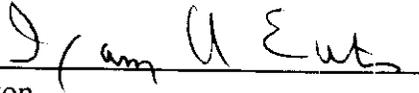
Plaintiff Richard Sellers, by counsel, and defendants DePuy Inc., DePuy Motech, Inc., and Johnson & Johnson, by counsel, stipulate as follows:

1. All claims and controversies between plaintiff Richard Sellers and all defendants have been compromised and settled.
2. The claims of plaintiff Richard Sellers are dismissed with prejudice as to all defendants.
3. The claims of other plaintiffs are not affected by this stipulation.

12

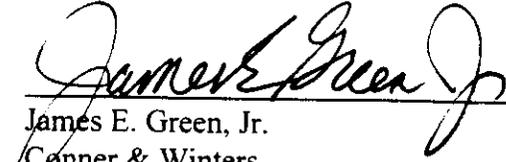
C/S

4. No costs are awarded.



Gary A. Eaton
Eaton & Sparks
1717 East 15th Street
Tulsa, OK 74104

Attorney for Plaintiff
Richard Sellers



James E. Green, Jr.
Conner & Winters
3700 First Mace Tower
15 East Fifth Street
Tulsa, OK 46601

Michael R. Fruehwald
Barnes & Thornburg
11 South Meridian Street
Indianapolis, IN 46204

Attorneys for Defendants DePuy Inc.,
DePuy Motech, Inc., and Johnson & Johnson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 9 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN COLLINS, et al.)
)
 Plaintiffs.)
)
 v.)
)
 DEPUY INC., et al.,)
)
 Defendants.)

CASE NO. 4:00-CV-000124 B(J) ✓

ENTERED ON DOCKET
DATE MAY 09 2000

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO PLAINTIFF DODSON**

Plaintiff Jack Dodson, by counsel, and defendants DePuy Inc., DePuy Motech, Inc., and Johnson & Johnson, by counsel, stipulate as follows:

1. All claims and controversies between plaintiff Jack Dodson and all defendants have been compromised and settled.
2. -The claims of plaintiff Jack Dodson are dismissed with prejudice as to all defendants.
3. The claims of other plaintiffs are not affected by this stipulation.

13

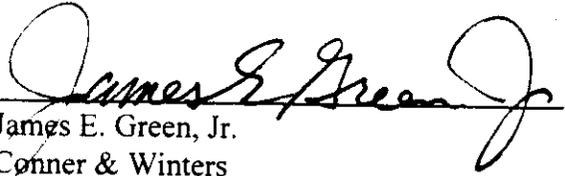
ctj

4. No costs are awarded.



Gary A. Eaton
Eaton & Sparks
1717 East 15th Street
Tulsa, OK 74104

Attorney for Plaintiff
Jack Dodson



James E. Green, Jr.
Conner & Winters
3700 First Mace Tower
15 East Fifth Street
Tulsa, OK 46601

Michael R. Fruehwald
Barnes & Thornburg
11 South Meridian Street
Indianapolis, IN 46204

Attorneys for Defendants DePuy Inc.,
DePuy Motech, Inc., and Johnson & Johnson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 4 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN COLLINS, et al.)
)
 Plaintiffs,)
)
 v.)
)
 DEPUY INC., et al.,)
)
 Defendants.)

CASE NO. 4:00-CV-000124 B(J) ✓

ENTERED ON DOCKET
DATE MAY 09 2000

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO PLAINTIFF O'BRIEN**

Plaintiff Thomas O'Brien, by counsel, and defendants DePuy Inc., DePuy Motech, Inc., and Johnson & Johnson, by counsel, stipulate as follows:

1. All claims and controversies between plaintiff Thomas O'Brien and all defendants have been compromised and settled.
2. The claims of plaintiff Thomas O'Brien are dismissed with prejudice as to all defendants.
3. The claims of other plaintiffs are not affected by this stipulation.

14

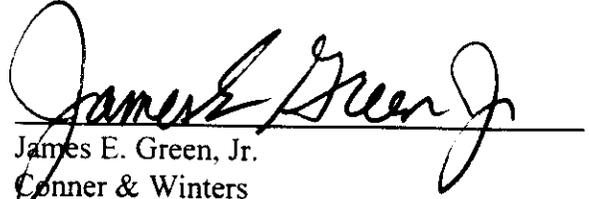
CS

4. No costs are awarded.



Gary A. Eaton
Eaton & Sparks
1717 East 15th Street
Tulsa, OK 74104

Attorney for Plaintiff
Thomas O'Brien



James E. Green, Jr.
Conner & Winters
3700 First Mace Tower
15 East Fifth Street
Tulsa, OK 46601

Michael R. Fruehwald
Barnes & Thornburg
11 South Meridian Street
Indianapolis, IN 46204

Attorneys for Defendants DePuy Inc.,
DePuy Motech, Inc., and Johnson & Johnson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 1 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN COLLINS, et al.)
)
 Plaintiffs,)
)
 v.)
)
 DEPUY INC., et al.,)
)
 Defendants.)

CASE NO. 4:00-CV-000124 B(T) ✓

ENTERED ON DOCKET
DATE MAY 09 2000

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO PLAINTIFF CROOK**

Plaintiff Michael Crook, by counsel, and defendants DePuy Inc., DePuy Motech, Inc., and Johnson & Johnson, by counsel, stipulate as follows:

1. All claims and controversies between plaintiff Michael Crook and all defendants have been compromised and settled.
2. -The claims of plaintiff Michael Crook are dismissed with prejudice as to all defendants.
3. The claims of other plaintiffs are not affected by this stipulation.

15

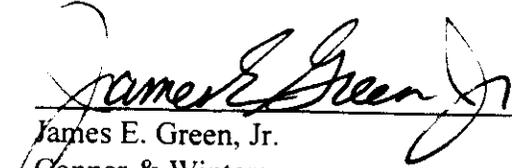
c/s

4. No costs are awarded.



Gary A. Eaton
Eaton & Sparks
1717 East 15th Street
Tulsa, OK 74104

Attorney for Plaintiff
Michael Crook



James E. Green, Jr.
Conner & Winters
3700 First Mace Tower
15 East Fifth Street
Tulsa, OK 46601

Michael R. Fruehwald
Barnes & Thornburg
11 South Meridian Street
Indianapolis, IN 46204

Attorneys for Defendants DePuy Inc.,
DePuy Motech, Inc., and Johnson & Johnson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 9 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN COLLINS, et al.)
)
 Plaintiffs,)
)
 v.)
)
 DEPUY INC., et al.,)
)
 Defendants.)

CASE NO. 4:00-CV-000124 B(J) ✓

ENTERED ON DOCKET
DATE **MAY 09 2000**

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO PLAINTIFF MASSEY**

Plaintiff Bonnie Massey, by counsel, and defendants DePuy Inc., DePuy Motech, Inc., and Johnson & Johnson, by counsel, stipulate as follows:

1. All claims and controversies between plaintiff Bonnie Massey and all defendants have been compromised and settled.

2. The claims of plaintiff Bonnie Massey are dismissed with prejudice as to all defendants.

3. The claims of other plaintiffs are not affected by this stipulation.

1/6

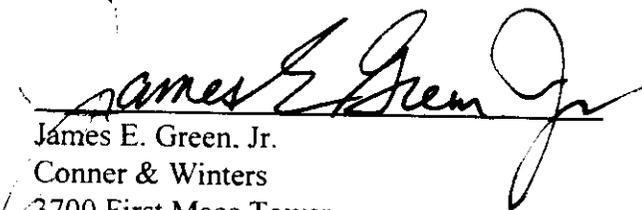
1/5

4. No costs are awarded.



Gary A. Eaton
Eaton & Sparks
1717 East 15th Street
Tulsa, OK 74104

Attorney for Plaintiff
Bonnie Massey



James E. Green, Jr.
Conner & Winters
3700 First Mace Tower
15 East Fifth Street
Tulsa, OK 46601

Michael R. Fruehwald
Barnes & Thornburg
11 South Meridian Street
Indianapolis, IN 46204

Attorneys for Defendants DePuy Inc.,
DePuy Motech, Inc., and Johnson & Johnson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 9 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN COLLINS, et al.)
)
 Plaintiffs.)
)
 v.)
)
 DEPUY INC., et al.,)
)
 Defendants.)

CASE NO. 4:00-CV-000124 B(J) ✓

ENTERED ON DOCKET
DATE MAY 09 2000

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO PLAINTIFF FEIL**

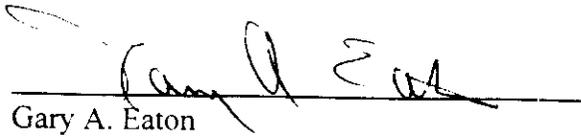
Plaintiff Lisa Feil, by counsel, and defendants DePuy Inc., DePuy Motech, Inc., and Johnson & Johnson, by counsel, stipulate as follows:

1. All claims and controversies between plaintiff Lisa Feil and all defendants have been compromised and settled.
2. The claims of plaintiff Lisa Feil are dismissed with prejudice as to all defendants.
3. The claims of other plaintiffs are not affected by this stipulation.

17

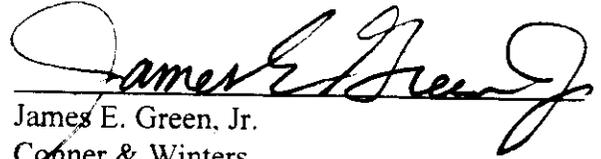
clb

4. No costs are awarded.



Gary A. Eaton
Eaton & Sparks
1717 East 15th Street
Tulsa, OK 74104

Attorney for Plaintiff
Lisa Feil



James E. Green, Jr.
Conner & Winters
3700 First Mace Tower
15 East Fifth Street
Tulsa, OK 46601

Michael R. Fruehwald
Barnes & Thornburg
11 South Meridian Street
Indianapolis, IN 46204

Attorneys for Defendants DePuy Inc.,
DePuy Motech, Inc., and Johnson & Johnson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 11 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN COLLINS, et al.

Plaintiffs,

v.

DEPUY INC., et al.,

Defendants.

CASE NO. 4:00-CV-000124 B(J) ✓

ENTERED ON DOCKET

DATE MAY 09 2000

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO PLAINTIFF JOHNSON**

Plaintiff Sherry Johnson, by counsel, and defendants DePuy Inc., DePuy Motech, Inc., and Johnson & Johnson, by counsel, stipulate as follows:

1. All claims and controversies between plaintiff Sherry Johnson and all defendants have been compromised and settled.
2. The claims of plaintiff Sherry Johnson are dismissed with prejudice as to all defendants.
3. The claims of other plaintiffs are not affected by this stipulation.

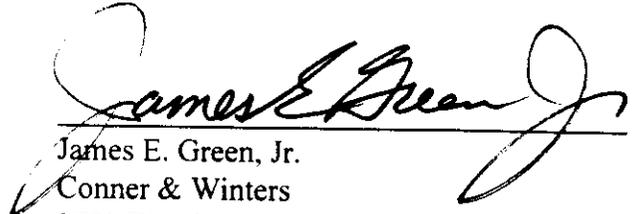
clb

4. No costs are awarded.



Gary A. Eaton
Eaton & Sparks
1717 East 15th Street
Tulsa, OK 74104

Attorney for Plaintiff
Sherry Johnson



James E. Green, Jr.
Conner & Winters
3700 First Mace Tower
15 East Fifth Street
Tulsa, OK 46601

Michael R. Fruehwald
Barnes & Thornburg
11 South Meridian Street
Indianapolis, IN 46204

Attorneys for Defendants DePuy Inc.,
DePuy Motech, Inc., and Johnson & Johnson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 11 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN COLLINS, et al.

Plaintiffs,

v.

DEPUY INC., et al.,

Defendants.

CASE NO. 4:00-CV-000124 B (J) ✓

ENTERED ON DOCKET

DATE ~~MAY 09 2000~~

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO PLAINTIFF LANIG**

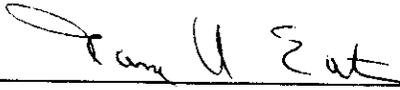
Plaintiff John Lanig, by counsel, and defendants DePuy Inc., DePuy Motech, Inc., and Johnson & Johnson, by counsel, stipulate as follows:

1. All claims and controversies between plaintiff John Lanig and all defendants have been compromised and settled.
2. The claims of plaintiff John Lanig are dismissed with prejudice as to all defendants.
3. The claims of other plaintiffs are not affected by this stipulation.

19

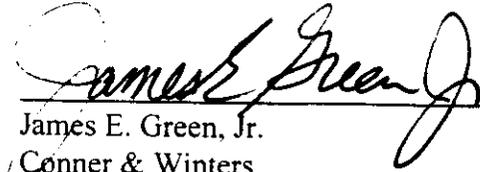
c/s

4. No costs are awarded.



Gary A. Eaton
Eaton & Sparks
1717 East 15th Street
Tulsa, OK 74104

Attorney for Plaintiff
John Lanig



James E. Green, Jr.
Conner & Winters
3700 First Mace Tower
15 East Fifth Street
Tulsa, OK 46601

Michael R. Fruehwald
Barnes & Thornburg
11 South Meridian Street
Indianapolis, IN 46204

Attorneys for Defendants DePuy Inc.,
DePuy Motech, Inc., and Johnson & Johnson

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 09 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HAROLD D. BROSETTE,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner, Social)
Security Administration,)
)
Defendant.)

Case No. 99-CV-607-J ✓

ENTERED ON DOCKET

DATE MAY 09 2000

ORDER

On April 3, 2000, this Court remanded this case to the Defendant for further administrative action. No appeal was taken from this Judgment and the same is now final.

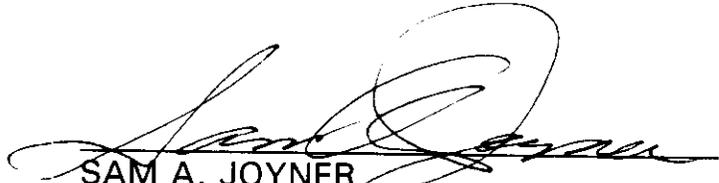
Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$2,696.40 for attorney fees and \$9.16 for costs, for a total award of \$2,705.56, for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$2,696.40 and costs of \$9.16 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to

19

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

It is so ORDERED THIS 9 day of May 2000.


SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

SM

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

FILED

MAY 5 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN RE:)
)
 KEVIN D. DAVIS and)
 MONICA M. DAVIS,)
)
 Debtors.)
)
 STEVEN W. SOULE, Trustee,)
)
 Plaintiff,)
)
 vs.)
)
 BEELER DISTRIBUTING CO.,)
 an Oklahoma Corporation,)
)
 Defendant.)

ENTERED ON DOCKET
DATE MAY 08 2000

Case No. 00-cv-00102

STIPULATION FOR DISMISSAL OF APPEAL

Steven W. Soule, trustee of the bankruptcy estate of Kevin Davis and Monica M. Davis, and Beeler Distributing Company, hereby stipulate and agree that the above styled matter has been resolved and this appeal is hereby dismissed.

REYNOLDS, RIDINGS, VOGT & MORGAN, P.L.L.C.

By: _____

James Vogt, OBA #9243
Attorneys for Beeler Distributing Co.
2200 First National Center
120 North Robinson
Oklahoma City, OK 73102
(405) 232-8131

58

CT5

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

By: _____

Bonnie N. Hefner, OBA #18392

Attorney for Trustee

320 South Boston Avenue, Suite 400

Tulsa, Oklahoma 74103-3708

(918) 594-0400

JV/alw
A:\beeler-dis

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

KATY D. CHAMPAGNE and)
 ANDRE CHAMPAGNE,)
)
 Plaintiffs,)
)
 vs.)
)
 SECURITY LIFE INSURANCE)
 COMPANY OF AMERICA, INC.;)
 CORPORATE BENEFIT SERVICES OF)
 AMERICA, INC., and WISCONSIN)
 PHYSICIANS SERVICE INSURANCE)
 CORPORATION,)
)
 Defendants.)

ENTERED ON DOCKET
DATE MAY 06 2000

No. 98 CV0170K (J)

FILED

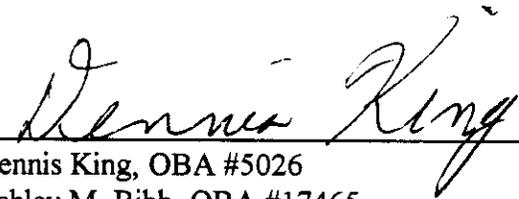
MAY 5 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**STIPULATION OF DISMISSAL WITHOUT PREJUDICE OF
DEFENDANT CORPORATE BENEFIT SERVICES OF AMERICA ONLY**

COME NOW the Plaintiffs, with the agreement and consent of all parties to this case, and hereby dismiss without prejudice the Defendant Corporate Benefit Services of America. The Plaintiffs expressly reserve their claims against Defendants Security Life Insurance Company of America, Inc. and Wisconsin Physicians Service Insurance Corporation.

Respectfully submitted,



Dennis King, OBA #5026
Ashley M. Bibb, OBA #17465
KING, TAYLOR & RYAN
603 Expressway Tower
2431 E. 51st Street
Tulsa, OK 74105
(918) 749-5566
Attorneys for Plaintiffs

Approved as to form and content:



Daniel S. Sullivan, OBA #12887

Steven W. Simcoe, OBA #15349

BEST & SHARP

808 ONEOK Plaza

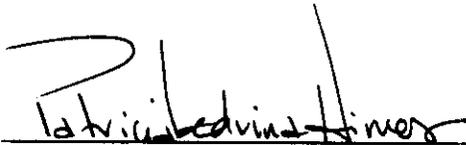
100 West 5th Street

Tulsa, Oklahoma 74103-4225

(918) 582-1234

Attorneys for Defendant

Corporate Benefit Services of America, Inc.



Patricia Draper, OBA #2482

Patricia Ledvina Himes, OBA #5331

ABLE & GOTWALS

100 W. 5th Street, Ste. 1100

Tulsa, OK 74103

(918) 595-4800

Attorneys for Defendants

Security Life Insurance Company of America and

Doctors in Physicians Service Insurance Corporation

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 05 2000 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROSE M. BURLESON,
SSN: 443-50-2566

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 99-CV-420-J ✓

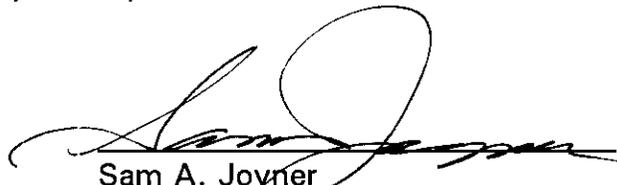
ENTERED ON DOCKET

DATE MAY 05 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 5th day of May 2000.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

ROSE M. BURLERSON,)
SSN: 443-50-2566)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner)
of Social Security Administration,)
)
Defendant.)

MAY 05 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-420-J

ENTERED ON DOCKET
DATE MAY 05 2000

ORDER^{1/}

Plaintiff, Rose M. Burlerson, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ did not properly evaluate Plaintiff's credibility or provide reasons for discounting Plaintiff's credibility, and (2) the ALJ did not adequately explore Plaintiff's complaints of depression. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was born October 19, 1951. [R. at 35]. Plaintiff was 45 years old at the time of her hearing before the ALJ. [R. at 35]. Plaintiff completed the eighth grade, but has no additional schooling. [R. at 36].

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

^{2/} Administrative Law Judge Richard J. Kallsnick (hereafter "ALJ") concluded that Plaintiff was not disabled on October 31, 1997. [R. at 9]. Plaintiff appealed to the Appeals Council. The Appeals Council declined Plaintiff's request for review on April 7, 1999. [R. at 5].

7

Plaintiff testified that she drove to the store approximately one time each week. [R. at 36]. On an average day, Plaintiff loads the dishwasher, and folds and puts away laundry. Plaintiff additionally does some dusting. Plaintiff's husband does most of the work around the house. [R. at 55].

Plaintiff's past prior work was as a janitor. Plaintiff was laid off from her work in June of 1995. [R. at 37]. Plaintiff testified that she and 43 other people were laid off at the same time. [R. at 59]. According to Plaintiff, she was having difficulty performing her work activities when she was laid off. Plaintiff stated that she had missed a lot of work. [R. at 59].

According to Plaintiff, she suffers from intense pain in her neck, shoulders, back, arms, and lower legs. [R. at 40]. Plaintiff takes Tylenol to relieve her pain. [R. at 41]. Plaintiff testified that her pain averages a seven on a one to ten scale. [R. at 42].

Plaintiff testified that she is unable to lift more than ten pounds, that cold weather causes her discomfort, that her left leg has been bothering her for approximately two weeks, and that she can sit for only 30 minutes. [R. at 43-45]. Plaintiff believes that she could constantly walk for approximately 15 minutes, that she could stand for approximately 30 minutes, that she could sit for approximately 30 minutes, and that she could lift approximately 10 pounds. [R. at 51]. In addition, Plaintiff stated that stooping and squatting causes pain, and that she can climb some stairs, but with difficulty. [R. at 51].

Plaintiff additionally testified that she had suffered from depression for approximately three to four years and that the depression appeared to be related to her pain. [R. at 47]. According to Plaintiff, she cannot afford to see a psychiatrist. [R. at 54].

Plaintiff had surgery for carpal tunnel syndrome on November 29, 1993. [R. at 131].

Kenneth Trinidad, D.O., wrote a letter for Plaintiff on October 30, 1995. He noted that Plaintiff's job required lifting 150 pound boxes, and that beginning in 1993, Plaintiff had stiffness and spasms in her back. He noted that Plaintiff had not worked since June 23, 1995. X-rays of Plaintiff's cervical spine were negative, and x-rays of Plaintiff's thoracic spine indicated minimal degenerative changes. [R. at 139]. On February 14, 1996, Plaintiff complained of stiffness in her neck and her upper back. Plaintiff was reported as "temporarily totally disabled." [R. at 136].

John B. Vosburgh, M.D., examined Plaintiff on March 18, 1996. [R. at 147]. He noted that Plaintiff complained of aches and pain in her left shoulder, the left side of her neck, and the left arm and forearm. He described Plaintiff as slightly over reactive. He observed that Plaintiff exhibited a full range-of-motion of her neck. [R. at 147]. He recommended six physical therapy treatments over the course of the next two weeks. He noted that if the physical therapy failed to achieve the desired results, Plaintiff should be retrained for light work activity that does not stress her upper left extremity. [R. at 147].

A CT of Plaintiff's cervical spine was interpreted on April 9, 1996 as unremarkable. [R. at 152].

On April 17, 1996, Dr. Vosburgh wrote that Plaintiff had sustained an injury to her neck and shoulder on June 23, 1995. He noted that she suffered from "chronic fibromyalgia which has been resistant to treatment, but in time is expected to improve." [R. at 154]. He concluded that Plaintiff had achieved maximum benefit from treatment and had a normal functional range of motion in her left shoulder, neck, left elbow, wrist and hand. Plaintiff was described as "becoming symptomatic when she uses her left upper extremity excessively." [R. at 154]. He released Plaintiff to work with limitations of avoiding repetitive movement with her left upper extremity, avoiding overhead work with her arms, and avoiding lifting more than 25 pounds. He noted that Plaintiff might require vocational retraining. [R. at 154]. Plaintiff was rated as having a 15% permanent partial impairment to her left upper extremity due to her injuries. [R. at 154].

A Psychiatric Review Technique Form completed June 17, 1996 by R. Smallwood, Ph.D., indicated that Plaintiff's impairment was "not severe." Plaintiff was described as having slight restrictions of activities of daily living, slight difficulty in maintaining social functioning, never having deficiencies of concentration, and having no episodes of deterioration. [R. at 165].

On December 26, 1996, Plaintiff reported trouble sleeping and depression. Plaintiff's doctor noted that Plaintiff stated she was stable on Prozac. [R. at 180].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

42 U.S.C. § 423(d)(2)(A).^{3/}

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

^{3/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary^{4/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

^{4/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

III. THE ALJ'S DECISION

The ALJ determined that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ summarized Plaintiff's medical history. The ALJ concluded that Plaintiff was limited to performing light work activity which did not require overhead work. [R. at 15]. Based on the testimony of a vocational expert, the ALJ found that a Plaintiff could perform a significant number of jobs in the national economy and was therefore not disabled.

IV. REVIEW

A. CREDIBILITY

Plaintiff asserts that the ALJ failed to analyze Plaintiff's credibility. Plaintiff contends that the ALJ rejected Plaintiff's subjective testimony and simply adopted an April 1996 opinion of a doctor without giving any reasons for rejecting Plaintiff's testimony. Plaintiff additionally contends that the ALJ ignored evidence that indicated Plaintiff's condition was worsening.

In evaluating a claimant's complaints of pain, an ALJ initially determines that the pain-producing impairment is supported by objective medical evidence, and that the

impairment could cause the type of pain alleged. See Luna v. Bowen, 834 F.2d 161, 163 (10th Cir. 1987). In addition, considering the medical data presented and any objective or subjective indications of the pain, the ALJ must assess the claimant's credibility.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir.

1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit again discussed the credibility evaluation required by ALJ. The ALJ must discuss the Plaintiff's complaints of pain and explain the ALJ's reasons for reaching his conclusions. Id. at 390-91.

Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 391. The Court specifically noted that the ALJ should consider such factors as:

the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Id. at 391.

In this case, Plaintiff states that the ALJ failed to give any reasons to his credibility analysis of Plaintiff. The Court cannot agree with this argument.

The ALJ summarized the medical records noting that Dr. Vosburgh released Plaintiff to return to work on April 17, 1996. [R. at 15]. The ALJ observed that

Plaintiff was treated for and had surgery related to carpal tunnel syndrome and was released to work. [R. at 18]. The ALJ noted that Plaintiff drove once each week to the store. The ALJ observed that Plaintiff last worked on June 23, 1995, the day that she was laid off from work, and that Plaintiff claimed that date as the date that her disability began. The ALJ noted that Plaintiff claimed depression over the last three to four years, but that Plaintiff had informed one of her doctors that she was stable on Prozac in December 1996, and that Plaintiff had not been referred for treatment to a mental health professional. The ALJ noted that Plaintiff complained of several restrictions, but that Plaintiff had been released to return to work with limitations of no overhead work. The ALJ noted that Plaintiff took Tylenol and used heat and massage for her neck pain. The ALJ additionally noted Plaintiff's workers compensation awards and discussed the impact such an award may have had on her motivation.

The ALJ does discuss several of the items listed in Kepler and Luna. The ALJ noted Plaintiff's medications, her daily activities, her motivations, the discrepancies with Plaintiff's testimony and the medical evidence, and other factors. This Court is not to reweigh the evidence. Findings of credibility are within the province of the ALJ and should not be disturbed if supported by substantial evidence. As noted above, substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. The Court concludes that the ALJ's discussion of Plaintiff's credibility, in this case, is sufficient.

B. DEPRESSION

Plaintiff additionally asserts that the ALJ did not adequately address Plaintiff's complaints in regard to her depression.^{5/} Plaintiff notes that the ALJ did include a PRT Form, but asserts that the ALJ did not explain the reasons behind his findings. Plaintiff additionally asserts that the ALJ ignored Dr. Martin's conclusion that Plaintiff's depression was worsening.

The Plaintiff's characterization of the ALJ's opinion is not entirely accurate. The ALJ did discuss Plaintiff's asserted depression. The ALJ noted that Plaintiff had seen Dr. Martin in December 1996 and reported stress and depressive symptoms but that Plaintiff had stated she was stable on Prozac. The ALJ additionally summarized Dr. Martin's notes related to Plaintiff's visit to Dr. Martin on July 9, 1997. [R. at 15]. The ALJ observed that Plaintiff had not been referred for mental health treatment and had not sought treatment for her mental health. The ALJ noted that Plaintiff testified that she was capable of performing a variety of activities of daily living which required attention and concentration such as visiting with family, listening to the radio and television, and shopping. [R. at 17]. The record additionally contains a PRT Form completed by a Ron Smallwood, Ph.D., on June 17, 1996 which concluded that Plaintiff's impairment was "not severe."

^{5/} The Court notes that Plaintiff does not allege that the ALJ should have referred Plaintiff for an examination by a mental health advisor. Plaintiff's sole argument is with regard to the evaluation of Plaintiff's subjective complaints of depression.

The Court has reviewed the record and the ALJ's analysis and concludes that the ALJ adequately analyzed Plaintiff's complaints with regard to her depression.

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

Dated this 5th day of May 2000.



Sam A. Joyner
United States Magistrate Judge

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

GINGER LANCE,

Plaintiff,

vs.

LOWRANCE ELECTRONICS COMPANY,
INC.,

Defendant.

ENTERED ON DOCKET

DATE MAY 05 2000

Case No. 99-CV-228-H

FILED

MAY 5 2000

FILED
J. J. Lowrance, Clerk
U.S. DISTRICT COURT

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Defendant Lowrance Electronics Company, Inc.'s ("Lowrance") Motion for Summary Judgment as to Plaintiff Ginger Lance's ("Lance") claims comes on for hearing on April 14, 2000. The Court has had an opportunity to review the record, consider the arguments and authorities submitted by the parties, as well as hear oral argument by representatives of both parties. Based on the foregoing, the Court finds as follows:

1. Summary judgment is appropriate where "there is no genuine issue as to any material fact," *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In *Celotex*, the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a

"genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

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

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

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

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

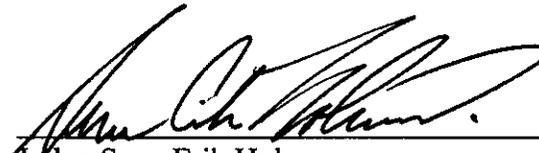
2. As to Lance's claim for sex discrimination/sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), summary judgment is

granted in favor of Lowrance, inasmuch as Lance's allegations of a single, isolated event do not rise to the level of actionable sex discrimination/sexual harassment.

3. With regard to Lance's Title VII retaliation claim, the Court rejects the application of *Little v. United Technologies*, 103 F.3d 956 (11th Cir. 1997), and *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978), as being inconsistent with Title VII law and the scheme Title VII is intended to achieve. Accordingly, Lance has stated a *prima facie* case of retaliation. Nevertheless, Lowrance has established a legitimate, non-retaliatory reason for Lance's discharge, and Lance has not offered sufficient evidence that Lowrance's legitimate, non-retaliatory reason is pretextual. For that reason, the Court grants summary judgment in favor of Lowrance as to Plaintiff's Title VII retaliation claim.

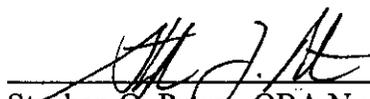
3. Inasmuch as this Order disposes of Lance's claims in their entirety, the Court declines to reach the issue whether there would be any limitation of an award of back pay or damages.

Dated this 4TH day of MAY, 2000.

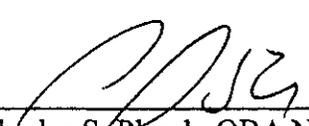


Judge Sven Erik Holmes
United States District Judge for the
Northern District of Oklahoma

Approved as to form:



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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 05 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PETROLEO BRASILEIRO S.A.,)
)
Plaintiff,)
)
vs.)
)
MID-CONTINENT HEATERS, INC.,)
)
Defendant.)

Case No. 99-CV-736-K(J) ✓

ENTERED ON DOCKET
DATE MAY 05 2000

REPORT AND RECOMMENDATION

Defendant's Motion to Dismiss is now before the Court. [Doc. No. 2]. Defendant's motion has been referred to the undersigned Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72. Defendant argues that this case must be dismissed because Joy Industries, Inc. is an indispensable party under Fed. R. Civ. P. 19 which cannot be joined in this action. For the reasons discussed below, the undersigned recommends that Defendant's motion to dismiss be **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a corporation organized under the law of Brazil, with its principal place of business in Rio de Janeiro, Brazil. Defendant is a corporation organized under the laws of the State of Oklahoma, with its principal place of business in Tulsa, Oklahoma.

In November 1998, Plaintiff and Defendant entered into a contract. Pursuant to the terms of the contract, Defendant agreed to sell and Plaintiff agreed to buy "pre-manufactured pipeline spools with alonized lining for installation into [Plaintiff's] atmospheric ovens" Doc. No. 1, ¶ 2. Defendant was to manufacture the spools and deliver them to Houston, Texas where Plaintiff would take possession of them and ship them to Brazil. Plaintiff was to pay US \$1,111,855.00 for the spools. Id. Pursuant to the contract, Plaintiff was to pay 60% of the purchase price (i.e., US \$667,113.00) to Defendant as a down payment, which Plaintiff paid in December 1998. Id. at ¶ 3. Plaintiff alleges that Defendant has never delivered the pipeline spools to Plaintiff. Id. at ¶ 7. Consequently, Plaintiff filed this diversity action on September 1, 1999 seeking a return of its down payment.

To perform its contract with Plaintiff, Defendant subcontracted with Joy Industries, Inc. ("Joy Industries") in December 1998. Joy Industries is a corporation organized under the laws of the State of Oklahoma, with its principal place of business in Tulsa, Oklahoma. Defendant provided certain raw material and engineering drawings to Joy Industries. Joy Industries was to perform certain fabrication services on the raw material, pursuant to the engineering drawings, and return the fabricated material to Defendant so Defendant could incorporate it into the spools Defendant was to manufacture for Plaintiff. According to Defendant, Joy Industries has failed to properly perform on its subcontract with Defendant. Consequently, Defendant filed suit against Joy Industries in Tulsa County, Oklahoma

on April 28, 1999 (i.e., four months before this lawsuit was filed) for breach of contract. Doc. No. 2, Exhibit "2."

Joy Industries performed some work on the raw material. Defendant alleges, however, that after inspection of Joy Industries' work, Defendant's and Plaintiff's inspectors determined that the welding Joy Industries performed was not done pursuant to American Society of Mechanical Engineers ("ASME") standards as required by the contract between Defendant and Joy Industries. Joy Industries, apparently believing its work to be satisfactory, refused to release any material to Defendant until Defendant paid for the work Joy Industries had already performed.

In its state court action against Joy Industries, Defendant also sought an injunction prohibiting Joy Industries from interfering with Defendant's attempts to ship to Plaintiff the material it had provided to Joy Industries.^{1/} On June 10, 1999, Defendant obtained an injunction, conditioned on the posting of a bond, against Joy Industries in the state action. On June 11, 1999, Defendant communicated to Plaintiff that it was not financially able to post the US \$46,944.00 bond. Doc. No. 2, Exhibit "3." Defendant suggested that Plaintiff post the bond itself if it wanted the material.^{2/} Plaintiff ultimately responded by filing this suit for return of its down payment.

^{1/} Defendant was attempting to mitigate its damages to Plaintiff by sending the uncompleted material to Plaintiff for completion by Plaintiff.

^{2/} Defendant also informed Plaintiff that Industrial Piping Specialists, Inc. ("IPS") held a materialman's lien on the material in the amount of US \$120,178.07. Defendant suggested that Plaintiff also make arrangements to obtain a release of IPS' materialman's lien. Doc. No. 2, Exhibit "3."

II. DISCUSSION

Defendant has filed a pre-answer motion to dismiss pursuant to Fed. R. Civ. P. 12(b). [Doc. No. 2]. In its motion, Defendant seeks dismissal under the following subsections of Rule 12(b): (1) for lack of subject matter jurisdiction, (3) for improper venue, and (7) for failure to join an indispensable party under Fed. R. Civ. P. 19.

A. VENUE – RULE 12(b)(3)

In its brief Defendant does not address venue. The undersigned finds, therefore, no basis upon which to recommend dismissal for improper venue.

B. SUBJECT MATTER JURISDICTION AND FAILURE TO JOIN AN INDISPENSABLE PARTY – RULES 12(b)(1) AND 12(b)(7)

Defendant's brief is far from a model of clarity. It requires the Court to intuit exactly what it is Defendant is arguing. As best the undersigned can tell, Defendant intends to argue the following in its brief: (a) Joy Industries is a party who, pursuant to Fed. R. Civ. P. 19(a)(2)(ii), should be joined in this action; (b) joining Joy Industries in this action would destroy diversity jurisdiction; (c) Joy Industries is an indispensable party, pursuant to the factors in Rule 19(b), without whom this case cannot proceed; and (d) because Joy Industries is indispensable, but cannot be joined without destroying the Court's subject matter jurisdiction, this case must be dismissed pursuant to Rule 12(b)(7). The undersigned agrees with none of these assertions.

1. Subject Matter Jurisdiction

The Court's subject matter jurisdiction over this case is premised on the diversity of the parties' citizenship and the amount in controversy. See 28 U.S.C. § 1332(a). Defendant argues that if Joy Industries is added to this case as a party under Rule 19, the Court would lose diversity jurisdiction because Joy Industries and Defendant are both citizens of the State of Oklahoma. Doc. No. 2, p. 3.

Since Justice Marshall's 1806 opinion in Strawbridge v. Curtiss, 3 Cranch 267, 7 U.S. 267 (1806), § 1332 has been subject to the rule of "complete" diversity when multiple parties are involved. *Sub silentio*, Defendant seems to argue that joining Joy Industries in this action would violate Strawbridge's complete diversity requirement. The undersigned does not agree.

The Tenth Circuit has defined the complete diversity rule as requiring that "each defendant [be] a citizen of a different State from each plaintiff." Harris v. Illinois-California Exp., Inc., 687 F.2d 1361, 1366 (10th Cir. 1982). "To vest a United States District Court with jurisdiction on the ground of diversity of citizenship, diversity must affirmatively appear and must be complete as between the plaintiffs on the one hand and the defendant[s] upon the other." Oppenheim v. Sterling, 368 F.2d 516, 518 (10th Cir. 1966). "That is, all the parties on one side must have citizenship diverse to those on the other side." Knoll v. Knoll, 350 F.2d 407, 407 (10th Cir. 1965).

The plaintiff in this case is a citizen of Brazil and the Defendant is a citizen of Oklahoma. Joy Industries is also a citizen of Oklahoma. Thus, the only way

complete diversity could be destroyed in this case is if Joy Industries joined this case as a plaintiff. If Joy Industries were joined as a plaintiff, there would then be a citizen from Oklahoma on each side of the case. Defendant has, however, offered no reason why Joy Industries would ever be joined as a plaintiff in this action. If Joy Industries is joined in this action at all, it would be joined as either an additional defendant or, perhaps, a third party defendant in an action over by Defendant. If Joy Industries is added as a defendant, this would become an action by a Brazilian citizen against two Oklahoma citizens. There would, therefore, be complete diversity between the plaintiff on the one hand and the defendants on the other.^{3/}

The major premise of Defendant's motion to dismiss – that Joy Industries is an indispensable party which cannot be joined in this case without destroying the Court's subject matter jurisdiction – is incorrect. Joy Industries could be joined in this action without affecting the Court's subject matter jurisdiction. Consequently, the undersigned recommends that Defendant's motion to dismiss be denied. The undersigned will proceed, however, to discuss whether Joy Industries must in fact be joined in this case pursuant to Rule 19.

^{3/} If Joy Industries is joined in this case, it could be joined as a defendant, and Defendant could then assert a cross-claim against Joy Industries similar to that which it asserted against Joy Industries in state court. See Fed. R. Civ. P. 13(g). Defendant could also join Joy Industries as a third-party defendant in an action over brought pursuant to Fed. R. Civ. P. 14. In either event, the Court's subject matter jurisdiction would not be affected. Given that the Court has subject matter jurisdiction over the original claim, the Court could assert supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over a cross claim or a third-party claim between Defendant and Joy Industries.

2. Joinder Under Rule 19

According to Professors Wright, Miller and Kane,

[c]ompulsory joinder is an exception to the general practice of giving plaintiff the right to decide who shall be parties to a lawsuit. Although a court must take cognizance of this traditional prerogative in exercising its discretion under Rule 19, plaintiff's choice will have to be compromised when significant countervailing considerations make the joinder of particular absentees desirable.

7 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2nd §1602, p. 18

(1986) (footnotes omitted).

The structure of Rule 19 reflects the analytical sequence that a court should follow in deciding a party joinder problem. Once an issue of compulsory joinder is raised, the court initially must determine whether the absent person's interest in the litigation is sufficient to satisfy one or more of the tests set out in the first sentence of Rule 19(a). When making that determination, the court must base its decision on the pleadings as they appear at the time of the proposed joinder If one or more of the tests set out in subdivision (a) are met, the second sentence of the subdivision states that if he has not been joined, "the court shall order that he be made a party." If the absent person should be regarded as a plaintiff, but refuses to join, the court may join him as a defendant or, in a proper case, as an involuntary plaintiff.

Difficulties arise only if the absentee cannot be effectively joined because he is not subject to service of process, if his joinder will deprive the court of subject matter jurisdiction, or if he makes a valid objection to the court's venue after joinder. When joinder of someone described in Rule 19(a) is not feasible, the court must examine the four considerations described in Rule 19(b) to determine whether the action may go forward in his absence or must be dismissed, "the absent person being thus regarded as indispensable." By proceeding in this orderly fashion the court will be able to avoid grappling with the difficult

question of indispensability whenever it initially decides that the absentee's interest is not sufficient to warrant compelling his joinder [under Rule 19(a)].

Id. at § 1604, pp. 40-41 (footnotes omitted).

i. **Rule 19(a)**

Rule 19(a) lists the instances in which an absent party should be joined if it is feasible to do so. The only instance upon which Defendant relies is Rule 19(a)(2)(ii), which provides as follows:

[Joy Industries] . . . shall be joined as a party in the action if . . . [Joy Industries] claims an interest relating to the subject of the action and is so situated that the disposition of the action in [Joy Industries'] absence may . . . leave [Plaintiff or Defendant] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [Joy Industries'] claimed interest.

Fed. R. Civ. P. 19(a)(2)(ii) (with the names of the parties relevant to this action substituted for clarity). The only argument Defendant makes in support of its position is that if this case is tried without Joy Industries, Defendant would be subject to "duplicate trials and inconsistent decisions." Doc. No. 2, p. 3. The undersigned finds that Defendant's reliance on Rule 19(a)(2)(ii) is misplaced.

Plaintiff has no contractual relationship with Joy Industries. Plaintiff entered into a contract with Defendant, not Joy Industries. Plaintiff contracted with Defendant for the manufacture of a certain product. The fact that Defendant chose to discharge its contractual obligations by subcontracting with Joy Industries is a matter between Defendant and Joy Industries. Plaintiff is asserting no claim against Joy Industries and Joy Industries is asserting no claim against Plaintiff.

Plaintiff entered into a contract with Defendant and Plaintiff made a down payment in accordance with that contract. Plaintiff alleges that Defendant has wholly failed to perform the contract because Defendant has failed to deliver any product in accordance with the contract. Plaintiff filed this lawsuit solely to recover its down payment. Joy Industries claims no interest in Plaintiff's down payment.

The issues involved in this lawsuit are distinct from those involved in Defendant's claim against Joy Industries. The only issue in this case is whether Defendant breached the contract by failing to deliver a product on time. As to Defendant's claim against Joy Industries, the issues relate to whether Joy Industries performed its work in accordance with certain technical engineering requirements for welding and manufacture of various metals. None of these issues are relevant to Plaintiff's claim in this case.^{4/}

A judgment in this case would in no way affect Defendant's ability to proceed against Joy Industries in the state court proceeding. Plaintiff seeks the return of its down payment. If the Court grants judgment in Plaintiff's favor, it will be determining the rights as between Plaintiff and Defendant. Defendant would be entirely free to proceed against Joy Industries in state court, arguing that Joy Industries breached its contract with Defendant. Nothing in this Court's judgment would address whether

^{4/} In its state court case, Defendant has asserted other claims against Joy Industries which are completely unrelated to the work which Defendant was performing for Plaintiff. In the state court case, Defendant alleges that Joy Industries also breached a contract pursuant to which Joy Industries was manufacturing items Defendant intended to incorporate into work Defendant was performing for a company named Air Liquide, Inc. Doc. No. 2, Exhibit "2." These issues in no way relate to the claim asserted by Plaintiff in this case.

Joy Industries breached its contract with Defendant, the Court being concerned here only with the contract between Plaintiff and Defendant. Regardless of the outcome in this case, Defendant will be free to establish in the state court that Joy Industries' breach caused Defendant to breach its contract with Plaintiff. The undersigned finds, therefore, that there is no risk that Defendant will be subjected to inconsistent decisions if this case is adjudicated without Joy Industries. This case will adjudicate rights as between Plaintiff and Defendant and the state court lawsuit will adjudicate rights as between Defendant and Joy Industries.

The undersigned finds that Rule 19(a)(2)(ii) does not require joinder of Joy Industries in this case. The undersigned also finds that, even though Defendant is not relying on them, none of the other provisions of Rule 19(a) requires Joy Industries to be joined in this case. Rule 19(a)(1) would require Joy Industries' joinder if "complete relief" could not be accorded to Plaintiff and Defendant in Joy Industries' absence. The undersigned finds that the Court can give complete relief on Plaintiff's return of down payment claim without Joy Industries being joined in this case. Rule 19(a)(2)(i) would required Joy Industries to be joined if the disposition of this case would "impair or impede" Joy Industries' ability to protect its own interests. The undersigned finds that Joy Industries would in no way be prejudiced by this lawsuit. Joy Industries has rights against Defendant only, which it can adequately assert in the state court action.

Defendant has failed to establish that Rule 19(a) requires Joy Industries to be joined, if feasible, for a just adjudication of this lawsuit. Consequently, the

undersigned need not discuss whether Joy Industries would be an indispensable party, without whom this case could not proceed, pursuant to Fed. R. Civ. P. 19(b).

RECOMMENDATION

The undersigned finds that the joinder of Joy Industries would not destroy the Court's subject matter jurisdiction as argued by Defendant. Nevertheless, the undersigned finds that Joy Industries need not be joined as a necessary party pursuant to Fed. R. Civ. P. 19(a). The undersigned recommends, therefore, that Defendant's motion to dismiss be **DENIED**. [Doc. No. 2].

If the Court adopts this recommendation, the undersigned also recommends that, within 10 days of the Order adopting this recommendation, (1) Defendant be required to answer Plaintiff's Complaint, Fed. R. Civ. P. 12(a)(4)(A); and (2) the parties be required to submit a case management plan pursuant to N.D. LR 16.1, so that a scheduling order can be entered.

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 5 day of May 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 5th Day of May, 2000.
C. Portillo, Deputy Clerk

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

FILED
MAY 5 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Charles Cotton,)
)
 Plaintiff,)
)
 v.)
)
 Nancy Girot,)
 nka, Nancy Wilson,)
)
 Defendant.)

Case No. 99-cv-950-C

ENTERED ON DOCKET
DATE MAY 05 2000

ORDER

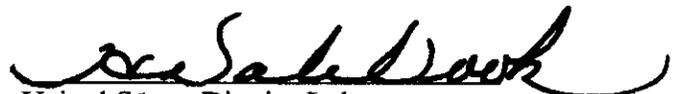
Rule 41(b) of the Federal Rules of Civil Procedure provides as follows:

(b) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

In the action herein, notice pursuant to Rule 41(b) was mailed to counsel of record or to the parties, at their last address of record with the Court, on March 31, 2000. No action has been taken in the case within thirty (30) days of the date of the notice.

Therefore, it is the Order of the Court that this action is in all respects dismissed.

Dated this 5th day of May 2000.


United States District Judge

om

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

F I L E D

MAY 5 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD C. ALLEN,)
)
 Plaintiff,)
)
 v.)
)
 ZEECO, INC.,)
 Defendant.)

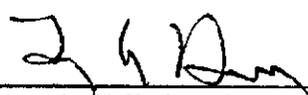
ENTERED ON DOCKET
DATE MAY 05 2000

Case No. 99-CV-0359 K(J) ✓

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Richard C. Allen, dismisses with prejudice all remaining causes of action as set forth in Plaintiff's Complaint. Each party will bear its respective costs and attorney fees.

Respectfully submitted,



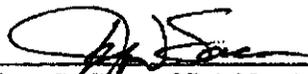
Terry A. Hall, OBA# 10668
Armstrong & Lowe
1401 S. Cheyenne
Tulsa, Oklahoma 74119
Telephone: (918) 582-2500
Facsimile: (918) 583-1755

ATTORNEYS FOR PLAINTIFF

38

c/5

READ AND APPROVED:



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ATTORNEYS FOR DEFENDANT

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

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

RICHARD C. ALLEN,)
)
Plaintiff,)
)
v.)
)
ZEECO, INC.,)
Defendant.)

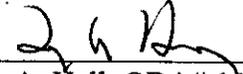
ENTERED ON DOCKET
DATE MAY 05 2000

Case No. 99-CV-0359 K(J)

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Richard C. Allen, dismisses with prejudice the following causes of action as set forth in Plaintiff's Complaint: 1) First Claim for Relief for Violation of 29 U.S.C. § 623; and 2) Third Claim for Relief for Breach of Contract. Each party will bear its respective costs and attorney fees.

Respectfully submitted,



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Telephone: (918) 582-2500
Facsimile: (918) 583-1755

ATTORNEYS FOR PLAINTIFF

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READ AND APPROVED:



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Tulsa, Oklahoma 74103
Tel: (918) 587-4200
Fax: (918) 587-4217

ATTORNEYS FOR DEFENDANT

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

MAY 04 2000 *pc*

JULIE A. VERADO,)

Plaintiff,)

v.)

ADAMS AND ASSOCIATES, INC.,)

Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-474-K(M) ✓

ENTERED ON DOCKET

DATE MAY 05 2000

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised by Settlement Judge Tom Hillis on May 2, 2000, that the parties have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

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

ORDERED this 4 day of MAY, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

F I L E D

MAY 04 2000 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN AMBRUS,)
)
Plaintiff,)
)
vs.)
)
CLAY D. THOMPSON, et al.,)
)
Defendants.)

No. 99-CV-537-K

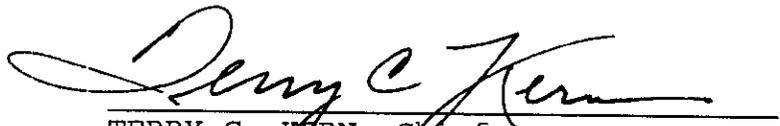
ENTERED ON DOCKET
DATE MAY 05 2000

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 4 day of May, 2000.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY - 4 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LARRY VAUGHAN,
SSN: 448-66-8671,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 99-CV-0223-EA

ENTERED ON DOCKET

DATE MAY 05 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 4th day of May, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY -4 2000

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

LARRY VAUGHAN,)
SSN: 448-66-8671,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 99-CV-0223-EA

ENTERED ON DOCKET

DATE MAY 05 2000

ORDER

Claimant, Larry Vaughan, 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 his “physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any

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

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

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

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

Claimant's Background

Claimant was born on November 3, 1957. He was 28 years old when his insured status expired on June 30, 1985, and he was 39 years old at the time of the ALJ's decision in 1997. He has an eleventh grade education, a General Equivalency Diploma (GED), and some vocational technical training in heating and air conditioning. Claimant worked prior to 1981 as a shop helper/janitor and laborer. Claimant alleges an inability to work beginning October 31, 1980, due to vision problems, migraine headaches, depression, anxiety, learning disabilities, and anti-social personality disorder.

Procedural History

On April 29, 1983, claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.). His application was denied and he did not pursue it further. He filed again by protective filing on March 15, 1993, but this time he filed for both Title II and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). His applications were denied again, and he did not pursue them further. On October 12, 1994, claimant protectively filed a third time and his applications for benefits was denied in their entirety initially and on reconsideration. Hearings were held on December 18, 1996, July 19, 1996, and December 16, 1996, before ALJ James D. Jordan in Tulsa, Oklahoma. By decision dated March 20, 1997, the ALJ found that claimant was not disabled at any time through the date of the decision. On January 27, 1999, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Decision of the Administrative Law Judge

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform the nonexertional requirements of work except for tasks requiring binocular vision, or good, fine, detailed vision, and claimant had no exertional limitations. The ALJ determined that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. The ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Review

Claimant asserts as error that the ALJ: (1) found claimant's mental impairment non-severe; (2) failed to fully develop the record; (3) found that claimant could perform other work; (4) failed to consider the combined effect of the claimant's impairments, as well as the treating physician rule, in assessing the claimant's RFC; and (5) failed to properly evaluate the claimant's credibility.

Evaluating Mental Impairments

The Tenth Circuit requires an ALJ to follow the procedure in 20 C.F.R. §§ 404.1520a, 416.920a when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey, 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant's impairment. The ALJ must then complete a Psychiatric Review Technique ("PRT") form and attach

it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

The ALJ followed these procedures. He acknowledged the findings of George Blake, M.D., a psychiatrist who performed a consultative examination of claimant on January 21, 1995. (R. 266-69) The ALJ also noted some of the findings by mental health professionals at Creoks Mental Health Services who evaluated claimant on March 19, 1996 and April 15, 1996. (R. 282-99) For the period on and before June 30, 1985, the ALJ deemed claimant's mental condition to (1) cause no restrictions of activities of daily living; (2) cause slight difficulties in maintaining social functioning; (3) never cause deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner; and (4) never cause episodes of deterioration or decompensation in work or work-like settings which cause an individual to withdraw from that situation or to experience exacerbation of signs and symptoms. For the period after June 30, 1985, the only change the ALJ made to his determination of claimant's functional loss that claimant's mental condition seldom caused deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner. (R. 24) The ALJ also completed and attached two PRT forms to his written decision. (R. 34-41)

Contrary to claimant's argument, the ALJ discussed claimant's fear of being around other people or in public places when he discussed Dr. Blake's report and the Creok treatment notes. (R. 23-34) He also discussed in his opinion the evidence he considered in reaching the conclusion expressed on the PRT form. What he failed to discuss, however, was the evidence he did not consider. The ALJ is required to "evaluate every medical opinion" he receives, 20 C.F.R. §§

404.1527(d), 416.927(d), and to “consider all relevant medical evidence of record in reaching a conclusion as to disability,” Baker v. Bowen, 886 F.2d 289, 291 (10th Cir. 1989), even though he is not required to discuss every piece of evidence. “Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects.” Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996) (citations omitted).

The one item omitted by the ALJ was a significant one: claimant’s General Assessment of Functioning (GAF) score of 35 indicated by the Creoks evaluation. (R. 287, 297) As claimant indicates, a score of 31-40 indicates “[s]ome impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school).” American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders § 245.2 (4th ed.1994). The Commissioner makes an compelling argument as to why the score of 35 may not be valid. (See Comm. Br., Docket # 16, at 2-5.) Unfortunately, the ALJ did not provide a similar analysis. While the GAF is not an absolute determiner of ability to work, Stalvey v. Apfel, No. 98-5208, 1999 WL 626133 (10th Cir. Aug. 18, 1999), it must be clear from the record that the ALJ considered and evaluated such a low GAF score. Chester v. Apfel, No. 98-7106, 1999 WL 360176 (10th Cir. June 4, 1999); Emarthle v. Apfel, No. 98-5068, 1998 WL 892304 (10th Cir. Dec. 23, 1998).

The Court notes that claimant did not allege that his depression or any mental impairment was disabling when he filed his 1983 and 1993 applications. Further, when asked by the ALJ at the

administrative hearing, he stated that his vision was the only problem that kept him from working. (R. 92) He did not mention any symptoms of depression, anxiety or psychosis when he met with the consultative examiner on January 21, 1995. (R. 268) The Creoks notes do not indicate for what period of time his GAF was at 35. On remand, these factors may become relevant for purposes of establishing the time period that claimant was disabled, if at all.²

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). 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). At the first hearing on December 18, 1995, claimant appeared *pro se*. (R. 50) He stated that he had talked to a representative and needed to obtain more medical records regarding his depression. (Id.) The ALJ offered to strike the hearing and reset it when claimant hired a representative and notified him that he wanted to reschedule the hearing. The ALJ also explained to claimant the proper procedure for notifying the Social Security Administration (SSA) that he had hired a representative. (R. 51) Claimant accepted the ALJ's offer, and the hearing was stricken. (R. 52)

At the second hearing on July 10, 1996, claimant again appeared *pro se*. Neither he nor his representative had filed the form indicating that claimant had a representative. Claimant stated that he talked to his representative in March or April and she told him to have Creoks send her his medical records. (R. 55) Claimant said that he had not been able to obtain the records and give them

² Since the ALJ found that claimant was not disabled at any time before the date of the decision, he did not deem it necessary to consider whether any of the prior applications should be reopened or revised. (R. 22)

to his representative until the day before the hearing because Creoks changed offices and temporarily lost his records. (R. 56) The ALJ again offered to strike the hearing and informed claimant that he needed a signed form from claimant indicating that he had appointed a representative and was ready to proceed. (R. 56-57) Claimant represented that his representative had all of the medical records. (R. 57) Claimant's father also testified and expressed his dismay that claimant's representative did not attend the hearing. (R. 52-53)

At the third hearing, claimant was represented by counsel. Claimant's attorney stated that claimant continued to seek treatment at Creoks but he had not been able to obtain updated records (R. 63-64) The ALJ probed as to whether the records would be necessary or merely cumulative. Claimant's attorney indicated that he did not know if the diagnosis would change, and he thought the additional records would should that claimant's headaches were not related to depression but to stress or some other problem. The ALJ asked claimant's attorney if he wanted the record held open. He responded that he did not know how long it would be before he could get the records and he stated: "if you don't want to hold it open then that's fine with me." (R. 65) The ALJ replied: "For the time being I will not go ahead and officially hold the record open," but "if it comes before the decision goes out I certainly will consider it." (R. 65-66; see also R. 69)

Claimant failed to submit any documents until after the ALJ's decision almost three months later. Yet, claimant argues that the ALJ should have indicated in his decision that the Creoks documents were outstanding, and that the ALJ should have taken steps to obtain the records from Creoks. He also accuses the ALJ of misrepresenting that claimant only had two sessions of treatments at Creoks. (Cl. Br., Docket # 13, at 3-4.) These arguments ring hollow. Given the representations of claimant and claimant's counsel on three occasions before the ALJ, the ALJ had

every right to think that claimant planned to submit documents from Creoks if they were necessary to a decision. Neither claimant nor his attorney indicated that it was necessary to leave the record open. The ALJ generously offered to consider the documents if they were submitted even though the record was closed. Claimant never submitted them. At the very least, claimant could have notified the ALJ or the SSA that he needed assistance in obtaining the documents.

Claimant cannot lay behind the log and lull the ALJ into thinking that he, the claimant, will obtain the documents and provide them to the ALJ, or that additional documents are not necessary, and then claim that the ALJ failed to fulfill his duty to develop the record. The duty to develop the record "is not a panacea for claimant . . . which requires reversal in any matter where the ALJ fails to exhaust every potential line of questioning." Glass v. Shalala, 43 F.3d 1392, 1396 (10th Cir. 1994). This is, as suggested in Hawkins, a case requiring a "stricter showing" because claimant argues that the evidence in existence at the time of the administrative hearing would have established disability. 113 F.3d at 1169. A stricter showing requires "the claimant to prove prejudice by establishing that the missing evidence would have been important in resolving the claim before finding reversible error." Id. (citing to Shannon v. Chater, 54 F.3d 484, 488 (8th Cir. 1995)). Claimant has not made such a showing.

Ability to Perform Other Work

Claimant argues that the ALJ's decision at step five, finding that other work exists in significant numbers in the national and regional economies that claimant could perform, is not supported by the evidence or the testimony of the vocational expert. In response to the ALJ's hypothetical question which assumed that a person like claimant could not perform tasks requiring good binocular vision or fine, detailed vision, the vocational expert testified that such a person could

work as a material handler, janitor, kitchen helper and laundry worker. (R. 120) The ALJ relied on this testimony and recited in his decision the numbers for jobs as janitor, kitchen helper and laundry worker existing in the regional economy (R. 30, 33). He omitted material handler, presumably because of the vocational expert's testimony that it could involve a danger of being hit on the head. (R. 120-21)

Upon questioning by claimant's attorney, the vocational expert testified that janitorial and kitchen helper jobs would still require a general ability to see whether a floor or pots were dirty. (R. 123-24, 126) Further, the vocational expert testified that a person who had 20/60 and 20/100 vision would typically need placement in a supportive employment where the employer made some kind of accommodation for the employee's vision loss. (R. 124-27) The vocational expert testified that supportive employment could be work in a sheltered workshop or other types of supportive employment. (R. 126-27) He said that a person with 20/60 or 20/100 vision would normally be placed in a supportive environment, not a sheltered one, but finding and keeping a job in that category would normally require third party intervention and would not be considered competitive. (R. 127-28)

Claimant argues that the ALJ erred by failing to discuss in his decision the vocational expert's testimony concerning the need for supportive employment. Claimant reasons that, since the ALJ accepted the claimant's vision impairment as true and included that impairment in his hypothetical to the vocational expert, the vocational expert's testimony that claimant's vision problems would require his employment in supportive employment or a workplace with vision loss accommodations is binding on the ALJ. There are two flaws in this argument. First, the ALJ found that claimant did not have good binocular vision or fine, detailed vision; he did not find that claimant

had 20/60 or 20/100 vision. The medical record provides several assessments of claimant's eyesight, ranging from 20/200 and 20/60 in 1983 (R. 259) to 20/300 and 20/40-1 in 1993 (R. 262) to 20/100 and 20/30 in 1995 (R. 264). Records before the Appeals Council show that claimant's vision ranged from 20/300 and 20/40-1 in 1993 (R. 305) to 20/200 and 20/50-2 in 1996 (R. 307).

The Tenth Circuit has held that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the [Commissioner's] decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, the ALJ need only include impairments in his hypothetical question if the record contains substantial evidence to support their inclusion. Shepherd v. Apfel, 184 F.3d 1196, 1203 (10th Cir. 1999); Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995). The ALJ found that claimant had a vision impairment, but not one as severe as claimant alleges.

Second, claimant's argument assumes that employment in supportive employment or a workplace with vision loss accommodations is insufficient to constitute substantial gainful activity. Sheltered employment is employment provided for handicapped individuals in a protected environment under an institutional program. SSR 83-33. It may or may not be considered "substantial gainful activity" depending on a claimant's earnings and activities. 20 C.F.R. §§ 404.1573(c), 404.1574(a)(3), 404.1574(b)(4), 416.973(c), 416.974(a)(3), 416.974(b)(4). While the Court does not deem the ALJ's hypothetical question to the vocational expert and his reliance on the vocational expert's testimony necessarily improper, on remand the ALJ may wish to clarify the extent and duration of claimant's vision loss at various points in the disability period, to inquire more specifically as to the kinds of jobs claimant could perform given his vision loss, and to analyze more

carefully the implications of claimant's vision loss on his ability to perform substantial gainful activity. As claimant suggests, the ALJ may wish to obtain the services of a medical advisor or expert for assistance.

Combined Effect of Impairments

Claimant's arguments that the ALJ failed to consider the combined effect of the claimant's impairments and the treating physician rule are merely extensions of his argument that the ALJ failed to properly evaluate claimant's mental impairment. Other than the fact that the ALJ failed to discuss claimant's GAF score, there is no basis for claimant's argument that the ALJ failed to consider the combined effects of claimant's impairments. The regulations require the Commissioner to "consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity." 42 U.S.C. § 423(d)(2)(B); see 20 C.F.R. §§ 404.1523, 416.923. If the claimant's combined impairments are medically severe, the Commissioner must consider "the combined impact of the impairments throughout the disability determination process." Id.

The ALJ discussed claimant's mental impairment by reference to the report of Dr. Blake and the treatment notes from Creoks. (R. 23-24) He also recorded the findings set forth on the PRT forms attached to his decision. After the ALJ evaluated claimant's allegations of disabling pain and claimant's substance abuse, drug addiction and alcoholism, he returned to the issue of whether claimant's depression and personality disorder was severe and noted the findings of the Disability Determination Service in that regard. (R. 28-29) The fact that the ALJ did not reach the same conclusions as claimant with regard to the severity of his mental impairment does not mean that he failed to consider it in combination with other impairments. Further, the fact that the ALJ may not

have properly determined that claimant's mental impairment was not severe does not mean that he failed to consider it in combination with other impairments. Even his failure to include claimant's mental impairment in his hypothetical question to the vocational expert does not mean that he failed to consider it in combination with claimant's other impairments. The ALJ's decision clearly indicates that he considered claimant's mental impairments in combination with his other alleged impairments throughout the five step process. As additional briefing revealed, claimant's argument regarding the ALJ's failure to consider the combined effect of claimant's impairments obscured his greater concern that the ALJ failed to accord controlling weight to Creek treatment notes which, he claims, establish a disabling mental impairment.

Treating Physician

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

Tenth Circuit law requires that substantial weight must be given to the opinion of a treating physician unless good cause is shown for rejecting it. Goatcher v. United States Dep't. of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted). A treating physician's

report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988).

Claimant argues that the ALJ improperly disregarded or rejected the Creoks treatment notes. The Commissioner argues that the ALJ was entitled to give greater weight to the opinion of the consultative examiner, Dr. Blake, because the clinicians who wrote and signed the Creoks records were not licensed or certified psychologists who qualify as acceptable medical sources under the regulations. 20 C.F.R. §§ 404.1513(a), 416.913(a). (Comm. Br., Docket # 16, at 5.) Claimant argues that the Creoks notes are acceptable because they were provided by persons authorized to send a copy or summary of medical records of a hospital clinic or health care facility. (Pl. Resp. Br., Docket # 20, at 2.) The Commissioner filed a sur-reply arguing that the cited regulation permits the custodian of records to certify as to the accuracy of the records, but does not transform document custodians in to licensed or certified psychologists. (Comm. Sur-Reply, Docket # 23, at 2). Claimant then filed a Reply to the Commissioner Sur-Reply without requesting permission from the Court, in an effort to argue the point further that the Creoks treatment notes were acceptable sources that the ALJ should have considered. (Pl. 2d Rep. Br., Docket # 25, at 1-2.)

All of this supplemental briefing obscures the fact that, although the ALJ discussed the Creoks notes before him, he did not adequately explain why he did not infer from the notes that the claimant's mental impairments were disabling. Again, while the Commissioner's arguments may indicate a valid reason to reject the Creoks notes, the ALJ did not make those arguments or otherwise

sufficiently justify his decision. The ALJ could have considered the Creoks notes as information from other sources under 20 C.F.R. §§ 404.1513(e), 416.913(e), but he did not discuss the weight he gave to those notes by considering the factors outlined in *id.* §§ 404.1527, 416.927 (examining relationship, treatment relationship, length of the treatment relationship, nature and extent of the treatment relationship, supportability, consistency, other factors).

Pain/Credibility

In contrast to his discussion of the Creoks notes, the ALJ fully discussed his reasons for discounting the claimant's allegations of pain and other symptomatology and finding claimant not entirely credible. The framework for the proper analysis of evidence of allegedly disabling pain was set forth by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987). That analysis requires consideration of:

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

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

F.2d 1125, 1132 (10th Cir. 1988)); accord Luna, 834 F.2d at 165-66 (citations omitted). The ALJ must explain why the specific evidence relevant to each factor led him to conclude that the claimant's subjective complaints were not credible. Kepler, 68 F.3d at 391.

The ALJ fully considered claimant's subjective complaints of disabling pain. He specifically referenced the parameters and the criteria set forth in Luna and Kepler, as well as 20 C.F.R. §§ 404.1529, 416.929 and Social Security Ruling 96-7p. The ALJ analyzed many of the relevant factors to determine the weight to be given claimant's subjective allegations of pain, and, as required by Kepler, 68 F.3d at 390, he made express findings as to the credibility of claimant's subjective complaints of disabling pain, with an explanation of why specific evidence led to the conclusion that claimant's subjective complaints were not fully credible. (R. 25-27) He specifically discussed the over-the-counter medication claimant took for his headaches and his failure to seek treatment for them. He acknowledged claimant's fear of being hit on the head but noted that it did not prevent claimant from assaulting someone else with a deadly weapon. The ALJ also noted claimant's ability to mow the yard for a friend, engage in activities with his girlfriend, and drive with a patch over his good eye. Claimant also admitted to the use of drugs and alcohol, and the ALJ noted that alcohol is a depressant, not a depression reliever. The ALJ deemed claimant "not strongly motivated to work" and commented that he had relied upon his parents all his life for support and maintenance. (R. 27)

Credibility determinations made by an ALJ are generally entitled to great deference. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health and

Human Servs, 898 F.2d 774, 777 (10th Cir. 1990); Social Security Ruling 82-59, 1982 WL 31384.

The ALJ's determination was amply supported by substantial evidence.

In fact, the ALJ could have detailed even more inconsistencies between claimant's statements and the medical record. Claimant failed to tell the ALJ that he was incarcerated in 1979 not just for stealing a car speaker and possession of marijuana, but for assault with a deadly weapon. He said that he didn't like crowds but he went to church (R. 83) and taverns (R. 84). He testified that he could "generally see pretty good" with his glasses (R. 91), but his vision was the only problem that kept him from working (R. 92). In 1983, he listed his daily activities as cooking, cleaning, shopping, driving, hunting, fishing, woodwork, construction, visiting his grandparents. (R. 215) In 1993, he described his daily activities as feeding his cat, watching television, listening to music, and writing letters, among other things. He also played checkers once a week for 2 or 3 hours, went to a shopping center three times a week to look around and talk to people, and went camping with his family 3 or 4 times every summer. (R. 223) He told Dr. Blake that he cleaned, watched television, and helped with cooking and washing dishes. He drank beer, emptied trash, dusted, picked up around the house, swept the floor, mowed the lawn, and had his girlfriend over, but he did not like being around people and got nervous when he went to the store. (R. 267) Claimant's argument that the ALJ failed to properly evaluate the claimant's credibility is not well-grounded.

Conclusion

Nonetheless, the ALJ's failure to properly evaluate claimant's mental impairment is reversible error. The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. If the Commissioner "failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence." Thompson v. Sullivan, 987

F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ's decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand "simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case." Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988). The decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

DATED this 4th day of May, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

AMERICAN PROTECTION INSURANCE)
COMPANY,)
)
Plaintiff,)
)
vs.)
)
SILVERADO FOODS, INC.,)
)
Defendant.)

ENTERED ON DOCKET

DATE MAY 04 2000

Case No. 99-CV-0934-H (J)

DEFAULT JUDGMENT

This cause came before the Court on the motion of plaintiff, American Protection Insurance Company ("American"), for a default judgment against defendant, Silverado Foods, Inc., pursuant to Fed. R. Civ. P. 55 and ND L.R. 55.1. The Court, having reviewed the motion of plaintiff and the affidavit of Thomas M. Ladner, and finding that defendant is in default and has admitted the substantial allegations of the Complaint, finds that the allegations of American are deemed true as set forth in the Complaint, that actual damages have been sustained by American in the amount of \$107,089.00, exclusive of interest and costs, and that American is entitled to judgment against Silverado Foods, Inc. for these amounts.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment should be and is hereby entered in favor of American Protection Insurance Company against Silverado Foods, Inc. for actual damages in the total amount of \$107,089.00, together with prejudgment interest through February 22, 2000 in the amount of \$ 19,646.16 and post-judgment interest at the rate of 6.197% per annum until paid, and all costs of this action as provided by law.

IT IS SO ORDERED, ADJUDGED AND DECREED this 14TH APRIL day of ~~March~~, 2000.



SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

Thomas M. Ladner, OBA #5161
NORMAN WOHLGEMUTH CHANDLER & DOWDELL
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571

and

OF COUNSEL:

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225 W. Wacker Drive, Suite 2800
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(312) 201-2000

ATTORNEYS FOR PLAINTIFF,
AMERICAN PROTECTION INSURANCE COMPANY

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

ROBIN TURNER, o/b/o)
PATRICIA TURNER, a minor)
SSN: 446-86-7877)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner)
of the Social Security Administration,)
)
Defendant.)

FILED
MAY 04 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-261-J ✓

ENTERED ON DOCKET

DATE MAY 04 2000

ORDER^{1/}

Plaintiff, Robin Turner, on behalf of Patricia Turner, a minor, appeals the decision of the Commissioner denying Patricia Social Security benefits. Plaintiff asserts that Administrative Law Judge R. J. Payne erred (1) because the ALJ's findings with respect to the listings are not supported by a proper analysis or substantial evidence, and (2) because the ALJ improperly evaluated Plaintiff's credibility. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

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

I. APPLICABLE STANDARDS

Pursuant to the Social Security Act,

[a]n individual under the age of 18 shall be considered disabled . . . if that individual had a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 1382c(a)(3)(C)(i). The regulations which implement this portion of the Act provide as follows:

An impairment(s) causes marked and severe functional limitations if it meets or medically equals in severity the set of criteria for an impairment listed in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, or if it is functionally equal in severity to a listed impairment.

- (1) Therefore, if [a claimant has] an impairment(s) that is listed in appendix 1, or is medically equal in severity to a listed impairment, and that meets the duration requirement, [the Commissioner] will find [the claimant] disabled.
- (2) If [a claimant's] impairment(s) does not meet the duration requirement, or does not meet,^{2/} medically equal,^{3/} or functionally equal^{4/} in severity a listed

^{2/} See 20 C.F.R. § 416.925.

^{3/} See 20 C.F.R. § 416.926.

^{4/} See 20 C.F.R. § 416.926a.

impairment, [the Commissioner] will find that [the claimant is] not disabled.

20 C.F.R. § 416.924(d). Consequently, to be disabled under the Social Security Act, a child must meet, medically equal or functionally equal one of the Listings in 20 C.F.R. Pt. 404, Subpt. P, App. 1. See Wallace v. Callahan, 120 F.3d 1133, 1135 (10th Cir. 1997).

To review the Commissioner's disability determination, the Court will not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court also will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). This Court reviews the Commissioner's disability determinations solely to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); and Williams, 844 F.2d at 750. To make this determination, the Court will meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d 748, 750 (10th Cir. 1988); Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

As long as the Commissioner's factual findings are supported by substantial evidence, they "shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams,

844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

II. THE ALJ APPLIED THE CORRECT LEGAL PRINCIPLES AND HIS DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Plaintiff alleges that the ALJ erred when he concluded that Patricia did not meet or equal a Listing. In particular, Plaintiff alleges that Patricia meets or equals Listing 112.05(D), pursuant to which a child may be found disabled if she has "a valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant limitation of function." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 112.05(D).

The ALJ and Plaintiff agree that Patricia meets the first half of Listing 112.05(D). That is, there is no dispute that all of Patricia's IQ scores fall between 60 and 70. Patricia's lowest IQ score is 64 and her highest is 69. *R. at 50-52 and 116*. The only issue, therefore, is whether Patricia has a physical or other mental impairment which significantly limits her functionality. The ALJ found that Patricia had no further impairments which significantly limited her functionality. Plaintiff alleges that the ALJ's finding is not supported by the record.

Plaintiff argues that Patricia has two physical impairments - asthma and obesity. Plaintiff also argues that Patricia has an additional mental impairment - moderate limitation of concentration, persistence and pace. Plaintiff argues that these

additional impairments significantly limit Patricia's ability to function. The Court finds no support for Plaintiff's claims in the record. The ALJ's decision is, therefore, supported by substantial evidence.

The only evidence in the record regarding Patricia's asthma is that she has an inhaler that she uses on an "as needed" basis. At the hearing, Patricia's mother only recalled an incident from more than a year prior to the hearing when Patricia had to use her inhaler. Plaintiff also described Patricia's inhaler use as intermittent, depending on the weather and pollen count. Patricia's asthma has also not required any form of hospitalization for over eight years. *R. at 37-38, 96 and 130.* There is, therefore, no evidence in the record that Patricia's asthma significantly limits her ability to function.

On the forms she filled out in connection with Patricia's application for disability benefits, Plaintiff did state that Patricia was "overweight." *R. at 105.* At the hearing, Plaintiff did not mention her daughter's weight. Plaintiff did, however, state at the hearing that Patricia "doesn't run well" and does not perform gymnastics activities at school well. *R. at 33.* On a note in Patricia's medical file, Patricia's pediatrician, George J. Bovasso, Jr., D.O., states as follows in response to a question about Patricia's development: "Normal (obese for age)." *R. at 115.* All of Patricia's school records indicate that Patricia attends regular physical education classes, field trips and assemblies, and that she has no restrictions because of her weight or otherwise. *R. at 69 and 76.* There is no other evidence in the record regarding Patricia's weight.

There is, therefore, no evidence in the record that Patricia's weight significantly limits her ability to function.

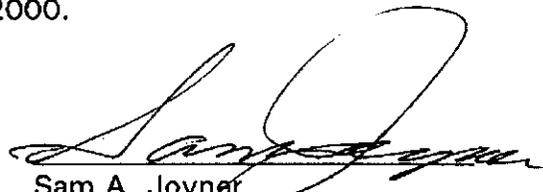
Plaintiff argues that Patricia has an additional mental impairment which causes her a moderate limitation of concentration, persistence and pace. Plaintiff does not, however, identify the additional mental condition causing these limitations. In fact, the only evidence in the record establishes that Patricia's problems with concentration, persistence and pace are incident to her mental retardation (i.e., her low IQ). See R. at 50-52 and 61-64. C.M. Kampschaefer, Psy. D., and Ron Smallwood, Ph. D., both noted that Patricia had a "marked" limitation in cognitive development and functioning as a result of her low IQ. In addition, they both also noted that Patricia had a "less than moderate" limitation in concentration, persistence and pace, and that this limitation was consistent with Patricia's low IQ. In Patricia's school records, her strengths are listed as concentration and attention. *R. at 68 and 81.* There is, therefore, no evidence that Patricia has a mental impairment, in addition to her low IQ, which significantly limits her ability to function.

Citing Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996), Plaintiff argues that the ALJ failed to adequately articulate his reasons for finding that Patricia did not meet or equal a Listing. The Court does not agree. In his decision, the ALJ discussed all relevant evidence in the record, and Plaintiff points to no evidence in the record which the ALJ ignored in his analysis. The Court finds the ALJ's analysis sufficient to permit a review of his conclusions – the analysis did not occur solely in the ALJ's head as prohibited by Clifton.

Plaintiff also argues that the ALJ failed to make adequate findings during his assessment of Plaintiff's credibility. Plaintiff argues that the ALJ's credibility finding is conclusory. Even if Plaintiff is correct, the ALJ's alleged error would be harmless in this case because there is nothing in Plaintiff's testimony, even if accepted as fully credible, which establishes that Patricia has a physical or mental impairment, other than low IQ, which significantly limits her ability to function.

The Commissioner's decision is **AFFIRMED**.

Dated this 4 day of May 2000.



Sam A. Joyner
United States Magistrate Judge

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

**ROBIN TURNER, o/b/o
PATRICIA TURNER, a minor
SSN: 446-86-7877**

Plaintiff,

v.

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

Defendant.

FILED

MAY 04 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-CV-261-J ✓

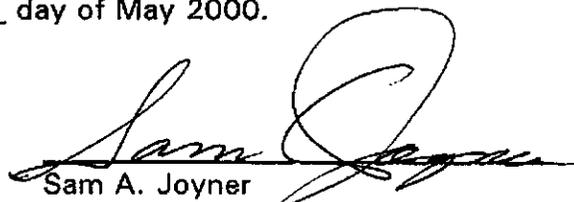
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DATE **MAY 04 2000**

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 4 day of May 2000.


Sam A. Joyner
United States Magistrate Judge

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

FILED

MAY 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

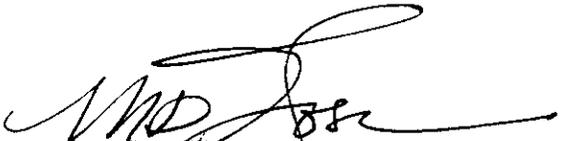
TOMMY HALL,)
)
Plaintiff,)
)
vs.)
)
S & S MOTORS, INC., an Oklahoma)
Corp., d/b/a ACURA OF TULSA,)
and TBC AUTOMOTIVE, INC., an)
Oklahoma corp., d/b/a DON CARLTON)
ACURA OF TULSA,)
)
Defendants.)

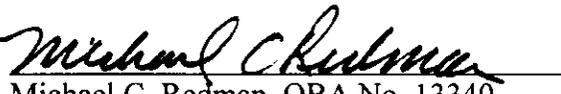
Case No. 99 CV 374 E(M) /

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DATE MAY 04 2000

DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, Plaintiff Tommy Hall, by and through his counsel, Michael Goss, and Defendants S&S Motors, Inc. and TBC Automotive, Inc. d/b/a Don Carlton Acura of Tulsa, by and through their counsel Michael C. Redman, hereby dismiss the above lawsuit with prejudice.

By: 
Michael D. Goss, OBA No. 16759
Goodwin & Goodwin
Post Office Box 3267
Tulsa, OK 74101-3267
Attorneys for Plaintiff

By: 
Michael C. Redman, OBA No. 13340
Audra K. Hamilton, OBA No. 17872
320 South Boston, Suite 500
Tulsa, Oklahoma 74103-3825
(918) 582-1211
918) 591-5360 (FAX)

SM

25

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

FILED

MAY 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LARRY NOEL MOORE and AUDREY MOORE,)

Plaintiffs,)

v.)

STAMINA PRODUCTS, INC., and OSHMAN'S SPORTING GOODS CO., OKLAHOMA, INC.,)

Defendants.)

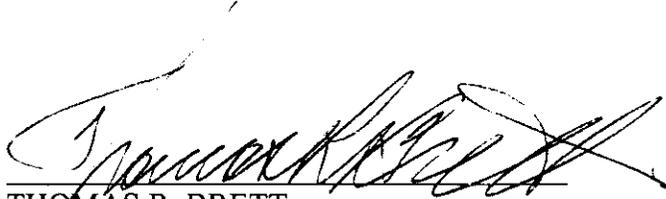
Case No. 99-CV-⁸⁴⁶~~08-46~~B(E)

ENTERED ON DOCKET
DATE MAY 04 2000

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 3rd day of May, 2000, the Court has for its consideration the Joint Stipulation of the parties seeking dismissal of this litigation with prejudice to the refiling thereof. The Court, having reviewed the Stipulation, finds that it should be accepted.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, that this litigation should be, and is hereby, dismissed with prejudice to the refiling thereof, each party to bear his/her/its own costs and attorneys' fees incurred.


THOMAS R. BRETT
SENIOR UNITED STATES DISTRICT JUDGE

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

FILED

MAY 4 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HOMeward BOUND, INC., et al.,)
)
Plaintiffs,)
)
v.)
)
THE HISSOM MEMORIAL CENTER,)
et al.,)
)
Defendants.)

Case No. 85-C-437-E

ENTERED ON DOCKET
DATE MAY 04 2000

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on April 4, 2000, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

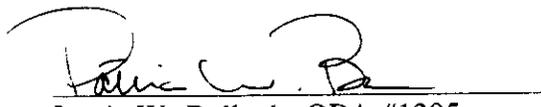
The Court has reviewed the application for fees, objection and the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock the agreed to attorney fees and expenses in the amount of \$34,539.47.

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 \$34,539.47, and a judgment in the amount of \$34,539.47 is hereby granted on this day.

ORDERED this 3RD day of May, 2000.


HONORABLE JAMES O. ELLISON
United States District Court

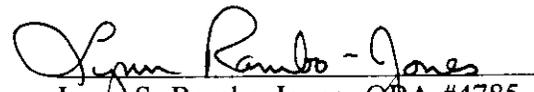

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- and -

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(405) 530-3439

ATTORNEYS FOR
DEFENDANTS

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FILED

MAY 3 2000

Phil Lombardi,
U.S. DISTRICT CC

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

FREDERICK R. BRANDT, *et al.*,)
)
Plaintiffs,)
)
v.)
)
E-Z GO FOODS, INC., *et al.*,)
)
Defendants.)

Case No. 98-CV-498-BU ✓

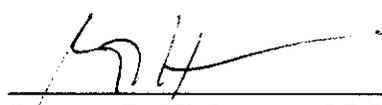
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DATE MAY 03 2000
04

STIPULATION OF DISMISSAL

COME NOW the parties and stipulate to the dismissal of Plaintiffs' claims as
against Defendant Joseph F. Gordon Architect, Inc.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN, LLP

By: 

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Attorneys for Plaintiffs

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c15

ATKINSON, HASKINS, NELLIS, HOLEMAN,
PHIPPS & BRITTINGHAM

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***Attorneys for Joseph F. Gordon Architect,
Inc.***

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

F I L E D

MAY -3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEEANN SHANE BRADLEY,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,)
)
Defendant.)

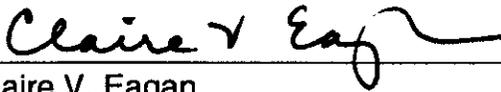
Case N. 99-CV-524-EA

ENTERED ON DOCKET
DATE MAY 04 2000

ORDER

Upon the unopposed motion of Defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Ken Roberts, Special Assistant United States Attorney, it is hereby ORDERED that this case be reversed and remanded to the Commissioner for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). Melkonyan v. Sullivan, 501 U.S. 89 (1991).

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



Claire V. Eagan
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY -3 2000

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

DEEANN SHANE BRADLEY,)
SSN: 446-70-7509,)
)
Plaintiff,)

v.)

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

Defendant.)

Case No. 99-CV-0524-EA

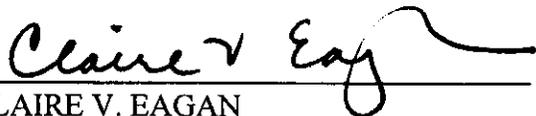
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DATE MAY 04 2000

JUDGMENT

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

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



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

MAY 2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ARMOND DAVIS ROSS,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

No. 99-CV-572-E (M) ✓

ENTERED ON DOCKET

DATE MAY 03 2000

ORDER

On July 14, 1999, Plaintiff submitted for filing a document entitled "Application for Post-Conviction Relief." (Docket #1). Although the pleading was on a form provided by the State of Oklahoma for a prisoner challenging his state court conviction, the Court noted that Plaintiff complained of the conditions of confinement he endured at the Tulsa County Jail ("TCJ") while he was awaiting trial in federal court.¹ Plaintiff did not include a request for relief in his original filing. As a result, by Order dated July 22, 1999 (#2), the Court liberally construed Plaintiff's pleading as a 42 U.S.C. § 1983 civil rights complaint, see Haines v. Kerner, 404 U.S. 519 (1972), and directed Plaintiff to submit an amended complaint using the court-approved form. Plaintiff was also directed to either pay the full \$150.00 filing fee or file a motion for leave to proceed *in forma pauperis*.

On October 1, 1999, Plaintiff paid the full \$150.00 filing fee and filed his amended complaint (#3), citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), as the basis for this Court's jurisdiction. Plaintiff identifies six (6) claims against Defendant

¹Plaintiff was convicted of Possession of a Destructive Device in this District Court, Case No. 98-CR-175-BU, pursuant to a judgment dated July 12, 1999.

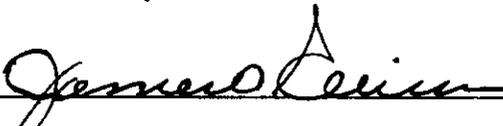
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Stanley Glanz, Sheriff of Tulsa County. As his request for relief, Plaintiff states only that "due to the extraordinary deplorable living conditions while incarcerated in the Tulsa County Jail entitles Plaintiff to be considered for some relief by reduction of sentence." (#3 at 8).

If the Court were to grant the relief requested by Plaintiff, the duration of his confinement would clearly be affected. While claims affecting the conditions of confinement are cognizable under Bivens, it is well settled that relief affecting the fact or duration of confinement is cognizable only upon application for writ of habeas corpus. Wolff v. McDonnell, 418 U.S. 539, 554 (1974); Preiser v. Rodriguez, 411 U.S. 475, 489 (1973). Because the relief sought by Plaintiff in this action is cognizable only upon application for writ of habeas corpus, the Court finds that the instant Bivens action must be dismissed without prejudice. However, the Court would consider reopening this matter should Plaintiff file a second amended complaint seeking appropriate relief.

ACCORDINGLY, IT IS HEREBY ORDERED that the complaint, as amended, is **dismissed without prejudice**.

SO ORDERED THIS 2^d day of May, 2000.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

MAY 2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LARRY NOEL MOORE and
AUDREY MOORE,

Plaintiffs,

v.

Case No. 99-CV0846B(E)

STAMINA PRODUCTS, INC., and
OSHMAN'S SPORTING GOODS CO.,
OKLAHOMA, INC.,

Defendants.

ENTERED ON DOCKET
DATE **MAY 03 2000**

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties, by and through their respective counsel, submit this Joint Stipulation requesting entry of an Order dismissing this litigation with prejudice to the refiling thereof. The requested relief is based upon stipulations between and among the parties that the Plaintiffs' claims and demands for damages were settled at a settlement conference conducted by Adjunct Settlement Judge John McCormick. Settlement occurred on April 4, 2000, and resolved all issues between and among all parties. A Release has been prepared and approved by counsel for the parties. A proposed Order of Dismissal With Prejudice is simultaneously submitted.

IT IS SO STIPULATED.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

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ATTORNEY FOR PLAINTIFF

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

F I L E D

MAY 2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY ELIZABETH VARNER,)
)
Plaintiff,)
)
vs.)
)
JOPLIN-JOHNSTON INDUSTRIAL SUPPLY)
d/b/a JOPLIN INDUSTRIAL SUPPLY, and)
AMERICAN AIRLINES,)
)
Defendants.)

Case No. 99-C-965-E /

ENTERED ON DOCKET
DATE MAY 03 2000

ORDER

Now before the Court is the Motion to Dismiss (docket # 2) of the Defendant, American Airlines ("American").

Plaintiff, Mary Elizabeth Varner, ("Varner") an employee of Joplin-Johnston Industrial Supply d/b/a Joplin Industrial Supply, ("Joplin"), asserts four claims against Joplin and American: 1) violation of public policy; 2) violation of Title VII; 3) violation of Title VII's pregnancy discrimination provisions; and 4) violation of the Family Medical Leave Act. Plaintiff asserts in her Complaint that Joplin is a subcontractor of American.

American seeks dismissal of all four claims as against American, arguing that each claim is viable only against an employer, and American is not Varner's employer. Varner argues that evidence establishing agency between American and Joplin is sufficient to give rise to liability on the part of American.

It is axiomatic that each of the claims asserted by plaintiff is a claim against an employer. Oklahoma' common law claim for violation of public policy protects against wrongful discharge *by employers*. See, Burke v. K-Mart Corp., 770 P.2d 24 (Okla. 1989). Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*, protects against discriminatory employment practices by employers. Frank v. U.S. west, Inc., 3 F.3d 1357, 1361 (10th Cir. 1993). Similarly, the Family Medical Leave Act of 1993, 29 U.S.C. §2601, *et seq.*, provides protection against employers. 29 U.S.C. §2611.

Plaintiff argues that the issue is whether there is some "agency relationship" that would give rise to liability by American as Varner's employer. However, no such agency relationship is alleged in the complaint. Plaintiff does not claim to be anything other than an employee of Joplin, and the only relationship described between Joplin and American is that Joplin "is a subcontractor to American Airlines."

Nonetheless, Plaintiff argues, relying on her on affidavit, rather than any allegations made in her complaint, that American exercises sufficient control over her employment to raise a question of fact with respect to agency. Plaintiff points out, correctly, that the "essential element of agency relationship is that the principal has some degree of control over conduct and activities of the agent." Haworth v. Central National Bank of Oklahoma City, 769 P.2d 740 (Okla. 1989). In her affidavit, Varner states that Joplin provided certain services to American, that American employees oversaw the quality of services of Joplin, and that she was told that she had to accept the harassment of the American Employee

because American was Joplin's big account. She also makes the conclusory allegation that the american employee controlled the means and manner of her performance and job. The Court simply cannot conclude, under these facts, that American is her employer, or that any claim is stated against American.

American's Motion to Dismiss (Docket #2) is GRANTED.

IT IS SO ORDERED THIS 2^d DAY OF MAY, 2000.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY 2 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 RICHARD E. ALFARO,)
)
 Defendant.)

No. 00CV0128C(M) ✓

ENTERED ON DOCKET
DATE MAY 03 2000

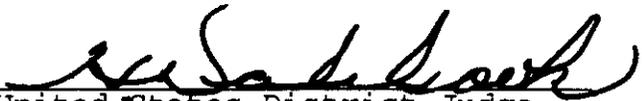
DEFAULT JUDGMENT

This matter comes on for consideration this 22 day of May, 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, Richard E. Alfaro, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Richard E. Alfaro, was served with Summons and Complaint on March 23, 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, Richard E. Alfaro, for the principal amount of \$2,974.57, plus accrued

interest of \$1,613.63, 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 74103-3809
(918) 581-7463

PEP/11f

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

MAY 3 2000

ORLEAN L. RICE and MAXINE RICE,)
)
 Plaintiffs,)

Frank Lombardi, Clerk
U.S. DISTRICT COURT

vs.)

Case No. 98-CV-0857H (M)

BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY,)
)
 Defendant.)

Class Action on Limited
Issue of Defendant's Title

ENTERED ON DOCKET
DATE MAY 03 2000

STIPULATION OF DISMISSAL

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, the parties hereby stipulate and agree that this matter is dismissed with prejudice, that the causes of action of Plaintiffs and actions set forth in Plaintiffs' Petition, as amended, against the Defendant have been satisfactorily settled by and between the parties hereto and that the consideration for said settlement has been accepted by Plaintiffs, Orlean L. Rice and Maxine Rice, in full satisfaction of any causes of action or claims against the Defendant.

It is further stipulated and agreed that each party will bear its own costs and attorney fees.

Dated this 25 day of April, 2000.

Orlean L. Rice
Orlean L. Rice

Maxine Rice
Maxine Rice

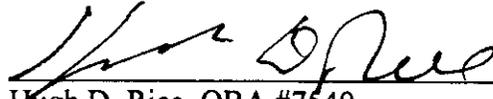
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APPROVAL:



Robert J. Scott
The Shawnee Professional Building
535 6th Street
Pawnee, OK 74058-2542

ATTORNEY FOR PLAINTIFFS



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Rod L. Cook, OBA #1872
Robert J. Campbell, Jr., OBA #1451
RAINEY, ROSS, RICE & BINNS
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(405) 235-1356 (telephone)
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ATTORNEYS FOR DEFENDANT, BURLINGTON
NORTHERN AND SANTA FE RAILWAY
COMPANY

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 02 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RALPH TIM BOLT, JR.,

Plaintiff(s),

vs.

DAYTON POPPELL, Warden,

Defendant(s).

Case No. 99-CV-220-K(J)

ENTERED ON DOCKET

DATE MAY 03 2000

REPORT AND RECOMMENDATION

Petitioner filed a Petition for a Writ of Habeas Corpus on March 22, 1999. By minute order dated March 23, 1999, the action was referred to the undersigned United States Magistrate Judge for further proceedings consistent with his jurisdiction. Petitioner is currently incarcerated at the Lawton Correctional Facility and appears *pro se*. Petitioner challenges two state court convictions imposing consecutive fourteen year sentences for first degree burglary (Case No. CF-95-93) and assault with intent to kill (Case No. 95-93).

The United States Magistrate Judge has reviewed the briefs and pleadings filed by the parties, the submitted transcripts, and the cited case law. For the reasons discussed below, the Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED** by the District Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner and the victim, Kimberly Bolt Strate, were divorced in March of 1995. Ms. Strate had obtained a protective order against the Petitioner. The record

additionally indicates that Petitioner's sister, at one time, had a protective order against Petitioner.

Petitioner testified that his ex-wife had previously informed him that she had been raped by a man, but that he later learned she had had an affair, and the "rape" was a "cover story." According to Petitioner, his wife taunted him by telling him about her sexual relations with other men after their divorce. Petitioner also testified that Mr. Hudson taunted him about Mr. Hudson's relationship with Petitioner's ex-wife.

Petitioner claims that on May 11, 1995, his ex-wife called him asking for money and requesting that Petitioner come to her residence. According to Petitioner, he drank that evening, and sometime during the evening of May 11, 1995, or the early morning of May 12, 1995, he decided to go to his ex-wife's residence. Petitioner's and Ms. Strate's daughter was present at the residence.

Petitioner testified that he knocked on the front door, and when no one answered, he knocked on the back doors and or windows. According to Petitioner, he heard noises from outside the residence which indicated to him that his ex-wife and Mr. Hudson were engaged in sexual relations. Petitioner broke down the back door. Petitioner testified that he discovered his ex-wife and Mr. Hudson naked. Ms. Strate testified that she and Mr. Hudson were asleep.

The testimony is undisputed that Petitioner and Ms. Strate struggled, and Petitioner, using a pocket knife, cut Ms. Strate several times on her back, buttocks, and neck. Petitioner claims that Ms. Strate had a long-term "thyroid problem," and

that on the night in question he believed that if he cut her neck he would relieve her of her thyroid problem.

Mr. Hudson left the residence by climbing out of the window. Mr. Hudson called 911 from a friend's residence. The testimony additionally indicates that Ms. Strate called 911 from her residence, but no address or other information was given by Ms. Strate to the 911 dispatchers.

Petitioner testified that he believed that his ex-wife was dead, and he sang a lullaby to his daughter before leaving the residence. Petitioner apparently returned to his residence and took several pills. Petitioner called the police and informed them of his location.

The police arrived at Petitioner's residence, questioned him, and took him to a hospital in an adjoining county. Petitioner's stomach was pumped. Petitioner returned with the police to the police station. Petitioner was again questioned by the police. Petitioner was charged with first degree burglary and assault with intent to kill.

Petitioner waived his right to a jury trial. Following a trial to the bench, the Court concluded that Petitioner was guilty. The Judge sentenced Petitioner to two consecutive fourteen year sentences.

Petitioner directly appealed his conviction, and the judgment and sentence of the trial court was affirmed on appeal by the Oklahoma Court of Criminal Appeals ("OCCA") in an unpublished decision. Petitioner filed an application for post-conviction relief in the trial court, and the application was denied December 10, 1998. Petitioner appealed to the OCCA, and Petitioner's appeal was denied on March 8, 1999.

II. DISCUSSION

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, this Court cannot grant habeas corpus relief on Petitioner's claims adjudicated by the Oklahoma Court of Criminal Appeals ("OCCA") either on direct appeal or on post-conviction appeal unless the adjudication of the claims -

(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).

On April 18, 2000, the Supreme Court decided Williams v. Taylor, 120 S. Ct. 1495 (2000). In Williams, the Court definitively interpreted the revised standards of review set out in § 2254(d), holding that Section

2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. . . . Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 1520.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner initially asserts that he was denied effective assistance of counsel due to his counsel's failure to effectively raise and argue an insanity defense.

Petitioner makes numerous arguments under the "ineffective assistance of counsel" sub-heading. Petitioner asserts that his trial counsel and his appellate counsel failed to object to the fact that his statement was taken only a few hours after he was treated in the emergency room for an attempted overdose. Petitioner asserts that his trial counsel failed to object to the failure of the police to provide him with a lawyer when he asked for one. Petitioner states that no objection was raised during the trial when his psychiatrist was not permitted to retrieve his notes. Petitioner claims that his psychiatrist was not permitted to give expert testimony without his notes. Petitioner states that his counsel additionally failed to interview his psychiatrist, failed to raise the issue of Petitioner's competency, and neglected to require the inclusion of items which were omitted from Petitioner's pre-sentence investigation report.^{1/} Petitioner notes that Mr. Hudson's record and charges of sex offenses against Mr. Hudson were not admitted. Petitioner states that his attorney did not examine Ms. Strate's "documented history of hyperthyroid disease." Petitioner asserts that his attorney told Petitioner that he would be unable to win an insanity defense. Petitioner additionally seems to suggest that he was offered a plea bargain of ten years and that

^{1/} Petitioner notes that his high school transcripts and a letter from his psychiatrist were not included.

his attorney failed to explain to him that a sentence of ten years would be equivalent to serving three years. Petitioner additionally mentions that his parents required his constant care, placing Petitioner under stress, that Petitioner had difficulty with blackouts and seizures, that Petitioner abused drugs, and that Petitioner's ex-wife dedicated her life to Satan and mis-treated their daughter.

To establish ineffective assistance of counsel, Petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). Petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88.^{2/} To establish the second prong, Petitioner must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 842-44 (1993) (counsel's unprofessional errors must cause a trial to be "fundamentally unfair or unreliable").

^{2/} "The proper standard for measuring attorney performance is reasonably effective assistance." Gillette v. Tansy, 17 F.3d 308, 310-311 (10th Cir. 1994) (quoting Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989)). In doing so, 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." Strickland, at 690. There is a "strong presumption [however,] that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 695. 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.

The Court has reviewed Petitioner's arguments and the court transcripts. Petitioner has failed to establish that his counsel was ineffective pursuant to Strickland. Petitioner suggests that his counsel was ineffective for failing to object to the taking of Petitioner's statement which occurred shortly after Petitioner was treated for an attempted overdose. In addition, Petitioner asserts that although he had requested an attorney prior to making his statement, his request was not honored. Initially, as pointed out by Respondent, the trial record indicated that Petitioner's counsel did assert that that Petitioner's statements to police should not be admitted due to Petitioner's intoxication and Petitioner's request for an attorney. Therefore Petitioner's attorney did make those arguments, but the court overruled the arguments. The fact that an attorney is not completely successful in pursuing certain arguments and objections is insufficient to constitute an ineffective assistance of counsel argument. In this case, the attorney did make the correct arguments, but those arguments were overruled by the trial court. This Court additionally notes that even if Petitioner could satisfy the first prong of Strickland, Petitioner cannot satisfy the second prong. Assuming the confession of Petitioner was improper and should not have been admitted, and that counsel for Petitioner was ineffective in permitting its admission, the confession did not, in all likelihood, change the outcome of the action. Ms. Strate testified that Petitioner broke into her residence, attacked her, and injured her. Mr. Hudson corroborated Petitioner's testimony. Ms. Strate called 911 before Petitioner left and the police dispatcher testified that he recognized Petitioner's voice during the phone call. Petitioner later called 911 from his residence and stated that

he believed he had killed his wife. The Court is satisfied that, assuming counsel was ineffective, the outcome would not have been different.

Petitioner asserts that his counsel was ineffective because he did not object during the trial when his psychiatrist was not permitted to retrieve his notes.^{3/} The trial transcript does not support Petitioner's arguments. The record does not indicate that Petitioner's psychiatrist would have testified substantially differently if he had had supporting notes. Petitioner includes nothing in the record that would support a different outcome if the psychiatrist had been permitted to testify with notes.

Petitioner additionally asserts that his attorney did not interview his psychiatrist. However, Petitioner does not explain what information the attorney would have obtained by interviewing the psychiatrist, and does not explain how that may have resulted in a different outcome.

Petitioner notes that his attorney failed to raise the issue of Petitioner's competency. Petitioner fluctuates between asserting arguments relating to his competency to stand trial and arguments relating to his defense relating to mental illness. Regardless, the record indicates that the trial court ordered a psychiatrist to evaluate Petitioner's competency to stand trial. The psychiatrist concluded that

^{3/} Petitioner refers the Court to United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976). The Fifth Circuit did conclude, in Fessel, that the Petitioner's attorney had been ineffective. The facts in Fessel differ from the facts presented by Petitioner. In Fessel, the defendant had repeatedly asked his attorney to secure the testimony of psychiatrists who had previously treated and examined the defendant to support the defendant's insanity defense. The attorney did not. At trial, the state introduced a live witness who testified that the defendant was not mentally incapable of committing the crime. Defendant was permitted to read from some of the treatment notes of his psychiatrists, but introduced no live testimony.

Petitioner was competent, and the trial court found Petitioner competent. Petitioner provides no psychiatric evidence to counter the evidence presented to the trial court.

Petitioner states that Mr. Hudson's record regarding sex offenses was not admitted at trial,^{4/} that his attorney did not examine Ms. Strate's thyroid disease, and that some items were omitted from the pre-sentence investigation report. Petitioner provides nothing to substantiate his statements. In addition, Petitioner cannot satisfy the second prong of Strickland. That is, assuming the actions identified by Petitioner could be considered unprofessional, nothing indicates that those actions resulted in a different outcome.

Petitioner essentially seems to assert that Petitioner's attorney was ineffective because his attorney did not win Petitioner's insanity defense. Petitioner notes that his attorney told Petitioner that he would be unable to win an insanity defense. This Court has reviewed the record and the arguments presented by Petitioner's attorney. The Court concludes that the failure of Petitioner's attorney to "win" an insanity defense was not due to the "ineffectiveness" of Petitioner's attorney. As noted by the OCCA, "the inability of defense counsel to present a successful 'temporary insanity' defense is a reflection of the available facts, not counsel's deficient performance." See OCCA decision, December 8, 1997, attached as Exhibit "B" to Respondent's Reply Brief.

^{4/} Part of Petitioner's argument is that he was incensed by the relationship between his ex-wife and a known sex offender, and concerned about the safety of his child. The record does not indicate whether or not Mr. Hudson has a criminal record. However, for the purpose of Petitioner's proffered defense, it is only necessary that Petitioner believe that Mr. Hudson had such a record. Petitioner testified that he did believe that Mr. Hudson was a sex offender.

Within Petitioner's ineffectiveness argument, Petitioner additionally appears to assert that the trial court erred, as a matter of law, by failing to find that Petitioner was innocent by reason of his mental insanity. Petitioner asserts that he was unable to differentiate between right and wrong, and states that he suffered from a mental defect during the commission of the alleged crimes. Petitioner asserts that he had consumed alcohol and drugs and that these factors should have been considered by the trial court. In his testimony to the trial court, Petitioner stated that he had consumed alcohol and drugs prior to and after the commission of the crime, that he believed he was relieving his ex-wife's thyroid problem, and that he was unable to appreciate the nature of the crime. The trial court concluded that Petitioner's asserted "mental insanity" did not render Petitioner innocent of the crime.

Assuming Petitioner is intending to assert this as an additional argument, several problems are presented. First, Petitioner does not identify the federal constitutional right which is involved. Second, the record does not indicate that this specific argument was presented to and resolved by the state courts. Petitioner's argument is therefore procedurally barred. Regardless, the Court has reviewed the transcript and the facts presented to the trial court in examining Petitioner's ineffective assistance of counsel argument. The Court recommends that the District Court deny Petitioner's Petition.

INVOLUNTARY CONFESSION

Petitioner asserts that evidence supports his argument that the confession he gave to police was involuntary. Petitioner argues that his due process rights were violated by the use of Petitioner's involuntary confession at his trial.

Respondent initially argues that Petitioner's argument is procedurally barred. Respondent notes that Petitioner presented this argument, for the first time, in his application for post-conviction relief, and that the OCCA, in addressing Petitioner's argument, declined to consider it on the merits due to Petitioner's failure to include the arguments in his earlier appeal.

If a state court applies an "independent and adequate" procedural rule to refuse to reach the merits of a constitutional claim (i.e., to procedurally bar a claim), a federal court will generally respect the state's procedural rule and also refuse to consider the constitutional claim in a petition for writ of habeas corpus. A state procedural rule is "independent" if it is separate and distinct from federal law. A state procedural rule is generally "adequate" if it is applied evenhandedly in the vast majority of cases. A federal court may, however, consider a procedurally barred claim if the petitioner can either (1) establish cause for the procedural bar and actual prejudice as a result of the alleged violation of federal law, or (2) demonstrate that a refusal to consider the claim will result in a fundamental miscarriage of justice. See Coleman v. Thompson, 501 U.S. 722, 724 (1991); Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991); and Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991).

Petitioner seems to acknowledge his procedural default with regard to this issue. However, Petitioner asserts that he represented himself *pro se* and that this should excuse his failure to comply with any procedural rules. Petitioner was, however, represented by an attorney in his direct appeal of the trial court's decision. Petitioner should have, in that appeal, included the issues which he now attempts to raise. Furthermore, assuming that Petitioner's lack of knowledge of state procedural rules could serve as adequate cause, Petitioner has not shown actual prejudice. As noted above, even if the trial court improperly considered Petitioner's confession, the record contains more than sufficient evidence to support the conclusion that with or without the confession Petitioner would have been convicted.

Petitioner additionally asserts that he meets the "miscarriage of justice" exception because his mental insanity renders him innocent of the crime. However, the miscarriage of justice exception exists for those who are actually and factually innocent of the crime. Petitioner acknowledges his culpability, but requests that that culpability be legally excused due to his temporary mental insanity. This argument does not render Petitioner factually innocent of the crime. See, e.g., Herrera v. Collins, 506 U.S. 390, 404 (1993) ("The fundamental miscarriage of justice exception is available 'only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.'").

INCOMPETENCE

Petitioner asserts that his due process rights were violated because he was tried while he was incompetent to stand trial. Petitioner presents no evidence to support

his argument that he was not competent. Petitioner notes only that his psychiatrist testified but was not permitted to leave the courthouse to obtain his notes. Petitioner also asserts that he was on medication and was treated for blackouts and seizures during the time of the trial.

Petitioner refers the Court to the Supreme Court's decision in Cooper v. Oklahoma, 116 S. Ct. 1373 (1996). The Court in Cooper concluded that Oklahoma's standard of review to determine competency, which placed the burden on the defendant to establish that he was incompetent by clear and convincing evidence was invalid. Since Cooper, the standard of review is "preponderance of the evidence." Petitioner asserts that because his competency was determined under the previous standard (clear and convincing), he was improperly determined competent under an unconstitutional standard.

The OCCA addressed the issue raised by Petitioner. The OCCA noted that the trial court ordered a competency evaluation for Petitioner, that a competency hearing was held, that Petitioner's counsel stipulated to the contents of a letter by a physician which concluded Petitioner was competent, and that Petitioner presented no additional evidence. The OCCA acknowledged that the standard applied by the trial court to determine the competency of Petitioner was incorrect, but concluded that the application of that standard was harmless.

No evidence of lack of competence to stand trial was presented at the post-examination competency hearing. Since the trial court had nothing to weight against the evidence of competence, the use of the clear and

convincing standard had no effect on the outcome of the proceeding , and is harmless beyond a reasonable doubt.

OCCA decision, December 8, 1997, attached as Exhibit "B" to Respondent's Reply Brief.

Petitioner presented nothing to the trial court that would suggest that he was not competent to stand trial. The competency hearing was held at the request of the trial court. Petitioner was examined by a psychiatrist, and the trial court concluded Petitioner was competent to stand trial. Petitioner presented no evidence. Although the trial court did find Petitioner competent under an incorrect standard, since the only evidence in the record was evidence of Petitioner's competence, Petitioner should have been found competent under any standard. The OCCA therefore concluded that the failure of the trial court to apply the correct standard was harmless error. The OCCA's application of the law does not result in a decision that is contrary to or involves an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States. The Magistrate Judge recommends that the District Court deny Petitioner's petition.

Petitioner additionally asserts that his attorney's failure to raise issues related to Petitioner's competency resulted in ineffective assistance of counsel. These arguments have been more specifically addressed above. In addition, the Magistrate Judge has reviewed the materials submitted by Petitioner and the case law. The Magistrate Judge recommends that Petitioner's petition be denied.

SUPPRESSION OF EVIDENCE

Petitioner asserts that the prosecution suppressed evidence which was favorable to the defense. Petitioner suggests that some information was omitted from his pre-sentence investigation report. Petitioner also identifies the failure to permit Petitioner's psychiatrist time to obtain his notes as a "suppression of evidence."

Respondent asserts that this issue is procedurally barred due to Petitioner's failure to assert it in his direct appeal. Petitioner asserts, with regard to the procedural bar argument, only that he was "unlearned in the law" and should be excused, and that he meets the "miscarriage of justice" standard. As discussed above, neither of these arguments is sufficient to overcome the procedural bar.

"SPEEDY TRIAL"

Petitioner states that he was tried too quickly, and that this is a violation of the Fifth and Fourteenth Amendments.

Petitioner is rather vague in his analysis that the speediness with which he was tried impacted his federal constitutional rights. Petitioner refers to several state court rules and asserts that the state rules were not properly followed. Petitioner does not explain how this constitutes a violation of a federal constitutional right. In addition, Petitioner generally asserts that the "urgency" with which he was tried deprived him of his due process rights. Petitioner also suggests that the trial court hurried in ruling on his application for post conviction relief.

Initially, the Court notes that Petitioner did not present this argument in his presentations to the state court below. Petitioner's arguments are, therefore,

procedurally barred.^{5/} As discussed above, Petitioner has presented no arguments in this court which would overcome the procedural bar.

Petitioner does not articulate a specific violation of a federal constitutional right. In habeas petitions, the federal courts act in a limited capacity and can review state court proceedings only for the possible violation of federal constitutional law. In addition, this Court has reviewed the record and the pleadings filed below. In regard to Petitioner's trial, Petitioner announced, at trial, that he was ready to proceed with the prosecution. Petitioner requested additional time to present his defense, and was granted additional time. Furthermore, assuming the trial court acted too quickly in denying Petitioner's application for post-conviction relief, acting quickly, absent additional federal constitutional error does not require the grant of the relief requested by Petitioner.

DOUBLE JEOPARDY

Petitioner claims that his constitutional rights were violated because the state tried and sentenced him for first degree burglary and attempt to kill. Petitioner asserts that the elements of the two crimes overlap and that the state violated his federal constitutional rights by trying him for both crimes.

^{5/} The pleadings submitted by Petitioner and Respondent do not indicate that this argument was presented below. The Court could require Petitioner to first present this argument to the state court before raising it here. However, the Court concludes that such a measure would be futile because the state court would raise the issue of procedural bar. See, e.g., Harris v. Champion, 48 F.3d 1127 (10th Cir. 1995) ("If a federal court that is faced with a mixed petition determines that the petitioner's unexhausted claims would now be procedurally barred in state court, 'there is a procedural default for purposes of federal habeas.' Therefore, instead of dismissing the entire petition, the court can deem the unexhausted claims procedurally barred and address the properly exhausted claims."). See also Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991).

Petitioner states that the elements of first degree burglary constitute: breaking, entering, a dwelling, of another, in which a human is present, with the intent to commit a crime within, by forcibly breaking the door. Petitioner outlines the elements of attempt to kill as: an attempt to kill, another person, by performing an act, with intent to cause death. Petitioner asserts that the element of first degree burglary which consists of "with the intent to commit a crime within," necessarily includes all of the elements of an "attempt to kill," and that, consequently Petitioner was tried twice for this crime.

Basically, Petitioner's argument is that because the elements of each of the two crimes of which he was convicted are present in each crime, he was tried and convicted for the same crime twice. However, Petitioner's argument is independent on the "intent" element of first degree burglary including all of the elements of attempt to kill. Oklahoma law provides that the intent required for first degree burglary is complete when entry is made with the intent to commit the crime. See, e.g. Smith v. State, 347 P.2d 232 (Okla. Ct. Crim. App. 1960). Proof of first degree burglary does not require, as suggested by Petitioner, that the state prove all of the elements of the commission of a second crime when establishing the elements of first degree burglary. The state only has to prove that the individual has the intent to commit the crime when he entered.

The crimes that Petitioner was charged with and convicted of are separate and distinct offenses. Petitioner's convictions therefore do not violate double jeopardy. See also Blockburger v. United States, 284 U.S. 299, 304 (1932).

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 2nd day of May 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

2nd Day of May, 1000.
Patricia J. Talley, Deputy Clerk.

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

F I L E D

MAY 2 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOGLE & BLACK AVIATION INCORPORATED,
an Illinois corporation,

Plaintiff,

vs.

STEVEN E. SMITH, an individual,
Defendant. and Third-Party Plaintiff

vs.

Charles H. Nogle, an individual,
Third-Party Defendant.

Case No. 98-CV-0899C(E)

ENTERED ON DOCKET

DATE MAY 03 2000

DISMISSAL WITH PREJUDICE

NOW, on the date inscribed below, this matter came on before me upon the Joint Stipulation of Dismissal with Prejudice filed by Nogle & Black Aviation, Inc., Steven E. Smith, and Charles H. Nogle, pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

IT IS THEREFORE ORDERED that the above case and all causes of action alleged in any pleading filed in this case is dismissed with prejudice as to all parties. Each party herein shall bear their own costs and attorney fees.

Dated: 2nd day of May, 2000.


Hon. H. Dale Cook, Judge
U.S. District Court for the
Northern District of Oklahoma

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FILED
MAY 2 2000

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 RONALD ENGLISH,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99CV1097BU(M) ✓

ENTERED ON DOCKET

DATE MAY 02 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 2nd day of May, 2000.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Phil Pinnell

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

CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of May, 2000, a
true and correct copy of the foregoing was mailed, postage prepaid
thereon, to: Otis Williams, Attorney for Defendant, P.O. Box 6339,
Tulsa, Oklahoma 74106.

Debra L. Overstreet

Debra L. Overstreet
Financial Litigation Agent

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F I L E D

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MAY 2 2000

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JANE E. ROBINSON,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 00CV0055K(M) ✓

ENTERED ON DOCKET

DATE MAY 08 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 2nd day of May, 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 2nd day of May, 2000, a
true and correct copy of the foregoing was mailed, postage prepaid
thereon, to: Jane E. Robinson, 1504 W. Gary St., , Broken Arrow, OK
74012.



Debra L. Overstreet
Financial Litigation Agent

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

BIZJET INTERNATIONAL SALES &)
SUPPORT, INC. an Oklahoma corporation,)

Plaintiff,)

vs.)

VALLEY SERVICES, L.L.C.,)
an Idaho Limited Liability Company,)

Defendant.)

ENTERED ON DOCKET
MAY 02 2000
DATE _____

Case No. 98-CV-569-BU(J)

FILED

MAY 2 - 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FINAL JUDGMENT

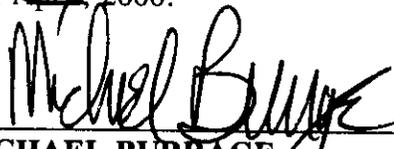
On January 20, 2000, the Motion for Summary Judgment of Plaintiff, BizJet International Sales & Support, Inc. ("BizJet") (Docket Entry #21), came before the Court for determination. Based on the parties' submissions, the Court entered an Order granting, in part, the Motion for Summary Judgment and holding that Plaintiff is entitled to judgment against Defendant under ¶ 4(a) of the Engine Lease Agreement in the amount of \$199.00 per day for fifty-four (54) days, representing the holdover period from June 13, 1998, to August 5, 1998 (\$10,746.00), and \$199.00 per flight hour for 114.1 hours (\$22,705.90), reduced by the \$75.00 per flight hour which Defendant has already paid, or agreed to pay (\$8,557.50), for a total judgment of \$24,894.40.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment should be, and hereby is entered on behalf of Plaintiff, BizJet International Sales & Support, Inc., and

against Defendant, Valley Services, L.L.C., on BizJet's Motion for Summary Judgment (Docket Entry #21) in the amount of \$24,894.40.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this decision is a final decision. The Court finds and concludes that there exists no just reason for delay in the entry of final judgment on the January 20, 2000 Order awarding summary judgment in favor of Plaintiff and against Defendant. Therefore, Final Judgment is entered in favor of Plaintiff, BizJet International Sales & Support, Inc., and against Defendant, Valley Services, L.L.C. in the amount of \$24,894.40.

IT IS SO ORDERED this 2nd day of May, 2000.



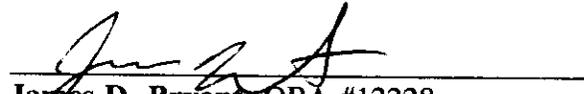
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:



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ATTORNEYS FOR PLAINTIFF, BIZJET
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FORSMAN & SELLERS
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ATTORNEYS FOR DEFENDANT,
VALLEY SERVICES, L.L.C.

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

MICHEAL F. CALLAHAN,)
)
 Plaintiff,)
)
 v.)
)
 SOUTHWESTERN BELL TELEPHONE)
 COMPANY,)
)
 Defendant.)

ENTERED ON DOCKET
DATE MAY 03 2000

Case No. 97-CV-686-K (J) ✓

F I L E D
MAY 02 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Defendant's motion for summary judgment.

History of Case

This case stems from Defendant's termination of Plaintiff's employment in December 1996, after 24 years and nine months of service. Plaintiff argues that Defendant fired him in retaliation for his reporting of tariff violations and opposing discrimination and to prevent him from obtaining certain retirement benefits. Defendant asserts that it fired Plaintiff for violating its code of conduct, including its policies against sexual harassment.

Plaintiff began working for Defendant in March 1972 and just prior to his dismissal had become Manager of Installation and Maintenance Quality with responsibility for reviewing the quality of the 68 technicians in South Tulsa. Around November 20, 1996, Plaintiff's supervisor, Gary Wooldridge, received a complaint from Deena Chappell that she had heard that Plaintiff had made an inappropriate remark about a female employee during a September 18, 1996, crew meeting. Mr. Wooldridge contacted three technicians who had

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attended that meeting, and they stated that Plaintiff had said that he would not run quality reviews on Ms. Chappell, because he planned to have sex with her. Mr. Wooldridge obtained written statements from Ms. Chappell and the three technicians. Mr. Wooldridge also compiled evidence of two past infractions – one for using a company fax machine to transmit a crude Christmas poem to another employee in December 1995 and another for a loud and profane verbal argument between Plaintiff and another employee earlier in November 1996. After informing his supervisor, Charles Ciskowski, the two met with Plaintiff around December 2, 1996. In this meeting, Mr. Ciskowski placed Plaintiff on suspension. Mr. Ciskowski then informed his supervisor, Richard Dietz, and Jan Hager, the Director of Management Resources and Compensation, of the complaint and the investigation. Mr. Ciskowski recommended that Plaintiff be terminated and Mr. Dietz and Ms. Hager concurred. Mr. Wooldridge informed Plaintiff of his dismissal around December 5, 1996.

Plaintiff's amended complaint states the following causes of action: (1) wrongful discharge in violation of public policy; (2) retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.*; (3) discharge in violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*; and (4) retaliation against a former employee in violation of Title VII and the ADA. Plaintiff argues that, despite Defendant's assertions, he was terminated for reporting tariff violations to his

supervisors, for opposing discriminatory conduct, and to prevent him from obtaining better retirement benefits.

Summary Judgment Standard

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

Public Policy Discharge

Plaintiff has failed to meet the requirements for a claim of wrongful discharge in violation of Oklahoma public policy. Oklahoma has adopted a public policy exception to the at-will termination rule in a narrow class of cases where the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory, or decisional law. *See*

Burk v. K-Mart Corp., 770 F.2d 24, 28 (Okla. 1989). This public policy exception is tightly circumscribed. *See id.* at 29. Plaintiff's allegations are insufficient to show that his discharge was in violation of a clear mandate of public policy. Plaintiff alleges that he was discharged for reporting violations of Oklahoma's tariff laws to his supervisors. In fact, Plaintiff alleges that he was placed in the position of Manager of Installation and Maintenance Quality, because Mr. Wooldridge knew that he would report violations, causing his technicians to file complaints against him. Unfortunately, there is no clear mandate of Oklahoma public policy against terminating an employee for this sort of "internal whistleblowing." *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 210-11 (10th Cir. 1997).

Title VII and ADA Retaliatory Discharge

Under the *McDonnell Douglas* framework, Plaintiff has the burden of establishing a prima facie case of retaliatory discharge. If he meets this test, Defendant must articulate a legitimate, nondiscriminatory reason for terminating his employment. If Defendant offers such a reason, the burden reverts to Plaintiff to show that the proffered reason is a pretext for discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804 (1973).

In order to state a prima facie case of retaliatory discharge, Plaintiff must show the following: (1) he engaged in protected opposition to Title VII or the ADA; (2) he was subjected to adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action. *See Bullington v. United Air Lines*,

Inc., 186 F.3d 1301, 1320 (10th Cir. 1999) (Title VII); *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178-79 (10th Cir. 1999) (ADA).

Plaintiff alleges that his termination was in retaliation for three acts of protected conduct: (1) in July 1994, Plaintiff filed a complaint to Judy McElwee of Defendant's Human Resources Department, alleging that his then supervisor, John Attebery, sexually harassed Janice Hull; (2) in 1994, Plaintiff had three conversations with Mr. Attebery, in which he objected to his alleged racial animus; and (3) Plaintiff participated in Susie Clark's ADA suit against Defendant. Although Plaintiff asserts in his response that he was a witness in Susie Clark's case prior to his dismissal, he has provided absolutely no evidence in support of this statement. On the contrary, Defendant has put forth evidence that Plaintiff was first added as a witness in the Clark case *after* Plaintiff's termination.

Plaintiff cannot show causation merely through the fact of his termination, because the time lag between his protected activity and the dismissal is too great. A causal connection may be shown by producing evidence of circumstances that justify such an inference, such as protected conduct followed closely by adverse action. *See Bullington*, 186 F.3d at 1320. While courts have found as much as 1½ months to be close enough, two years is too long of a time lag to support this inference absent additional evidence. *See Anderson*, 181 F.3d at 1179 (citing cases finding 1½ months to be close enough and 3 months too long).

Plaintiff has put forward no evidence demonstrating a causal connection between his protected activity and the dismissal. Plaintiff must present some evidence that his employer

fired him for the purpose of discrimination. See *Bullington*, 186 F.3d at 1320-21. The uncontroverted evidence indicates that Mr. Wooldridge investigated the complaint against Plaintiff and compiled the information regarding the two earlier incidents and reported to Mr. Ciskowski. Both of these individuals met with Plaintiff, at which time he was placed on suspension. Mr. Ciskowski then consulted with Mr. Dietz and Ms. Hager, who concurred with his recommendation that the company terminate Plaintiff. Although Mr. Wooldridge has subsequently passed away, Messrs. Dietz and Ciskowski and Ms. Hager all state by affidavit that they had no knowledge of Plaintiff's prior opposition to discrimination when in Mr. Attebery's department. In order to rebut this testimony, Plaintiff makes the following set of inferences. Mr. Wooldridge played golf with Mr. Attebery on occasion. In an August 1996 letter, Mr. Wooldridge noted that he had spoken with Plaintiff's previous management and they had the same concerns as he did regarding Plaintiff's support of management. Mr. Wooldridge, thus corrupted, performed the initial investigation into the allegations. Mr. Ciskowski relied in large part on this investigation, and Mr. Dietz and Ms. Hager relied entirely on Mr. Ciskowski's representations to them. From this, Plaintiff asks the Court to allow the inference that Mr. Wooldridge actually made the decision to terminate Plaintiff and that Mr. Wooldridge knew of the prior problems with Mr. Attebery. This wobbly edifice is insufficient to constitute evidence that Plaintiff was fired because he opposed discrimination. Cf. *Bullington*, 186 F.3d at 1321 (insufficient to show that a person with animus supervised and had the opportunity to influence the decisionmakers, where no evidence those

decisionmakers knew of the protected conduct). Evidence of an opportunity to influence does not amount to evidence of actual influence, and Plaintiff's mere speculation about that influence is not enough to create a genuine issue of material fact. *See id.*

Defendant has met its burden of articulating a legitimate, nondiscriminatory reason for its actions, namely that Plaintiff violated its code of conduct concerning sexual harassment. The burden then shifts back to Plaintiff to show that this reason is a mere pretext. To establish pretext, Plaintiff must show either that a discriminatory reason more likely motivated Defendant or that Defendant's proffered explanation is unworthy of credence. *See Bullington*, 186 F.3d at 1317. Plaintiff may show that Defendant's articulated reason is unworthy of credence by demonstrating such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the proffered reason that a reasonable factfinder could rationally find it unworthy of credence and infer that Defendant did not act for the given reason. *See Anderson*, 181 F.3d at 1179. The relevant inquiry is not whether Defendant's actions were wise, fair, or correct but whether Defendant honestly believed those reasons and acted in good faith upon those beliefs. *See Bullington*, 186 F.3d at 1318.

Even if Plaintiff had evidence of a causal connection between his protected activity and his dismissal, he fails to present evidence that Defendant's articulated reason is a mere pretext for discrimination. Plaintiff's only evidence in this regard is the social interaction of various bit actors in this tale. Mr. Wooldridge and Mr. Attebery played golf together. Mr. Attebery also socialized with Stan Burns, the person with whom Plaintiff had the loud

argument, and Frank Floyd, Mr. Burn's supervisor and the person who contacted Mr. Wooldridge regarding Plaintiff's conduct during that argument. Furthermore, Plaintiff asserts, by affidavit, that the three men who initially confirmed his alleged sexually-harassing statement were technicians he had written up for violations. As noted above, Plaintiff has not presented any evidence that Mr. Wooldridge had any knowledge of Plaintiff's anti-discrimination activity or was in any way influenced by Mr. Attebery. Plaintiff has testified that Mr. Wooldridge once used a racial slur in his presence and argues that this is evidence that Mr. Attebery, who also used inappropriate racial language, influenced Mr. Wooldridge. Plaintiff has also testified that Mr. Attebery spoke to Plaintiff's wife while Plaintiff was suspended regarding Plaintiff's need to make some life choices. From this Plaintiff infers that Mr. Attebery had knowledge of the plan to fire him. Plaintiff does not dispute that Messrs. Ciskowski and Dietz and Ms. Hager had no knowledge of his problems with Mr. Attebery in 1994. Plaintiff has not presented any evidence that Defendant did not honestly believe that Plaintiff made the inappropriate comment regarding Ms. Chappell or did not act in good faith on this belief. This is simply not enough evidence for a reasonable factfinder to infer that Defendant's asserted reason for terminating Plaintiff is a mere pretext for discrimination.

ERISA Discharge

Plaintiff has not identified evidence indicating that Defendant terminated him in order to prevent him from recovering retirement benefits. It is unlawful to discharge an employee

for the purpose of interfering with the attainment of any benefits under an ERISA plan. See ERISA § 510, 29 U.S.C. § 1140. Plaintiff need not show that the intent to deprive him of ERISA-protected benefits was Defendant's sole motivation but merely that it was a motivating factor. See *Garratt v. Walker*, 164 F.3d 1249, 1256 (10th Cir. 1998) (en banc). Plaintiff may rely on direct or indirect proof of this intent. See *id.* Plaintiff has put forward no direct evidence of an intent to deprive him of ERISA benefits. Although the Tenth Circuit has not directly addressed this issue, the other circuits apply the McDonnell Douglas framework in analyzing a section 510 claim in these circumstances. See *Walsh v. United Parcel Serv.*, 201 F.3d 718, 728 (6th Cir. 2000); *DiFederico v. Rolm Co.*, 201 F.3d 200, 205 (3d Cir. 2000); *Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1343-44 (11th Cir. 2000); *Matthews v. Trilogy Communications, Inc.*, 143 F.3d 1160, 1166 (8th Cir. 1998); *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 296 (7th Cir. 1998); *Stafford v. True Temper Sports*, 123 F.3d 291, 295 (5th Cir. 1997) (per curiam); *Lehman v. Prudential Ins. Co. of Am.*, 74 F.3d 323, 330 (1st Cir. 1996); *Henson v. Liggett Group, Inc.*, 61 F.3d 270, 277 (4th Cir. 1995); *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 457 (9th Cir. 1995); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988).

While the elements of a prima facie case of section 510 discrimination differ,¹ under any test, Plaintiff has failed to put forth evidence that Defendant's articulated reason is a mere pretext, disguising its intent to deny Plaintiff his retirement benefits. Plaintiff puts forward evidence that he would have qualified for early retirement and buy out three months, and full retirement 20 months, following his termination. Plaintiff has further testified that he told Mr. Wooldridge almost four months prior to his termination that he intended to retire on March 7, 2001, with 30 years of service. Plaintiff, however, has put forward absolutely no evidence from which a reasonable jury could find that Defendant's stated reason for termination was a mere pretext disguising its intent to deprive him of these benefits.

Title VII and ADA Retaliation Against Former Employee

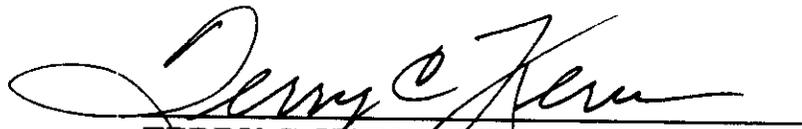
The Court dismisses Plaintiff's claims for retaliation against a former employee, because the EEOC's 180-day investigatory period has not expired. Defendant initially asked the Court to dismiss this claim, because Plaintiff has not received a right-to-sue letter from the EEOC. Plaintiff acquiesced in a dismissal on these grounds. Defendant then withdrew its motion to dismiss and asked for summary judgment. Plaintiff continues to maintain that

¹The First, Second, Fourth, Seventh, and Eleventh Circuits break the prima facie case into the following three factors: (1) Plaintiff is in the protected class; (2) Plaintiff was qualified for the position; and (3) Plaintiff was discharged under circumstances giving rise to an inference of the prohibited intent. See *Wolf*, 200 F.3d at 1343 (11th Cir.); *Lindemann*, 141 F.3d at 296 (7th Cir.); *Lehman*, 74 F.3d at 330 (1st Cir.); *Henson*, 61 F.3d at 277 (4th Cir.); *Dister*, 859 F.2d at 1114-15 (2d Cir.). The Third and Sixth Circuits hold that Plaintiff must show the following to state a prima facie case: (1) prohibited employer conduct; (2) taken for the purpose of interfering; (3) with the attainment of any right to which Plaintiff may become entitled. See *DiFederico*, 201 F.3d at 205 (3d Cir.); *Walsh*, 201 F.3d at 728 (6th Cir.). The Tenth Circuit has cited the Third Circuit's test but has not adopted any standard. See *Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1504 (10th Cir. 1995).

an adjudication of this claim is inappropriate at this time. A plaintiff generally must exhaust his administrative remedies prior to filing a Title VII claim. *See Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir.), *cert. denied*, — U.S.—, 120 S. Ct. 53 (1999); 42 U.S.C. § 12117(a) (adopting the procedures of Title VII for the ADA). Because the EEOC's 180-day investigatory period, in which it has the exclusive right to sue, has not expired, the Court cannot hear Plaintiff's claim for retaliation against a former employee. *See* 42 U.S.C. § 2000e-5(f)(1); *EEOC v. Duval Corp.*, 528 F.2d 945, 948 (10th Cir. 1976) (noting that the language of section 2000e-5(f)(1) unambiguously gives the EEOC an exclusive right to sue during the first 180 days). Congress intended this bar on private-party suits within the 180-day period to insure that the aggrieved parties would not hinder the EEOC's efforts to conciliate. *See id.* Moreover, the Court finds that it would be inappropriate to sever this claim from the others and retain jurisdiction over the discovery and other aspects of this claim.

IT IS THEREFORE ORDERED that Plaintiff's claim for retaliation against a former employee in violation of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 is DISMISSED WITHOUT PREJUDICE; Defendant Southwestern Bell Telephone Company's Motion for Summary Judgment (# 42) is GRANTED as to Plaintiff's remaining claims; and Plaintiff's Motion to Sever and Stay Proceedings of Plaintiff's Claim of Retaliation Which Occurred After Employment at SWBT (# 118) is DENIED.

ORDERED THIS 2 DAY OF MAY, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

MICHEAL F. CALLAHAN,)
)
 Plaintiff,)
)
 v.)
)
 SOUTHWESTERN BELL TELEPHONE)
 COMPANY,)
)
 Defendant.)

ENTERED ON DOCKET

DATE MAY 02 2000

Case No. 97-CV-686-K (J) ✓

FILED

MAY 02 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Defendant, Southwestern Bell Telephone Company, and against the Plaintiff, Micheal F. Callahan.

ORDERED THIS 2 DAY OF MAY, 2000.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY -3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHNNY D. WALKER,)

Plaintiff,)

v.)

Case No. 97-CV-1120-EA ✓

KENNETH S. APFEL,)

Commissioner, Social)

Security Administration,)

Defendant.)

ENTERED ON DOCKET

DATE MAY 03 2000

ORDER

On January 5, 2000, this Court reversed the decision of the Commissioner and remanded this case to the Commissioner for further proceedings. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$3,294.60 for attorney fees and no costs, for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$3,294.60 and no costs under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's

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

It is so ORDERED THIS 3rd day of May 2000.



CLAIRE V. EAGAN
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


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

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

RAUL RODRIGUEZ and HILARIO
GONZALEZ,

Plaintiffs,

v.

WILLIE LEE JONES, and NEW PRIME,
INC., a Nebraska corporation, d/b/a
PRIME, INC.,

Defendants.

No. 99-CV-966-H

ENTERED ON DOCKET

DATE **MAY 03 2000**

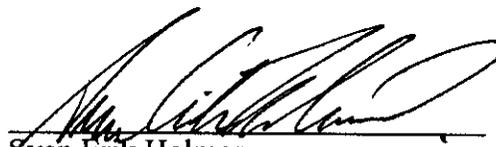
ORDER

This matter comes before the Court on the Court's March 17, 2000 minute order directing Plaintiffs to obtain local counsel and to cause such counsel to enter an appearance in the case.

Upon review of the record, it appears that Plaintiffs have neither obtained local counsel nor caused such counsel to enter an appearance in this case, and therefore have failed to comply with the Court's order. In its order, the Court indicated that failure to comply would result in dismissal for failure to prosecute. Rule 41(b) of the Federal Rules of Civil Procedure allows the Court to dismiss an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." The Court also has inherent authority to dismiss an action for failure to prosecute. See Stanley v. Continental Oil Co., 536 F.2d 914, 917 (10th Cir.1976). Plaintiff has not complied with the Court's order and has not diligently prosecuted this matter. Accordingly, Plaintiff's action is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 3rd day of May, 2000.


Sven Erik Holmes
United States District Judge

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

F I L E D

MAY - 1 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MERRILL LYNCH, PIERCE, FENNER)
& SMITH INC.,)

Plaintiff,)

v.)

WILLIAM D. CUTSINGER,)

Defendant.)

NO. 00CV-0340B(J) ✓

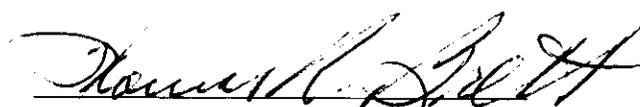
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DATE MAY 02 2000

ORDER FOR DISMISSAL

On this 1st day of May, 2000, upon consideration of Plaintiff's Motion for Dismissal in the above-captioned matter, filed pursuant to Fed.R.Civ.P. 41(a)(2), and having determined that the parties have reached a settlement and resolution of their claims;

IT IS HEREBY ORDERED and DECREED that this action is dismissed with prejudice with each party to bear his or its own costs.


UNITED STATES DISTRICT JUDGE

SJM
4/27/00

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

MAY -1 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACK CHESBRO,)
)
Plaintiff,)
)
vs.)
)
GROUP HEALTH SERVICE OF)
OKLAHOMA, INC., a non-profit)
corporation, d/b/a Blue Cross)
Blue Shield of Oklahoma,)
)
Defendant.)

Case No. 96-CV-561-B

ENTERED ON DOCKET
DATE MAY 02 2000

CONSENT DECREE

NOW on this 26th day of April, 2000, the parties' Joint Application for Consent Decree comes on for consideration. The Court, being fully advised in the premises, grants said Application and finds as follows:

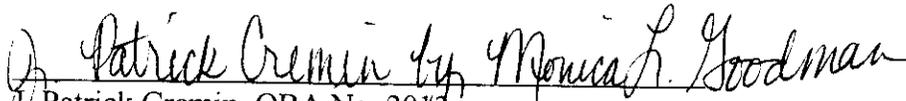
1. Plaintiff filed this action on June 21, 1996, alleging claims under the Age Discrimination and Employment Act and for wrongful discharge and intentional infliction of emotional distress.
2. Venue and jurisdiction are proper before this Court.
3. The parties have agreed to a revised date of Plaintiff's termination from his employment by Defendant which, when ordered by this Court, will resolve this litigation.
4. As part of this settlement, the parties have agreed that Plaintiff's date of termination from employment with Defendant was May 18, 1996, rather than June 24, 1994.

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IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's date of termination from employment with Defendant is June 24, 1994. This case is dismissed with prejudice with each party bearing their own costs and attorney's fees incurred in this matter.


JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:


Patrick Cremin, OBA No. 2013
Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.
320 S. Boston, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

ATTORNEYS FOR DEFENDANT


Stephen L. Andrew, OBA No. 294
D. Kevin Ikenberry, OBA No. 10354
Stephen L. Andrew & Associates
125 West 3rd Street
Tulsa, Oklahoma 74103
(918) 583-1111

ATTORNEYS FOR PLAINTIFF

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

BRYAN R. RAMER,)
)
 Petitioner,)
)
 vs.)
)
 RITA MAXWELL,)
)
 Respondent.)

Case No. 97-CV-383-B

FILED

APR 23 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

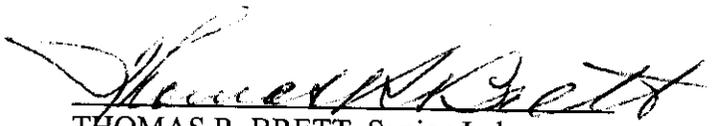
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DATE MAY 01 2000

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 amended 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 2nd day of Apr., 2000.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

CONNIE FRIEDL,

Plaintiff,

v.

PACIFICARE OF OKLAHOMA, INC.,
and PACIFICARE OF TEXAS, INC.,

Defendants.

ENTERED ON DOCKET

DATE MAY 01 2000

Case No. 98-CV-590-K(E)

FILED

APR 30 2000

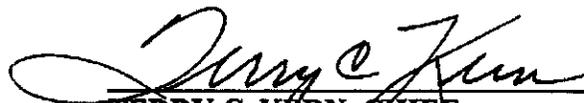
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised by counsel for the parties on April 14, 2000, that the parties have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

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

ORDERED this 28 day of APRIL, 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 RAY SCHNEIDER,)
)
 Petitioner,)
)
 vs.)
)
 BOBBY BOONE, Warden,)
)
 Respondent.)

ENTERED ON DOCKET
DATE MAY 01 2000

No. 99-CV-753 K (E) ✓

F I L E D

MAY 01 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the 28 U.S.C. § 2254 petition for writ of habeas corpus filed by Petitioner, a state prisoner appearing *pro se*. In his petition, Petitioner states that alterations in the definition of prison capacity by the Oklahoma Department of Corrections (“ODOC”) have resulted in the denial of emergency time credits to his sentence. As a result, Petitioner asserts that he has been deprived of due process and equal protection and that his sentence is being administered by the ODOC in violation of the *ex post facto* clause.

In response to the petition, Respondent filed a motion to dismiss for failure to exhaust state remedies (Docket #3). Respondent asserts that the petition must be dismissed because Petitioner has never presented his claims either in administrative proceedings or in the state courts of Oklahoma. Petitioner has not filed a response to the motion to dismiss. However, for the reasons discussed below, the Court finds that this petition should be denied regardless of the exhaustion status of Petitioner’s claims. As a result, Respondent’s motion to dismiss for failure to exhaust state remedies has been rendered moot and should be denied on that basis.

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BACKGROUND

Petitioner states in his petition that he is incarcerated pursuant to a judgment of conviction entered May 17, 1999, in Tulsa County District Court, Case No. CF-99-1268, for Knowingly Concealing Stolen Property. Petitioner received a sentence of five (5) years imprisonment.

In the instant action, originally filed in the United States District Court for the Eastern District of Oklahoma on August 18, 1999, Petitioner challenges the administration of his sentence by the Oklahoma Department of Corrections ("ODOC"). He does not challenge his conviction. He raises three (3) propositions of error as follows:

- Ground 1: The state has denied me emergency time credits in violation of due process rights.
- Ground 2: Change in criteria for determining prison system capacity violates equal protection rights and ex post facto laws.
- Ground 3: The board of corrections has violated petitioner's due process and equal protection rights by violations of state statutory law.

Petitioner concedes he has not presented these claims to the state courts of Oklahoma, but states that "there are no available means to remedy unlawful deprivation of Emergency Time Credits in state courts." (#1-1).

ANALYSIS

As an initial matter, the Court finds that this petition should be construed as a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 because Petitioner challenges the administration of his sentence rather than the validity of his underlying conviction. Montez v. McKinna, --- F.3d ---, 2000 WL 342235, *1 (10th Cir. April 3, 2000).

A. Exhaustion

"A habeas petitioner is generally required to exhaust state remedies whether his action is brought under § 2241 or § 2254." *Id.* at *2 (citing Coleman v. Thompson, 501 U.S. 722, 731 (1991)). The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman, 501 U.S. at 731. To exhaust a claim, a habeas corpus petitioner in custody pursuant to an Oklahoma state court judgment must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (*per curiam*).

While it is clear in this case that Petitioner has not presented his claims to the state courts of Oklahoma, it is doubtful whether the Oklahoma Court of Criminal Appeals would consider Petitioner's claims unless he would be entitled to immediate release if relief were granted. See Canady v. Reynolds, 880 P.2d 391 (Okla. Crim. App. 1994). However, as discussed below, Petitioner's claims are without merit and should be denied. The Tenth Circuit Court of Appeals recently held that where no credible federal constitutional claim is raised in a § 2241 petition, it is not inconsistent with § 2241 to follow the policy of § 2254(b)(2) (providing that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"). Montez, 2000 WL 342235, *2. Therefore, the Court will proceed with a review of Petitioner's claims regardless of the exhaustion status of the claims.

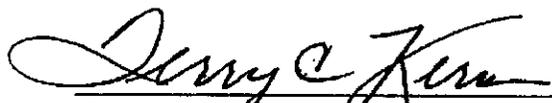
B. No constitutional right is implicated by Petitioner's claims

Each of Petitioner's claims is premised on his assertion that he is "entitled" to receive "emergency time credits" pursuant to Oklahoma's Prison Overcrowding Emergency Powers Act, Okla. Stat. tit. 57, §§ 570, et seq. However, the Oklahoma statutes governing inmate credits do not guarantee that inmates will receive an opportunity to receive the "emergency time credits" at issue in this action. Cf. Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir. 1978) (stating that Oklahoma law does not create a protected right to work-time credits). Thus, no constitutional right is implicated by Petitioner's claims concerning ODOC's failure to award "emergency time credits." Furthermore, Petitioner's claim of state law violations is not cognizable in a federal habeas action. § 2241(c)(3); Montez, 2000 WL 342235, *2. As a result, the Court cannot grant habeas corpus relief and the petition should be denied. Respondent's motion to dismiss has been rendered moot and should be denied on that basis.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The petition for writ of habeas corpus is construed as a petition filed pursuant to 28 U.S.C. § 2241.
2. The petition for writ of habeas corpus (Docket #1) is **denied**.
3. Respondent's motion to dismiss for failure to exhaust state remedies (Docket #3) has been rendered **moot** and is denied on that basis.

SO ORDERED THIS 1st day of May, 2000.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

APR 28 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PETROLEUM DEVELOPMENT COMPANY,)
AN Oklahoma Corporation,)
)
Plaintiff,)

vs.)

Case No. 99-C-149-E ✓

RED MOUNTAIN, EXPLORATION, L.L.C., a)
Colorado L.L.C., MEWBOURNE OIL COMPANY,)
a foreign corporation, MMP 1998, a Texas)
partnership, CURTIS W. MEWBOURNE, CURTIS)
MEWBOURNE, trustee, MEWBOURNE ENERGY)
PARTNERSHIP 98-A, a Texas partnership, and)
3MG CORPORATION, a foreign corporation,)
)
Defendants.)

ENTERED ON DOCKET

DATE MAY 01 2000

ORDER

Now before the Court is the Motion for Summary Judgment (docket # 65) of the Defendants and Counterclaimants, Red Mountain Exploration ("Red Mountain"), L.L.C., Mewbourne Oil Company, MPP 1998, Curtis W. Mewbourne, Curtis W. Mewbourne, Trustee, Mewbourne Energy Partners 98-A, and 3MG Corporation (collectively, "Mewbourne"), the Motion For Partial Summary Judgment (docket #67) of the Plaintiff, Petroleum Development Company ("PDC"), and the Motion for Partial Summary Judgment (docket #68) of PDC.

PDC and Red Mountain entered into an agreement regarding the purchase, exploration, and development of Sections 9, 21, and 16, Township 22 North, Range 24 West, Ellis County, Oklahoma. Red Mountain subsequently assigned its interest in the property to Mewbourne. Although Plaintiff's Complaint was originally couched in terms of seven different causes of action,

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this court granted summary judgment in favor of Defendants on the first four claims, finding that Defendants did not violate the "reassignment clause" in contract between them. The remaining claims are Plaintiff's claim for breach of contract and usurpation of business opportunity, an additional claim for breach of contract, and its request for accounting. Plaintiff's remaining claims are not related to the "reassignment clause," but rather are related to the clauses requiring monthly reports and allowing Plaintiffs the right to an accounting. Those clauses provide as follows:

In connection with any and all wells drilled by Red Mountain under the terms of this agreement, Red Mountain will provide PDC with all well information in a timely manner, including monthly payout reports on producing wells.

* * * * *

PDC reserves the right to conduct an audit and full accounting of any well drilled by Red Mountain or its assigns in the sections covered by this agreement.

Plaintiffs allege by withholding monthly reports from February 25, 1999, the time the Braley 1-21 Well was drilled, to June 1, 1999, Defendants were able to determine that other property (Sections 33 and 34 of Township 22 North, Range 24 West, Ellis County, Oklahoma) would be productive and were able to obtain that property without knowledge of Plaintiff.

Defendants have claims remaining for slander of title, and equitable forfeiture. The slander of title claim relates to the allegations made by PDC in relation to its position on the reassignment clause. In Defendants' rather convoluted claim for equitable forfeiture, they claim that PDC's allegation that Defendant's failure to drill a well by February 8, 1999 constituted breach of the reassignment clause was actually a repudiation of the letter agreement, and PDC therefore has no rights under the letter agreement. PDC seeks partial summary judgment on the equitable forfeiture and slander of title claims and Defendants seek summary judgment on PDC's remaining claims as well as their own counterclaims.

Legal Analysis

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

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

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

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

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

* * *

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

Id. at 1521.

The Counterclaim for Equitable Forfeiture

In its Answer to Amended Complaint and Counterclaim, Mewbourne describes the factual basis for its equitable forfeiture counterclaim as follows:

53. By a letter dated February 8, 1999 from Dennis Ingram, President of PDC to Tony Phillips of Mewbourne, Mewbourne was notified that PDC considered Mewbourne to be in breach of the letter agreement dated October 20, 1997 covering Section 21-T22N-R24W, Ellis county, Oklahoma. The letter rescinded the letter agreement of October 20, 1997 and PDC sought to renegotiate the contract by converting its overriding royalty interest to a working interest.

54. As a direct result of PDC's repudiation of the letter agreement of October 20, 1997 on February 8, 1999, PDC has foregone any right to request that Mewbourne honor any benefits sought to be retained by PDC in the agreement it has now repudiated.

PDC argues that the equitable forfeiture claim is not available at law, that it is not supported by the undisputed material facts, and that it is inconsistent with Defendants' position in this case. The Court agrees with PDC's arguments regarding the availability of the claim and its support in the facts of this case. Notably, Mewbourne has no Oklahoma cases wherein a claim for equitable forfeiture is recognized. Moreover, in support of its claim, Mewbourne cites to a number of cases discussing the doctrine of quasi-estoppel. The facts of this case are in no way similar to the facts in Bowen v. Freeark, 370 P.2d 546 (Okla. 1962) or Willard v. Ward, 875 P.2d 441 (Okla. App. 1994). Quasi-

estoppel deals with the unconscionable taking of inconsistent positions. Id.

In determining whether the doctrine of quasi-estoppel is applicable to the matter before it, a court should consider whether the party asserting the inconsistent position has gained an advantage or produced some disadvantage through the first position; whether the inconsistency was of such significance to make the present assertion unconscionable; and whether the first assertion was based on full knowledge of the facts.

Id., at 444. The Court must conclude both that the asserted "inconsistency" was not "unconscionable," and that the first assertion was not based on full knowledge of the facts. When PDC believed that Mewbourne violated the reassignment clause, it took the position that a renegotiation of the agreement should take place. Such a renegotiation never took place, and the demand was certainly based on facts unknown at the time of entering into the original agreement: Mewbourne did not drill a well by February 4, 1999. On these facts, the court must also conclude that there is no inconsistency and no repudiation. Defendants' claim for equitable forfeiture must fail.

The Counterclaim for Slander of Title

With respect to slander of title, Defendants claim actual attorneys' fees incurred in this action. Plaintiff's claim that summary judgment is appropriate because these damages are not available at law for a slander of title action in Oklahoma. Misco Leasing, Inc. v. Keller, 490 F.2d 545 (10th Cir. 1974)(applying Oklahoma law) stands for the proposition that attorney's fees can be awarded as special damages under certain circumstances in slander of title actions. With this authority, summary judgment is not appropriate at this time.

Plaintiff's Claims for Breach of Duty to Provide Reports

This discussion includes both Plaintiff's claim for usurpation of business opportunity with

respect to the additional property and its claim for breach of the obligation to provide reports. Defendants make two arguments in support of its motion for summary judgment on these claims. The first, regarding quasi-estoppel, has already been rejected by the Court as a matter of law. The second argument, that there was no information gained from drilling the Braley 1-21 Well, is a closer question. Although Mewbourne claims that it has an interest in the other sections prior to drilling Braley 1-21, there is evidence that the drilling of this well shed light on desirability of Sections 33 and 34. It appears undisputed that Mewbourne did not provide all required information in a timely manner, the question of fact for trial is whether PDC suffered any damages as a result of this failure.

Plaintiff's Claim for an Accounting

Defendants seek summary judgment on the claim for an accounting, asserting that they have provided over 998 pages of documents. Plaintiffs argue that they still have not received "back up detail for all costs associated with drilling, completing, and operating the Braley 1-21 Well through and current date and []information regarding revenue from the well and adjustments to revenue." Clearly there is a question of fact whether all information has been provided.

Conclusion

The Motion for Summary Judgment (docket # 65) of the Defendants and Counterclaimants, Red Mountain and Mewbourne is DENIED, the Motion For Partial Summary Judgment (docket #67), regarding the equitable forfeiture counterclaim, of the Plaintiff, PDC, is GRANTED and the Motion for Partial Summary Judgment (docket #68), regarding the slander of title counterclaim, of PDC is DENIED. In light of these rulings, the Motion to Strike Counterclaim or to Dismiss for Failure to State a Claim Upon Which Relief May be Granted (docket # 29) is DENIED as moot, and the Request for Leave to File Reply to Brief in Opposition to Motion for Summary Judgment (docket

73) is DENIED as moot.

IT IS SO ORDERED THIS 29th DAY OF APRIL, 2000.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 28 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SRC HOLDINGS CORPORATION)
)
 Plaintiff,)
)
 v.)
)
 KENNETH L. ARNOLD,)
)
 Defendant.)

Case No. 98-CV-0944-EA¹

ENTERED ON DOCKET

DATE ~~MAY 01 2000~~

ORDER

On March 17, 2000, plaintiff SRC Holdings Corporation ("SRC") filed a Motion for Partial Summary Judgment (Docket # 24) on the three remaining counterclaims of defendant Kenneth L. Arnold ("Arnold"). The Court previously granted summary judgment on defendant's shareholder derivative action counterclaim by Order dated March 8, 2000 (Docket # 23). Defendant's remaining counterclaims include (1) negligent and intentional fraudulent inducement, misrepresentation, and deceit; (2) tortious interference with prospective economic gain; and (3) breach of fiduciary duty.

FACTS

The parties agree on the following facts. SRC and Arnold, along with Linda Laird, Rick Coody, and Tom Allen, owned stock in Tulsa Equipment Manufacturing Company ("TEM"). Arnold, Laird, Coody, and Allen were employees and directors of TEM at one time, but Arnold was not an employee at the time of the events relevant to this lawsuit. SRC owned 45% of the TEM stock and was TEM's largest shareholder. Other TEM employers also held a small number of shares.

¹ The parties have consented to proceed before a United States Magistrate Judge in accordance with the provisions of 28 U.S.C. § 636(c).

In 1996, TEM hired Shawn Eiserman as its controller and Grant Pick as its general manager and president of the board of directors. Eiserman was an employee of SRC when she applied for the TEM position. Arnold argues that SRC encouraged both Eiserman and Pick to apply for and take jobs at TEM. SRC agreed to pay the salaries and benefits for Eiserman and Pick and then charged TEM a management fee which could be paid at a time later than TEM's payroll cycle.

In October 1997, all of the shareholders entered into a letter of intent with Tuboscope Vetco International ("Tuboscope") whereby Tuboscope agreed to pay \$2,850,000 to purchase all the stock in TEM. The shareholders agreed that this amount would be allocated among them so that SRC received more per share for its stock than the other shareholders. Defendant stated that he had no expectation of receiving a better offer, and he believed that the agreement should be disclosed to the small minority shareholders. A portion of the purchase price was to be paid by Tuboscope at the closing of the transaction, with the remainder placed in escrow to be paid out over a three-year period. Since Arnold was unable to attend the closing of the transaction in Houston on Monday, December 22, 1997, he signed some of the closing documents in Tulsa on Friday, December 19, 1997.

In connection with the sale, SRC offered to pay a bonus to Pick and Eiserman and other TEM employees selected by Pick and Eiserman, for their efforts in facilitating the sale of TEM. SRC asserts that it advised counsel for TEM and Tuboscope of the agreement, and all of the directors and principal shareholders of TEM were aware of it prior to closing except Arnold. Arnold claims that he did not learn of the bonus until December 20, 1997. On Sunday, December 21, 1997, Arnold assigned to Allen all of his rights to receive disbursement from the escrow account in exchange for immediate payment for his shares at an increased price per share. Arnold demanded this agreement

as a condition for selling his stock. Arnold signed other closing documents he received by facsimile from Houston on Monday, December 22, 1997.

Eight months after the sale, Arnold contacted Tuboscope. He claimed that he had not learned of the bonus until after the sale and he would not have sold his shares if he had known. Arnold demanded the same price per share that SRC had received, or rescission of the sale agreement. SRC brought this suit for declaratory and other relief, claiming that Tuboscope halted all disbursements from the escrow account as a result of Arnold's actions. Arnold counterclaimed, asserting the claims addressed herein.

REVIEW

A. Standard of Review

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where there is no genuine issue of 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); Kendall v. Watkins, 998 F.2d 848, 850 (10th Cir. 1993), cert. denied, 510 U.S. 1120 (1994).

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. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Id. at 327.

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the

record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). “There mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the plaintiff. Anderson, 477 U.S. at 252. In essence, the inquiry for the Court is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Garrett v. Walker, 164 F.3d 1249, 1251 (10th Cir. 1998).

B. Agency

Arnold asserts that SRC committed its wrongful actions against him by and through an agent, Grant Pick, who served as TEM’s president. Agency does not exist merely because a third party assumes that it exists, nor because an alleged agent assumes to act as such, nor because conditions and circumstances are such as to make such an agency seem rational and probable. Bayless v. Christie, Manson & Woods Intern., Inc., 2 F.3d 347, 354 (10th Cir. 1993) (quotations omitted). An agency relationship generally exists if two parties agree that one is to act for the other or the conduct of the parties is such that it demonstrates the willingness of one to act for the other. Haworth v. Central Nat. Bank of Oklahoma City, 769 P.2d 740, 743 (Okla. 1989). An essential element of agency relationship is that the principal have some degree of control over the conduct and activities of the agent. Id.; see also Garrison v. Bechtel Corp., 889 P.2d 273, 283 (Okla. 1995). An agency relationship based on actual authority may arise by express or implied authorization. Bayless, 2 F.3d

at 352 n. 6. In other words, it may arise even if the parties do not intend to create one. Haworth, 769 P.2d at 743.

SRC argues that Arnold has failed to offer any evidence that Pick acted as agent of SRC for any purposes, and thus, SRC has no liability for Pick's acts. The parties agree that SRC allowed Pick to discuss the sale of SRC's TEM stock with Tuboscope, "within well defined guidelines." (See Sheppard Aff., attached as Ex. C to Pl. Motion, Docket # 24 and as Ex. I to Def. Resp. Br., Docket # 36.) Given the difference in price per share paid to SRC and the other principal shareholders, it appears that Pick may have negotiated a better deal for SRC than he did for the other principal shareholders. Arnold points out that SRC rewarded Pick for facilitating the sale of SRC stock. (See General Release and Settlement Agreement, attached as Ex. F. to Def. Resp. Br., Docket # 36.) The Agreement also provides an opportunity for Pick "to accept reemployment with SRC or one of its affiliates" within a six month period after the sale to Tuboscope, as well as relocation expenses associated with reemployment. (Id.)

In a letter by Pick and Eiserman to SRC in which they request the bonus, Pick indicates that the two of them "relied on the due diligence performed by SRC" when they accepted employment with TEM. (See Letter, dated November 6, 1997, attached as Ex. G to Def. Resp. Br., Docket # 36.) Pick wrote that SRC told them in the summer of 1996: "If you can get our money back, we'll pay both your salaries for a year and give you \$100,000 to invest in a new business opportunity in Tulsa." (Id.) According to the Pick, SRC again stated in September 1997: "We've set aside \$100,000 for you if we can get our money back." Pick and Eiserman requested \$100,000 as a reward/bonus for "making TEM salable and allowing SRC to get their money back with a sizable profit." They also requested "offers of employment with SRC which would include a relocation package and realtors

fees separate from the above.” (Id.) The letter concludes: “We will do our best to encourage the sale of TEM to Tuboscope because that will allow SRC to cash a check for \$1,950,000 instead of write off over \$1,000,000. SRC has always been supportive of us and very fair.” (Id.)

SRC paid salaries and benefits to Pick and Eiserman while they were employed by TEM. Pick testified that he was recruited by SRC to be TEM’s general manager. (Pick Depo., p. 13, ll. 14-17, p. 13 ll. 21-25, p. 22, ll. 1-2, attached as Ex. D. to Def. Resp. Br., Docket # 36.) He also testified that he communicated with certain individuals at SRC more than once a week while he employed with TEM. (Pick Depo., p. 17, ll. 14-17.) Another TEM shareholder testified that the principal shareholders other than SRC viewed Pick and Eiserman as “extensions of SRC.” (Coody Depo., p. 68, l. 23, attached as Ex. H to Def. Resp.Br., Docket # 36.) These facts leave room for an inference that Pick was willing to act for SRC, and SRC’s payment of Pick’s salary and benefits demonstrates that SRC may have had some degree of control over Pick’s conduct and activities.

SRC claims that it granted Pick no actual authority to act on its behalf in any dealing with Arnold. But actual authority is not a prerequisite to establishing an agent’s apparent authority. Bayless, 2 F.3d at 353. SRC argues that Arnold can point to no conduct of SRC on which he could have reasonably relied to establish apparent authority. “[B]efore a third party can hold principal liable for the acts of the agent on a theory of apparent authority, the third party must show that he changed his position because of his reasonable reliance on the conduct of the principal.” Bayless, 2 F.3d at 354; see also Sparks Bros. Drilling Co., v. Texas Moran Exploration Co., 829 P.2d 951, 954 (Okla. 1991). Apparent authority results from manifestations by the principal to a third person that another is the principal’s agent. Garrison, 889 P.2d at 283 n.27. As set forth above, Arnold has shown that SRC recruited Pick to work for TEM, paid his salary (although charged back to TEM

as a management fee), agreed to give him a bonus for facilitating the sale of its stock, and offered him future employment opportunities with SRC. Arnold could have reasonably relied on this conduct.

Under Oklahoma law, the party asserting the existence of an agency relationship carries the burden of proving the relationship exists. Daniel v. Ben E. Keith Co., 97 F.3d 1329, 1335-36 (10th Cir. 1996); see also Bayless, 2 F.3d at 352; A-Plus Janitorial & Carpet Cleaning v. Employers' Workers' Compensation Ass'n, 936 P.2d 916, 930 (Okla. 1997). Agency is generally a question of fact to be determined by the trier of fact. A-Plus, 936 P.2d at 930. However, "[w]here facts relied upon to establish the existence of the agency are undisputed and no conflicting inferences may be drawn therefrom, the question of whether an agency exists is one of law for the court." Bayless, 2 F.3d at 354. The record here reflects material facts in dispute as to whether Pick acted on SRC's behalf or whether SRC controlled his actions such that a principal-agent relationship between them was established. Conflicting inferences may be drawn from the disputed facts. The question of whether Pick acted as SRC's agent must be determined by the trier of fact.

C. Negligent and Intentional Fraudulent Inducement, Misrepresentation and Deceit

Arnold asserts that SRC, by and through its agent Grant Pick, purposely and fraudulently withheld and or misrepresented material information. As a result, Arnold sold his TEM shares at a significantly lower price per share than the amount for which SRC sold its shares.

It is well-settled hornbook law, universal in scope, that false representations which will invalidate a contract must be such as to constitute actual or legal fraud, and indispensable elements of such fraud are (1) that the representations must have been material to the contract or transaction at the time they were made; (2) the misrepresented facts must be facts of which the victim is ignorant, and which a person of ordinary sagacity and diligence would have acquired no knowledge; (3) the

misrepresentations must be well calculated to deceive, and to induce the victim to make the contract; and (4) they must have induced him to do so.

James Talcott, Inc., v. Finley, 389 P.2d 988, 992-93 (Okla. 1964). The representations at issue included, among other things, shareholder representation in negotiations with Tuboscope, TEM's true financial condition, the bonus agreement, and SRC's charges to TEM for management services.

1. Shareholder Representation in Negotiations

Arnold asserts that Pick led him to believe that Pick was negotiating the stock purchase agreement on behalf of all TEM shareholders when Pick was actually working for SRC. A transcript of a telephone conversation between Arnold and Pick on November 12, 1997, indicates that Arnold thought Pick was negotiating for SRC and all of the principal shareholders. (See Transcript, p. 3, attached as Ex. M to Pl. Motion, Docket # 24.) The transcript also appears to indicate that Pick requested some type of bonus from the principal shareholders other than SRC, but they were not promising him any share in their proceeds, and he was threatening to "kill the deal" if he did not receive some type of remuneration for his part in the negotiations. (See Transcript, pp. 1-2, 4.)

At the time of the telephone conversation, Pick had already written a letter to SRC requesting a bonus and future employment opportunities with SRC. The letter is dated November 6, 1997. (See Letter from Pick and Eiserman, attached as Ex. G to Def. Resp. Br., Docket # 36.) SRC responded affirmatively on November 10, 1997. (See Letter from SRC to Pick and Eiserman, attached as Ex. E to Def. Resp. Br., Docket # 36.) There is a genuine issue of material fact as to whom Pick was representing, the nature and extent of his representation, Pick's representation as to his role, and Arnold's knowledge regarding Pick's role. Summary judgment is inappropriate as to this claim.

2. TEM's Financial Condition

Arnold argues that Pick misrepresented to Arnold the actual financial position of TEM, and he relied upon that representation when he agreed to sell his TEM stock. Specifically, he testified that Pick represented that the balance sheet was correct, the company could not make its payroll, and the company would go bankrupt if the shareholders did not sell it. (See Arnold Depo., p. 63, ll. 4-21, p. 64, ll. 9-11, attached as Ex. A to Def. Resp. Br., Docket # 36.) Arnold argues that TEM had come to rely on SRC's financial assistance, and the financial assistance was cut off to induce him to sell his shares. (Def. Resp. Br., Docket # 36, at 14.) Arnold offers some evidence from Eiserman's testimony which indicates that SRC ceased lending money to TEM, Eiserman was concerned about making payroll, and she was concerned that failure to sell TEM to Tuboscope "might spell a financial failure for TEM." (Eiserman Depo., p. 73, ll. 1-25, attached as Ex. C to Def. Resp. Br., Docket # 36.) Arnold points out Pick gave himself and Eiserman salary raises, with SRC's blessing but without informing the other principal shareholders, despite TEM's financial condition and payroll problems. (See Pick Depo., p. 21, ll. 21-25 and p. 22, ll. 1-9, attached as Ex. D to Def. Resp. Br., Docket # 36; see also Letter, dated December 18, 1997, from Rick Coody to Mike Carrigan and Dennis Sheppard, attached as Ex. H to Pl. Reply Br., Docket # 46.)

SRC points to testimony of numerous witnesses, including Arnold, which indicates that TEM experienced financial difficulties. (Pl. Motion, Docket # 24, at 12-13.) However, the issue is not whether TEM was experiencing financial difficulties and Arnold knew it, but whether TEM's financial condition was as dire as Pick represented, *i.e.*, that the company would not be able to meet payroll and TEM would experience financial failure if Arnold refused to sell his shares at the price Pick negotiated (if, indeed, Pick made those representations). Eiserman's testimony indicates that

she was considering short-term loans or taking money out of a savings account to meet payroll when SRC stopped lending money to TEM. (Eiserman Depo., p. 73, ll. 2-19.) The transcript of Arnold's telephone conversation with Pick on November 12, 1997, suggests that Pick was considering taking money out of a cash advance to meet payroll, and asking Coody and Allen to collect money on certain accounts receivable or cut expenses in an effort to pay bills. (Transcript, p. 7, attached as Ex. M to Pl. Motion, Docket # 24.) A letter from SRC's counsel to Arnold, dated December 3, 1997, suggests that SRC was not concerned about TEM failing if the sale to Tuboscope did not occur. If the transaction failed, SRC wanted TEM to "go back to operating TEM profitably." (Letter, at 2, attached as Ex. K to Def. Resp. Br., Docket # 36.)

Conflicting inferences could be drawn from these documents. There is a genuine issue of material fact as to whether Pick made material misrepresentations that were calculated to and did deceive Arnold and induce him to enter into the contract. Summary judgment is inappropriate as to this claim.

3. Bonus Agreement

Arnold asserts that SRC failed to disclose the bonus agreement to him, and, if he had known he would not have sold his TEM shares. TEM's president was to receive a portion of the bonus for his role in the sale, and SRC, TEM's largest shareholder, paid the bonus. This fact, according to Arnold, makes the bonus agreement material. SRC argues that it disclosed the bonus agreement to Laird and the party charged with preparing the disclosure schedule, and the existence of the bonus agreement appeared on the disclosure schedule distributed by Laird before the closing of the transaction. SRC claims that Arnold used the same method of disclosure, *i.e.*, disclosure to Laird, Coody, Allen, and Maddux, when he disclosed to other minority shareholders information regarding

the allocation of receipts from the sale. SRC contends that Coody, Allen and Gary Maddux, TEM's general counsel, knew about the agreement before the closing of the sale.

Laird, Coody and Allen were concerned enough to ask Maddux whether they needed to inform Arnold about the agreement. Maddux told them the agreement was not uncommon and not material to the transaction. Based on Maddux's advice, they did not expressly disclose it to Arnold. In fact, SRC admits that Laird and Coody were aware that the bonus arrangement would have angered Arnold and caused him to refuse to sell his shares.

SRC argues that Arnold has presented no evidence showing that SRC knew the bonus agreement was material to Arnold's decision to sell, and thus, there can be no inference that SRC, as opposed to the principal individual shareholders, intended to deceive Arnold. The fact remains that SRC did not expressly disclose the existence of the bonus agreement to Arnold, and none of SRC's allegations proves that the bonus agreement was provided to Arnold or that he knew about it prior to signing certain transaction documents on December 19, 1997.

SRC points out that, after Arnold learned of the agreement on December 20, 1997, he executed additional closing documents on December 22, 1997, and he accepted accelerated payment for his shares of TEM stock. According to Arnold, he believed, when he signed the "consent to board action" on December 19, 1997, that "the deal was done" even though some document remained to be signed on December 22, 1997. (Arnold Depo., p. 107, ll. 12-25 - p. 108, ll. 1-14.) He also testified that Maddux advised him that the minority shareholders could sue him if he backed out after signing documents on December 19, 1997. (Arnold Depo., p. 110, ll. 10-25 - p. 111, ll. 1-23.)

Genuine issues of material fact exist which require submission to a jury as to whether and when Arnold knew about the existence of the bonus agreement, what role, if any, SRC played in withholding that information from Arnold, and whether Arnold waived the bonus arrangement by executing additional closing documents after disclosure of the agreement. Summary judgment is inappropriate as to this claim.

4. Management Services

Finally, SRC challenges Arnold's claim that Pick and SRC failed to disclose to him that the salaries and benefits of Pick and Eiserman were paid by SRC and then charged back to TEM as a "management service." SRC admits that no such disclosure was expressly made, but SRC argues that Arnold participated in the decision to hire Pick and Eiserman and set their salaries. SRC also argues that Arnold thus knew that an employment expense would be incurred, and incurring it as a charge from SRC as opposed to payroll and benefits expense was immaterial. Further, SRC argues that there is no evidence SRC knew Arnold considered the distinction to be material or that SRC intended to deceive Arnold by this means of accounting for the salaries and benefits of Pick and Eiserman.

Arnold did not address this allegation in his response to SRC's motion for partial summary judgment. The Court is unaware of any evidence which would create a genuine issue of material fact as to whether Arnold was deceived by SRC's failure to disclose the means by which TEM accounted for the salaries and benefits of Pick and Eiserman. Accordingly, summary judgment is granted as to this narrow issue. However, Arnold may introduce evidence of SRC funding of salaries by means of a management services charge in his attempt to prove agency, or control, or a special relationship between or among SRC, Pick, and/or Eiserman.

D. Tortious Interference with Prospective Economic Gain

Arnold alleges that the actions of SRC and Pick tortiously interfered with his prospective economic gain because he did not receive the same share price SRC received when TEM sold to Tuboscope. The tort of interference with prospective economic advantage² is recognized in Oklahoma. Overbeck v. Quaker Life Ins. Co., 757 P.2d 846 (Okla. Ct. App. 1984); see also Crystal Gas. Co., v. Oklahoma Natural Gas Co., 529 P.2d 987 (Okla. 1974). No Oklahoma case specifically sets forth the elements of the tort, but two Oklahoma Supreme Court cases specifically reference three Michigan cases and the Restatement (Second) of Torts for the elements of the tort. Gaylord Entertainment Co. v. Thompson, 958 P.2d 128, 150 n. 96 (Okla. 1998); Brock v. Thompson, 948 P.2d 279, 293 n. 58 (Okla. 1997).

The Michigan case law provides: “The elements of tortious interference with a economic relations are: (1) the existence of a valid business relation or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) an intentional interference causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship has been disrupted.” Wilkerson v. Carlo, 101 Mich. App. 629, 300 N.W.2d 658, 659 (1980); see also Lakeshore Community Hospital, Inc. v. Perry, 212 Mich. App. 396, 538 N.W.2d 24, 27 (1995); Weitting v. McFeeters, 104 Mich. App. 188, 304 N.W.2d 525, 529 (1981). These

² Courts often use the term “interference with prospective economic advantage” interchangeably with interference with prospective business advantage, interference with financial advantage, interference with prospective contractual relations, or interference with business relations. See, e.g., Occusafe, Inc. v. EG&G Rocky Flats, Inc., 54 F.3d 618, 622 (10th Cir. 1995); Dow Chemical Corp. v. Weevil-Cide Co., Inc., 897 F.2d 481, 488 n. 7. (10th Cir. 1990). Overbeck distinguishes between interference with economic advantage and interference with a contractual relationship: “Interference with a prospective economic advantage usually involves interference with some type of reasonable expectation of profit, whereas interference with a contractual relationship results in loss of a property right.” 757 P.2d at 847-48.

elements closely track those cited by the parties in this matter. The Oklahoma Supreme Court has emphasized the expectancy aspect in years past: “Where there is no existing contract, as in the tort of interference with business relations, the plaintiff must show either that prospective economic advantage would have been achieved had it not been for such interference or that there was, in view of all the circumstances, a reasonable assurance thereof,” Crystal Gas. Co., 529 P.2d at 990 (quoting 45 Am. Jur. 2d, *Interference* § 6).

The Restatement provides: “One who intentionally and improperly interferes with another’s prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.” Restatement (Second) of Torts § 766B (1977). Oklahoma case law also focuses on the nature of the interference: “In most instances the tort of interference with a prospective economic advantage is not recognized unless some intentional or improper conduct or means exist on the part of the defendant.” Overbeck, 757 P.2d at 848. The Overbeck court found that, in the absence of evidence of malice or intentional conduct, alleged interference with prospective economic advantage did not state a cause of action. Id. at 848-49.

Consideration of several factors may assist in determining whether interference is improper: “(a) the nature of the actors’ conduct, (b) the actor’s motive, (c) the interests of the other with which the actor’s conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties." Restatement (Second) of Tort, § 767 (1977).

Arnold alleges that he expected future economic benefits as a co-shareholder in TEM with SRC. The expected economic benefit took the form of an equal share price when the company sold to Tuboscope. Apparently, Tuboscope attempted to force a price reduction after the letter of intent and due diligence were performed because the value of the company was less than Tuboscope originally thought. Arnold challenged the accounting procedures employed by Eiserman, and he wanted SRC to participate in the price reduction. (See Letter, dated December 1, 1997, from Arnold to SRC, attached as Ex. J to Def. Resp. Br., Docket # 36.) SRC refused. (See letter, dated December 3, 1997, from Sheppard to Arnold, attached as Ex. K to Def. Resp. Br. Docket # 36.)

SRC argues that Arnold never expected to receive the same price SRC received because Arnold stated in his deposition that he was "satisfied that was all that was going to be offered." (Arnold Depo., p. 40, ll. 8-9, attached as Ex. F. to Pl. Motion, Docket # 24.) The deposition transcript indicates, however, that Arnold was responding to a question about the total price Tuboscope offered, not the share price. (Id., p. 39, ll. 24-25 - p. 40., ll. 1-17.) Further, Arnold testified that he suggested that Pick try to negotiate a higher price after that, but Pick refused. (Id., p. 40, ll. 19-23.)

The interference, according to Arnold, took place when SRC did not disclose its bonus agreement with Pick for representing its interests and when Pick convinced Arnold that TEM would be insolvent and Arnold would lose his investment if the sale was not consummated. Arnold does not argue, as SRC claims, that SRC interfered with his prospective economic advantage by intentionally decreasing the value of TEM, although he suggests that Eiserman and Pick ("SRC

handpicked employees”) partially caused the price reduction. Regardless of how the price was reduced, the question remains whether SRC intentionally and improperly interfered with Arnold’s expectation that he would receive the same share price as SRC received. As set forth in the preceding section, genuine issues of material fact exist as to whether SRC had a duty to disclose the bonus agreement and failed to do so, and/or had a duty to disclose TEM’s true financial situation and failed to do so, inducing Arnold to enter into the purchase agreement. Likewise, genuine issues of material fact exist as to whether any alleged failure to disclose constituted interference with Arnold’s prospective economic advantage.

E. Breach of Fiduciary Duty

Arnold contends that SRC owed a fiduciary duty to Arnold to insure that he was informed of all material information that might have influenced his decision to sell his TEM stock, and SRC breached its fiduciary duty by failing to disclose the bonus agreement. Arnold bases his claim on the fact that SRC, with 45% ownership of the TEM shares, was the “primary” TEM shareholder. He also points out that Pick, the president of the corporation, considered SRC to be a majority shareholder. (Pick Depo., p. 21, l. 16 to p. 22, l. 2, attached as Ex. D. to Def. Resp. Br., Docket # 36.) Arnold claims that Pick acted as SRC’s agent in facilitating the sale of TEM, gaining a personal economic advantage for himself and SRC as a result. It is clear, however, that TEM was not the majority shareholder: SRC did not own more than 50% of TEM’s stock. See Black’s Law Dictionary 955 (6th ed. 1990).

It is true, as SRC asserts, that majority shareholders owe a fiduciary duty to minority shareholders not to misuse their power or fail to protect the interests of the minority. See, e.g. Renberg v. Zarrow, 667 P.2d 465, 472 (Okla. 1983). However, a shareholder does not necessarily

have to be a majority shareholder to exercise control over the corporation and thus owe a fiduciary duty to the minority shareholders.

The realities of corporate practice make it necessary to recognize that a stockholder owning less than a majority of the outstanding shares may, by various perfectly legitimate devices and arrangements, effectively control the conduct of corporate affairs. Hence, within the context of this discussion, such a stockholder will generally be considered 'dominant,' although there is no attempt to refer to any specific percentage of stockholding by any person or group as the minimum required to constitute a position of dominance, as the cases themselves do not approach the subject on this basis.

Ferdinand S. Tinio, Annotation, Dominant Shareholder's Accountability to Minority for Profit, Bonus, or the Like, Received on Sale of Stock to Outsiders, 38 A.L.R.3d 738, n.2 (1971); see also M. Thomas Arnold, Shareholder Duties Under State Law, 28 Tulsa L.J. 213, 228 (1992) ("A shareholder who exercises control over or 'dominates' a corporation's affairs is a fiduciary.")

In Guaranty Laundry Co. v. Pulliam, 191 P.2d 975 (Okla. 1948), for example, the plaintiff and defendant each owned 50 percent of the corporate stock. The court stated: "Although not a minority stockholder in the strict sense of the term, we are of the opinion defendant was a proper party to seek relief in a court of equity, in order to protect herself and others standing in the same position, from the acts of plaintiff as president and manager of the company and so able to control the actions of the board of directors." Id. at 980. The Tenth Circuit has explained that:

' . . . Every stockholder, including a majority holder, is at liberty to dispose of his shares at any time and for any price to which he may agree without being liable to other stockholders . . . as long as he does not dominate, interfere with, or mislead other stockholders in exercising the same rights.' In other words, a dominant or majority stockholder does not become a fiduciary for other shareholders by reason of mere ownership of stock. It is only when one steps out of the role as a stockholder and acts in the corporate management, with disregard for the interests and welfare of the corporation and its stockholders that he assumes the burden of fiducial responsibility.

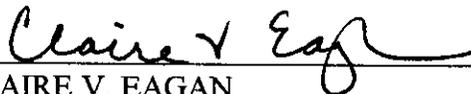
McDaniel v. Painter, 418 F.2d 545, 547 (10th Cir. 1969)(citations omitted).

The issue, then, is not whether SRC was a majority shareholder, but whether it exercised control over the corporation through Pick, who served as president and manager of TEM. That issue presents a question of fact which is inextricably intertwined with the determination of whether Pick acted as SRC's agent. "Under Oklahoma law, the existence of a fiduciary relationship is a question of fact which must be proven by the party asserting the relationship." Quinlan v. Koch Oil Co., a Div. of Koch Industries, Inc., 25 F.3d 936, 942 (10th Cir. 1994). Arnold should have the opportunity to prove that relationship before the trier of fact. Summary judgment is inappropriate as to this claim.

CONCLUSION

For the foregoing reasons, plaintiff's Motion for Partial Summary Judgment (Docket # 24) is **DENIED** as to Arnold's remaining counterclaims, except as to the claim for negligent and intentional fraudulent inducement, misrepresentation, or deceit based on non-disclosure of SRC's charges to TEM for management services, for which summary judgment is **GRANTED**.

Dated this 28th day of April, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

BRYAN R. RAMER,
Petitioner,

vs.

RITA MAXWELL,
Respondent.

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ENTERED ON DOCKET
DATE MAY 01 2000

Case No. 97-CV-383-B

FILED
APR 28 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Petitioner's amended petition for writ of habeas corpus (Docket #30), filed on September 7, 1999. Respondent has filed a response to the amended petition (#34) and Petitioner has filed a reply to Respondent's response (#39). Petitioner has also filed a "notice to the court, and motion for a ruling" (#40). For the reasons discussed below, the Court finds this petition should be denied. As a result of today's ruling, Petitioner's motion for a ruling has been rendered moot.

BACKGROUND

Petitioner is incarcerated pursuant to convictions entered December, 1978, in Tulsa County District Court, Case Nos. CRF-78-1025, 78-1026, 78-1027, and 78-1028, upon Petitioner's pleas of guilty. After serving almost five (5) years of his sentence, Petitioner escaped from custody on November 25, 1983 by failing to return to the Lawton Community Treatment Center from a pass. Petitioner was apprehended on November 26, 1983, in Torrance County, New Mexico, following a shoot-out with New Mexico law enforcement officers. Petitioner was incarcerated in New Mexico until July 3, 1992, as a result of the convictions from the shoot-out. On July 4, 1992, pursuant to a

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detainer lodged by the Oklahoma Department of Corrections ("ODOC"), Petitioner returned to Oklahoma in the custody of ODOC. On July 10, 1992, ODOC officials prepared a misconduct report charging Petitioner with escape and served the misconduct on Petitioner that same day. On July 15, 1992, a hearing was held before a three member ODOC disciplinary committee. Petitioner was found guilty of administrative misconduct, i.e., escape, and as a result, all of Petitioner's earned credits, a total of 1, 511 days, were revoked.

After exhausting his administrative remedies, see #39, Exs. M-1 through M-7, Petitioner filed a petition for writ of mandamus in the District Court of Alfalfa County. Petitioner claimed that (1) he was not given proper notice of the misconduct report; (2) the disciplinary hearing committee was not impartial because it failed to consider his claims of duress and of mitigating circumstances; and (3) the ODOC procedures that provided for the loss of all accumulated earned credits for escape or attempted escape were adopted after Petitioner committed the offenses for which he was convicted and, therefore, the application of the procedures to his sentence violated *ex post facto* principles. See #6, Ex. A. In his request for relief, Petitioner asked for the expungement of the misconduct report, the return of the forfeited earned credits, and the return of his previous (pre-misconduct report) classification. See id. On August 23, 1994, the state district court denied the requested relief (#6, Ex. B).

Petitioner attempted to appeal the district court's decision by filing a petition in error in the Supreme Court of Oklahoma. However, because the Oklahoma Court of Criminal Appeals ("OCCA") has exclusive jurisdiction of criminal matters in Oklahoma, the Supreme Court of Oklahoma transferred the matter to the OCCA. See #30, Ex. A. On May 15, 1995, the OCCA dismissed the appeal, without considering Petitioner's claims, as a result of Petitioner's failure to file

a brief in support of his petition as required by Rule 10.1, *Rules of the Court of Criminal Appeals*. (#30, Ex. B). Petitioner sought reconsideration of the dismissal. After the OCCA denied his request for reconsideration (#39, Ex. D), Petitioner filed a "petition for writ of mandamus or in the alternative for writ of certiorari" (#39, Ex. E) in the Supreme Court of Oklahoma. Upon denial of relief by the Supreme Court of Oklahoma, Petitioner filed a petition for writ of certiorari in the United States Supreme Court. The petition was denied on April 29, 1996 (#30, Ex. D).

Petitioner filed his original petition in this case on April 22, 1997 (#1). The amended petition presently before the Court (#30) was filed on September 7, 1999. In his amended petition, Plaintiff raises the following claims, each based on the administration of his sentence by the Oklahoma Department of Corrections ("ODOC"):

Ground One: 14th Amendment -- Due Process of Law violations -- (1) failure of notice, (2) denial of an impartial tribunal, and (3) application of ex post facto laws in violation of U.S. Const. Art. I, § 10, cl. 1, (that impermissibly increase the time Ramer must spend in prison, the punishment made more onerous long after the offense had been committed).

Ground Two: 14th Amendment -- Due Process of Law violation and application of EX POST FACTO LAWS in violation of U.S. Const. Art. I, § 10, cl. 1, (that impermissibly increase the time Ramer must spend in prison, the punishment made more onerous long after the offense had been committed).

(#30). Petitioner's Ground One is premised on the events surrounding the July 15, 1992, disciplinary hearing resulting in the revocation of Petitioner's previously earned sentence credits. Petitioner premises his second proposition of error on the fact that effective November 1, 1988, Okla. Stat. tit. 57, § 138 was amended and sentence credits for blood donations by Oklahoma inmates were

eliminated. Petitioner contends that the elimination of the sentence credits constitutes an *ex post facto* violation.

In response to Petitioner's claims (#34), Respondent argues that Petitioner's first claim is procedurally barred from this Court's review as a result of the OCCA's dismissal of the petition in error based on Petitioner's failure to comply with the OCCA's procedural rules. Respondent further argues that each of Petitioner's subclaims raised in ground one is without merit. As to Petitioner's second ground of error, Respondent contends, without specifically addressing Petitioner's blood credits claim, that Petitioner has not demonstrated that his sentence has been administered in violation of the *ex post facto* clauses of the United States Constitution.

ANALYSIS

A. 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. Coleman v. Thompson, 501 U.S. 722, 729 (1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995). 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). However, a state rule used to establish a procedural default may be inadequate and may not bar federal relief if the state rule as applied did not allow "a reasonable opportunity to have the issue as to the claimed [federal] right heard and determined by the state court' in the circumstances of this case." Michel v. Louisiana, 350 U.S. 91,

93 (1955) (quoting Parker v. Illinois, 333 U.S. 571, 574 (1948)).

In the instant case, the OCCA ruled that Petitioner defaulted his claims arising from the misconduct hearing when he failed to comply with Rule 10.1, *Rules of the Court of Criminal Appeals*, requiring submission of a supporting brief along with the petition in error. As a result of Petitioner's default, the OCCA imposed a procedural bar on Petitioner's claims and dismissed the appeal. Petitioner's failure to comply with the requirements of Rule 10.1 was the sole reason for the OCCA's dismissal of Petitioner's appeal. See #30, Ex. B.

The OCCA's dismissal was clearly based on an independent state procedural ground. The imposition of a procedural bar was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. However, this Court cannot say that the OCCA's reliance on Rule 10.1 for imposition of a procedural bar was an "adequate" ground under the facts of this case. Here, Petitioner made a good faith attempt, albeit a misguided attempt, to comply with state procedural rules in perfecting an appeal from the state district court's denial of his request for extraordinary relief. At the time Petitioner filed his appeal, it was established that the Oklahoma Court of Criminal Appeals had exclusive jurisdiction of cases involving credits affecting a prisoner's sentence. Waldon v. Evans, 861 P.2d 311, 312-13 (Okla. Crim. App. 1993); State v. Mahler, 786 P.2d 82, 85-86 (1990). However, as late as 1992, the Supreme Court of Oklahoma, after determining that a prisoner's petition in error seeking reversal and expungement of a disciplinary hearing had been timely filed, stated that the "appeal shall proceed in its ordinary course, in the manner contemplated by the Rules of Appellate Procedure in Civil Cases, 12 O.S. 1991, Ch. 15, App. 2." Woody v. State, 833 P.2d 257, 260 (Okla. 1992) (determining that "mailbox" rule applied to render petition in error timely filed). Furthermore, prior to 1990, the civil appellate courts of

Oklahoma considered sentence credit cases filed by prisoners. See, e.g., Mitchell v. Meachum, 770 P.2d 887 (Okla. 1988); Prock v. District Court, 630 P.2d 772 (Okla. 1981); Baker v. Kaiser, 793 P.2d 877 (Okla. Ct. App. 1990).¹

Against this somewhat confusing procedural background, Petitioner submitted his appeal of the state district court's denial of his petition for writ of mandamus pursuant to the *Rules of Appellate Procedure in Civil Cases*, to the Supreme Court of Oklahoma. Under those rules, a supporting brief is either not required, see Rule 1.203(A)(3), or is not required to be filed until sixty (60) days after receipt of notice of completion of the record on appeal, see Rule 1.28. Citing State ex rel. Henry v. Mahler, 786 P.2d 82 (Okla. 1990), the Supreme Court of Oklahoma transferred the appeal to the OCCA.

In contrast to the Rules governing submission of briefs in civil appeals, Rule 10.1, *Rules of the Court of Criminal Appeals*, requires the petitioner to submit, *inter alia*, a petition and supporting brief in order to appeal from the state district court's denial of an extraordinary writ. Of course, since Petitioner had filed his petition in error pursuant to the rules governing civil appeals, he had not submitted a supporting brief when the appeal was transferred to the OCCA. Nonetheless, because Petitioner had not submitted a supporting brief along with his petition as required under the rules governing criminal appeals, the OCCA dismissed the appeal citing Petitioner's failure to comply with its rules. This Court finds that under these facts, the state rule providing the basis for the procedural default as applied by the OCCA deprived Petitioner of any meaningful review of his due process claim. Cf. Brecheen v. Reynolds, 41 F.3d 1343 (10th Cir. 1994). As a result, the procedural default

¹The implied overruling of the appellate procure followed in each of the cited opinions was recognized in Waldon, 861 P.2d at 312-13.

relied on by Respondent is not adequate in this case to preclude federal habeas corpus review of Petitioner's claims asserted in his first proposition of error. Therefore, the Court will proceed with a review of Petitioner's claims asserted in Ground 1.

B. Ground 1

As his first proposition of error, Petitioner asserts that he was denied due process of law in violation of the Fourteenth Amendment at his July 1992 disciplinary hearing because (1) he was denied meaningful notice, and (2) he was denied an impartial tribunal. He also asserts that the revocation of all of his previously earned sentence credits based on ODOC policy enacted after the 1978 commission of the crimes for which he was convicted constituted an *ex post facto* violation.

It is well settled "that an inmate's liberty interest in his earned good time credits cannot be denied 'without the minimal safeguards afforded by the Due Process Clause of the Fourteenth Amendment.'" Taylor v. Wallace, 931 F.2d 698, 700 (10th Cir.1991) (quoting Ponte v. Real, 471 U.S. 491, 495 (1985)); Mitchell v. Maynard, 80 F.3d 1433, 1444-45 (10th Cir. 1996). The Supreme Court has held, however, that "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." Wolff v. McDonnell, 418 U.S. 539, 556 (1974). To meet the standards of due process in a disciplinary proceeding under Wolff, the inmate must receive: (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. Superintendent, Mass. Correctional Inst. v. Hill, 472 U.S. 445, 454 (1985). If there is some evidence to support the

disciplinary committee's decision to revoke good time credits, then the requirements of procedural due process have been met. Id. "Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses or weighing of the evidence. Instead, the relevant conclusion is whether there is any evidence that could support the conclusion reached by the disciplinary board." Id. at 455-56. The decision can be upheld even if the evidence supporting the decision is "meager". Id. at 457.

Petitioner does not dispute that he was given advance written notice of the disciplinary charge. In fact, at least five days prior to his hearing he was given a written copy of the misconduct report indicated he was charged with escape. He also does not dispute he was provided a hearing where he had the opportunity to present evidence and to call witnesses. Also, Petitioner has never contended that he was not provided a written statement by the fact finder of the evidence relied on and the reasons for the disciplinary hearing. Furthermore, as pointed out by Respondent, it is indisputable "that petitioner fled the state of Oklahoma and shot it out with the police in New Mexico." (#34, at 13). In this case, there was some evidence to support the disciplinary committee's finding that Petitioner was guilty of escape. Superintendent, 472 U.S. at 454. Therefore, the Court finds that Petitioner was provided all the due process required under Wolff.

However, Petitioner asserts that he was denied "proper notice" of the misconduct report (#39). He argues that the disciplinary proceedings were barred by the equitable doctrine of laches, that ODOC failed to comply with its own regulations in issuing the misconduct report, and that ODOC could have held the disciplinary hearing prior to Petitioner's return to ODOC physical custody. The Court rejects Petitioner's claim that the disciplinary proceedings were barred by laches. In order to prove the affirmative defense of laches, the defendant, Petitioner in this case, must

demonstrate that there has been an unreasonable delay in asserting the claim and that he was materially prejudiced by that delay. Hutchinson v. Pfeil, 105 F.3d 562, 564 (10th Cir. 1997) (citing Olansen v. Texaco Inc., 587 P.2d 976, 985 (Okla. 1978); Clark v. Unknown Heirs of Osborn, 782 P.2d 1384 (Okla. 1989)). In this case, the delay in filing the misconduct report is directly attributable to Petitioner's own actions following his escape from ODOC custody and resulting in his lengthy incarceration in the State of New Mexico. Petitioner argues that he tried repeatedly to determine whether escape charges had been filed against him in Oklahoma and was informed that no charges had been filed. As a result, Petitioner asserts that ODOC concealed the existence of the misconduct report from him. However, although the record before the Court indicates that no criminal escape charge was ever filed against Petitioner, nothing supports Petitioner's contention of concealment by ODOC. The fact that no criminal charges were filed would not preclude ODOC from proceeding on an administrative misconduct. Because Petitioner was incarcerated in New Mexico, the Court finds that the delay in filing the misconduct report was not unreasonable and the doctrine of laches does not apply.

Petitioner also asserts that he was denied "proper notice" of the misconduct and that ODOC violated its own regulations in providing the notice, thereby violating Petitioner's right to due process. However, the Court is not persuaded by Petitioner's attempt to derive additional liberty interests from ODOC's regulations addressing disciplinary procedures. Under Sandin v. Conner, 515 U.S. 472, 484 (1995), inmates have no liberty interest based on regulations regarding disciplinary measures unless those measures "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Of course, prior to revoking Petitioner's previously earned credits, ODOC was required to provide due process as mandated by Wolff. However, under the facts of this case, additional due process concerns are not implicated by the notice of the misconduct received by

Petitioner upon his return to ODOC custody following his escape more than eight (8) years previously. As stated above, the delay in conducting the disciplinary hearing resulted from Petitioner's own criminal conduct in New Mexico as opposed to ODOC's failure to comply with its own regulations. Because the Court has already concluded that the minimum due process requirements of Wolff were satisfied prior to the revocation of Petitioner's earned credits, the Court finds Petitioner has failed to establish he was denied due process in conjunction with his disciplinary hearing.

Petitioner also alleges that he had a legitimate defense to the escape misconduct that the disciplinary committee failed to acknowledge. However, as stated above, some evidence supported the disciplinary committee's conclusion that Petitioner was guilty of escape. It is not this Court's job to address the validity of that evidence, see Mitchell v. Maynard, 80 F.3d 1433, 1435 (10th Cir. 1996), or the disciplinary committee's consideration of the evidence. The Court cannot evaluate the legitimacy of Petitioner's asserted defense and therefore, rejects his challenge on that basis.

According to Petitioner, he was denied an impartial tribunal during his disciplinary proceedings. Petitioner asserts that the disciplinary committee refused to consider his defense and that "[t]he committee had decided the case before the hearing started." (#39 at 24-25). However, absent a showing that the committee engaged in "arbitrary decision making," Wolff, 418 U.S. at 571, there is no basis for finding a due process violation. Under the facts of this case, Petitioner has failed to demonstrate that the committee's rejection of his defense was in any way arbitrary. Petitioner's claim is rejected.

Lastly, the Court finds unpersuasive Petitioner's contention that the revocation of all of his previously earned sentence credits constituted an *ex post facto* violation. The revocation of

Petitioner's previously earned credits was imposed as the result of his November 25, 1983 escape from ODOC custody. The regulation allowing revocation of all previously earned credits became effective November 14, 1983, or eleven (11) days prior to Petitioner's escape. See #39, Ex. J-1. In order for an *ex post facto* violation to occur, the law must be retrospective, applying to events which occurred before its enactment. Fultz v. Embry, 158 F.3d 1101, 1102 (10th Cir. 1998). In this case, the ODOC regulation allowing for revocation of all earned credits was applied to Petitioner based on his escape, an event which occurred after the effective date of the regulation. Thus, the regulation was not retrospective and there was no *ex post facto* violation.

C. Ground 2

As his second proposition of error, Petitioner asserts that ODOC has applied Okla. Stat. tit. 57, § 138 (1988) to the calculation of his sentence credits in violation of the *ex post facto* clause. Specifically, Petitioner claims that in 1978, when he committed the crimes for which he was convicted, prisoners were credited with 20 days of sentence credit for donating a pint of blood. Prisoners were allowed to donate up to 4 pints of blood per year, allowing the accumulation of 80 days of sentence credit per year for donating blood. However, effective November 1, 1988, the State of Oklahoma substantially amended its earned-credit statute. One of the changes incorporated in the amended statute is the elimination of the opportunity for inmates to earn credits by donating blood. Petitioner claims that he has been willing and able to donate blood during the entire course of his incarceration. However, he has been denied the opportunity to donate and has, therefore, been denied sentence credits totaling in excess of 920 days.

Petitioner admits he has never presented this claim to the state courts. However, the Court

finds that it would be futile to require Petitioner to present this claim to the state courts because the OCCA has ruled squarely on this issue.² In Hallmark v. State, 795 P.2d 113 (Okla. Crim. App. 1990), the OCCA rejected an identical claim, holding that while Okla. Stat. tit. 57, § 65 (1981) provided for the mandatory crediting of time for certain amounts of blood given, "it [did] not mandate that the inmate be given the opportunity to give blood." Id. at 115. The OCCA also stated that "it is enough to say that Petitioner is not entitled to the credit because the blood was not donated." Id. In the instant case, Petitioner complains that the OCCA's reasoning is untenable under the rules of statutory construction and that the ODOC's refusal to award blood credits constitutes an *ex post facto* violation. The Court disagrees.

"[T]he constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them." Collins v. Youngblood, 497 U.S. 37, 41 (1990). As discussed above, an *ex post facto* violation may occur if a law is retrospective, applying to events which occurred before its enactment, and it must disadvantage the individual, by "altering the definition of criminal conduct or increasing the punishment for the crime." Fultz v. Embry, 158 F.3d 1101, 1102 (10th Cir. 1998) (quoting Lynce v. Mathis, 519 U.S. 433 (1997)). A fundamental element of a cognizable *ex post facto* claim is that the application of the law somehow disadvantages the claimant. Devine v. New Mexico Dep't of Corrections, 866 F.2d 339, 341 (10th Cir. 1989).

In Ekstrand v. State, 791 P.2d 92 (Okla. Crim. App. 1990), *overruled on other grounds*,

²Because it would be futile for Petitioner to present this claim to the state courts, the exhaustion requirement of § 2254(b) is satisfied. See Wallace v. Cody, 951 F.2d 1170, 1171 (10th Cir. 1991) (exhaustion of state remedies futile where highest court has recently decided the precise issue petitioner seeks to raise in federal habeas petition).

Waldon v. Evans, 861 P.2d 311 (Okla. Crim. App. 1993), the OCCA held that application of the amended statute to inmates convicted prior to November 1, 1988 "runs afoul of the prohibition of *ex post facto* laws." Id. at 95. In order to avoid a constitutional violation, the ODOC now tabulates for each inmate how many credits he has earned under each version of the statute on a monthly basis and automatically awards the inmate the greater of the two totals. Thus, ODOC's application of Okla. Stat. tit. 57, § 138 has not enhanced Petitioner's punishment from what it would have been had the law never been amended. In fact, Petitioner has benefitted from the amendments since he is awarded more credits in those months where the new system is more favorable to him than the old. As a result, Petitioner has no *ex post facto* claim.

Furthermore, the Court rejects Petitioner's assertion that an *ex post facto* violation has occurred because the elimination of sentence credits for blood donations has made his sentence more onerous. Under the pre-1988 version of the statute, the award of sentence credits occurred only if the prisoner donated blood. Thus, Petitioner's belief that under the pre-1988 statute he would be entitled to the credits is premised on the assumption that he would donate blood. The Court finds that Petitioner's assumption is speculative and, as a result, his argument that the administration of his sentence under the amended statute has effected a more onerous punishment is also premised on speculation and must be rejected. See California Dep't of Corrections v. Morales, 514 U.S. 499, 509-510 (1995) (finding no *ex post facto* violation where a retroactive change "create[d] only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes"). The Court finds that Petitioner's *ex post facto* challenge to the administration of his sentence is without merit and Petitioner is not entitled to habeas corpus relief on this claim.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States, his petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for writ of habeas corpus, as amended, is **denied**. Petitioner's motion for a ruling (Docket #40) is **moot**.

SO ORDERED THIS 27th day of Apr., 2000.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 28 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES MONFORT,

Plaintiff,

vs.

OMNICARE, INC.,

Defendant.

Case No. 99-CV-413-K(J)

ENTERED ON DOCKET

DATE MAY 01 2000

REPORT AND RECOMMENDATION

The following motions are now before the Court:

1. Defendant's motion to dismiss its counterclaim without prejudice, [Doc. No. 25]; and
2. Plaintiffs' motion for fees and costs, [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. A hearing was held and arguments heard on April 27, 2000. For the reasons discussed below, the undersigned recommends that Defendant's motion to dismiss its counterclaim without prejudice be **GRANTED** and that Plaintiff's request for fees and costs be **DENIED**.

I. DISCUSSION

At all relevant times, Plaintiff was the President and CEO of Saber Management Systems, Inc. ("Saber"). In March 1997, Defendant loaned Saber approximately \$2 + million. Pursuant to the terms of the loan agreement, Defendant was given, and it exercised, a right to place its nominee on Saber's board of directors. Plaintiff alleges in his Complaint that Defendant, through its board nominee, effectively took control

of Saber. Plaintiff's Complaint asserts three claims alleging that: (1) Defendant breached its fiduciary duty to Saber, (2) Defendant fraudulently induced Saber to enter into the loan agreement, and (3) Defendant intentionally interfered with Plaintiff's contractual relationship with Saber.

Defendant filed an answer to Plaintiff's Complaint and a counterclaim. In its counterclaim, Defendant alleges that at the time it entered into the loan agreement, Plaintiff and Saber entered into a management agreement. Defendant alleges that the management agreement was a material inducement to the loan agreement Defendant executed with Saber. Defendant alleges in its counterclaim that it is a third party beneficiary of the management agreement. Defendant also alleges that Plaintiff has breached the management agreement, that this breach caused harm to Saber, and that the harm to Saber caused Saber to default on the \$2+ million dollar loan Saber owed to Defendant.

Defendant moved to dismiss Plaintiff's first two causes of action, arguing that Plaintiff lacked standing to assert them. Defendant argued that the first two causes of action in Plaintiff's Complaint belonged to Saber and not Plaintiff. Plaintiff responded to Defendant's motion to dismiss by filing a motion for leave to amend his Complaint to add Saber as a party. On March 14, 2000, Judge Terry Kern denied Plaintiff's motion for leave to amend because it was filed after the deadline for amendments established by the case management plan in this case. Judge Kern ordered Plaintiff to respond to the merits of Defendant's motion to dismiss. Three days later, on March 17th, Plaintiff filed a response to Defendant's motion to dismiss

conceding that the first two claims in the Complaint belonged to Saber and that he lacked standing to assert them. Two weeks later, on March 29th, Defendant filed a motion to dismiss its counterclaim without prejudice. Plaintiff opposes the dismissal of Defendant's counterclaim without prejudice, arguing that the claim should be dismissed with prejudice.

Fed. R. Civ. P. 41(a)(2) governs Defendant's request for a voluntary dismissal of its counterclaim. Courts generally allow dismissal of claims without prejudice unless the opposing party would "suffer some plain legal prejudice other than the mere prospect of a second lawsuit." Keal v. Monarch Life Insurance Co., 126 F.R.D. 567, 569 (D. Kan. 1989). The possible filing of a second lawsuit, even if the party dismissing would gain a tactical advantage from refiling the action in a different court, is not legal prejudice that would justify denying voluntary dismissal. American National Bank and Trust Co. v. BIC Corp., 931 F.2d 1411, 1412 (10th Cir. 1991). To avoid a voluntary dismissal, the opposing party must establish that the dismissal would cause manifest and prejudicial harm. Saviour v. Revco Discount Drug Centers, Inc., 126 F.R.D. 569, 570 (D. Kan. 1989). Factors relevant to determining whether defendants would suffer legal prejudice include: the opposing party's efforts and funds expended towards preparing for trial; the claimant's undue delay or lack of diligence in prosecuting the action; the adequacy of the claimant's explanation for needing to dismiss; claimant's diligence in moving to dismiss; the present stage of litigation; and duplicative expenses involved in a likely second suit. Clark v. Tansy, 13 F.3d 1407, 1411 (10th Cir. 1993).

The undersigned finds that Plaintiff would suffer no prejudice at this stage of the litigation from the voluntary dismissal of Defendant's counterclaim. This case is not close to trial, and Plaintiff has presented no evidence that he has expended funds or efforts in connection with Defendant's counterclaim that were not also necessarily expended in connection with the claims he originally asserted in this action, but were later dismissed. As soon as Plaintiff agreed to a dismissal of its first two causes of action, Defendant diligently and timely moved for a dismissal of its counterclaim. Defendant has offered a rational reason for why it is now seeking dismissal. Now that Plaintiff is no longer asserting a claim that Defendant mismanaged Saber, Defendant is willing to drop its counterclaim alleging that Plaintiff mismanaged Saber. The undersigned finds, therefore, that the factors articulated by the Tenth Circuit in Clark v. Tansy support dismissal of Defendant's counterclaim without prejudice.

Plaintiff's primary argument against dismissal without prejudice is Plaintiff's belief that Defendant is attempting to forum shop its counterclaim. Defendant has recently filed a lawsuit against Saber, not Plaintiff, in Ohio to recover from Saber the \$2 + million that Defendant loaned to Saber. Plaintiff believes that Defendant wishes to dismiss its counterclaim against Plaintiff here and refile that claim against Plaintiff in Ohio. At the hearing counsel for Defendant denied that Defendant had any present intention of filing a claim in any other forum against Plaintiff, but that it reserved the option to do so if Defendant were again affirmatively sued by Saber. The undersigned finds that Plaintiff has failed to present sufficient evidence that Defendant is forum shopping or otherwise seeking a dismissal of its counterclaim in

bad faith. In any event, as the Tenth Circuit has held, the possible filing of a second lawsuit, even to obtain a tactical advantage, is not sufficient legal prejudice to justify the denial of a voluntary dismissal without prejudice. BIC Corp., 931 F.2d at 1412.

Rule 41(a)(2) permits a district court to dismiss an action without prejudice "upon such terms and conditions as the court deems proper." These conditions are designed to alleviate any prejudice a defendant might otherwise suffer upon refiling of an action. BIC Corp., 931 F.2d at 1412. The court should, however, impose only those conditions which actually will alleviate harm to the defendant. Id. Short of dismissal with prejudice, the only other condition of dismissal Plaintiff argues should be imposed is the payment of Plaintiff's fees and costs of defending the counterclaim. As previously discussed, however, Plaintiff has presented no evidence that he has expended funds defending Defendant's counterclaim which were not also necessarily expended in connection with his own claims which were eventually dismissed. The undersigned finds, therefore, that the payment of fees and costs should not be attached, pursuant to Rule 41(a)(2), as a condition to dismissal of Defendant's counterclaim without prejudice.

If Defendant's counterclaim is dismissed, with or without prejudice, Plaintiff argues that he should be awarded his costs pursuant to Fed. R. Civ. P. 54(d) as a prevailing party on Defendant's counterclaim. The Tenth Circuit has specifically held that "when a party dismisses an action with or without prejudice, the district court has discretion to award costs to the prevailing party under Rule 54(d)." Cantrell V. Int'l Brotherhood of Electrical Workers, AFL-CIO, Local 2021, 69 F.3d 456, 458 (10th

Cir. 1995). Plaintiff has presented no evidence establishing what his costs are. Plaintiff has also failed to present any evidence that he expended any "costs"^{1/} in defending the counterclaim which were not also expended in connection with the two claims on which he was the losing party. The undersigned finds, therefore, that Plaintiff is not entitled to any costs as a prevailing party under Rule 54(d).

RECOMMENDATION

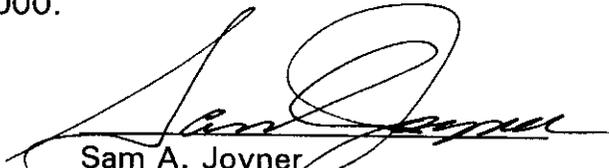
The undersigned recommends that Defendant's motion to dismiss its counterclaim without prejudice be **GRANTED**. [Doc. No. 25]. The undersigned recommends that the Court dismiss Defendant's counterclaim without prejudice and with no conditions. In particular, the undersigned recommends that Plaintiff's motion for the imposition of fees and costs as a condition to dismissal of Defendant's counterclaim be **DENIED**. [Doc Nos. 27-1 and 27-2]. The undersigned finds that Plaintiff is not entitled to fees or costs under either Rule 41(a)(2), as a condition of dismissal, or Rule 54(d), as a prevailing party.

Dated this 28 day of April 2000.

CERTIFICATE OF SERVICE

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

1st Day of May 2000, 2000.


Sam A. Joyner
United States Magistrate Judge

^{1/} Plaintiff is also seeking attorney fees under Rule 54(d). Plaintiff has not, however, supplied the Court with any authority which suggests, as required by Rule 54(d)(2), that he is entitled to fees in connection with the type of claim Defendant asserted as a counterclaim.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

ANDERSON-MARTIN MACHINE
COMPANY,

PLAINTIFF,

vs.

FCI, INC.,

DEFENDANT.

APR 28 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE No. 99-CV-386-K (M)

ENTERED ON DOCKET

DATE MAY 01 2000

REPORT AND RECOMMENDATION

Defendant's Motion To Dismiss Under Rule 12(b) [Dkt. 4] has been referred to the undersigned United States Magistrate Judge for a Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(B). Defendant seeks dismissal under Fed. R. Civ. P. 12(b)(2) on the basis that the Court lacks personal jurisdiction over it and for the reason that venue is improper. Fed. R. Civ. P. 12(b)(3); 28 U.S.C. §§ 1391, 1400 and 1406.

Background

Plaintiff is a corporation organized and existing under the laws of the State of Arkansas, having its principal place of business in Fort Smith, Arkansas. At all times relevant to this action, Plaintiff was the owner of the entire interest, right and title to United States Patent No. 5,826,400 ('400 patent).

Defendant is a corporation organized and existing under the laws of the State of Ohio, having its principal place of business in Cleveland, Ohio.

Plaintiff alleges that a product manufactured and sold by Defendant, the PET Stop System, and bottle capping machinery which incorporates the PET Stop System infringes claims of the '400 patent. Plaintiff further alleges that Defendant has and continues to directly infringe, induce infringement of and contribute to infringement of Plaintiff's '400 patent by making, installing, using, offering for sale and selling its PET Stop System and bottle capping machinery which incorporates the PET Stop System.

Defendant has established that it conducts business from a single location in the State of Ohio and that it manufactures and sells its products in the State of Ohio. Defendant does not manufacture products, hold title to property, maintain inventory, or advertize in telephone directories in Oklahoma. Further, Defendant has no employees or representatives and maintains no regular and established place of business in Oklahoma. All offers for sale of Defendant's products are made in Ohio and title to Defendant's products changes when they are shipped from Ohio. No product accused of infringement has been sold or installed in the State of Oklahoma. However, Defendant has a bottling division, which is a supplier to the bottling industry. Defendant sells to one bottling plant in the Northern District of Oklahoma. Since January 1, 1998, sales in the Northern District of Oklahoma amounted to only \$7,000 to \$8,000 out of a total bottling division annual sales of approximately \$4 million a year. Only one of Defendant's employees has traveled to the Northern District of Oklahoma since January 1, 1998, and that employee made only one visit to the Northern District of Oklahoma.

In support of finding personal jurisdiction Plaintiff asserts that Defendant advertizes its products, including the accused product, on an internet site which may be viewed by people in Oklahoma. Defendant placed an advertisement in the December 1997 issue of *Beverage Industry*, a national publication distributed in Oklahoma. Additionally, Plaintiff has offered the affidavit of its General Manager who makes the following claims in opposition to Defendant's motion to dismiss:

11. Upon information and belief, FCI has made and continues to make sales, has serviced and continues to service equipment, and has provided and continues to provide technical support or the like to at least three bottling plants in Oklahoma.

12. Upon information and belief, FCI's past and present customers in Oklahoma include the Ada Coca-Cola Bottling Company, in Ada, Oklahoma; the Great Plains Coca-Cola Bottling Company in Okmulgee, and the Love Bottling Company in Muskogee, Oklahoma.

13. Upon information and belief, sales of products, services or support to these Oklahoma customers has occurred for several years and still occurs. The dollar amount of the business activity between FCI and these Oklahoma customers greatly exceeds \$8,000.

14. Upon information and belief, FCI and its predecessor in interest (one of which is known as Fabsulation), has made sales, serviced equipment, and provide technical support or the like in the Northern District of Oklahoma to a customer presently known as Pepsi Bottling Group/Tulsa Beverage Products for more than ten years and beginning long before January of 1998.

15. Upon information and belief, the dollar amount of the business activity between FCI and Pepsi Bottling

Group/Tulsa Beverage Products over such period greatly exceeds \$8,000.

[Dkt. 9, Ex. A].

Discussion

Personal jurisdiction over a non-resident defendant must be established under the laws of the forum state and must not offend due process. Oklahoma provides for personal jurisdiction on any basis consistent with the Constitution of Oklahoma and the Constitution of the United States. 12 Okla. Stat. § 2004(f). Thus, the inquiry before this Court is whether assertion of personal jurisdiction over the Defendant comports with the due process clause of the United States Constitution. In patent cases, the law of the federal circuit rather than the circuit where the case arises determines whether the Court may properly exercise personal jurisdiction over an out-of-state accused infringer. *Akro Corp. v. Luker*, 45 F.3d 1541 (Fed. Cir. 1995). Personal jurisdiction may be specific or general. In either case, Plaintiff bears the burden of establishing personal jurisdiction over the Defendant. *Far West Capital Inc. v. Towne*, 46 F.3d 1071, 1075 (10th Cir. 1995).

Specific Jurisdiction

Plaintiff must establish facts to meet a three-part test to establish specific personal jurisdiction: 1) that Defendant purposefully directed its activities at residents in the forum; 2) that the claim arises out of or relates to those activities; and 3) that assertion of personal jurisdiction is reasonable and fair. *3D Systems, Inc. v. Aarotech AA Rotch Laboratories, Inc.*, 160 F.3d 1373 (Fed. Cir. 1998).

The facts show that Defendant has not sold or installed any product accused of infringement in the State of Oklahoma. Thus, Plaintiff's claim cannot arise out of or relate to sales activities. The only remaining potential support for specific personal jurisdiction would be the assertion that Defendant's internet site or its advertisement in a national publication distributed in Oklahoma supports specific personal jurisdiction. However, the authorities uniformly hold that a passive internet site is an insufficient basis upon which to establish specific personal jurisdiction. *CIVIX-DDI, LLC v. Microsoft Corp.*, 52 U.S.P.Q. 2d 1501 (D. Colo. 1999). Similarly, this Court finds that Defendant's single advertisement in a national publication distributed in Oklahoma does not support specific personal jurisdiction.

General Jurisdiction

For general jurisdiction, Plaintiff must establish that the Defendant's contacts with the forum state are so continuous and systematic that the state may exercise personal jurisdiction even when the claims are unrelated to the Defendant's contacts with the forum state. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 80 L.Ed.2d 404 (1984).

Plaintiff has made very general allegations concerning the Oklahoma business activities of Defendant and its predecessor, these allegations, made upon information and belief, are so vague that they add no meaningful information to the jurisdiction inquiry. The facts do establish that Defendant's bottling division had sales in the Northern District of Oklahoma since January 1, 1998, amounting to only \$7,000 to \$8,000 out of annual sales of approximately \$4 million and that one of Defendant's

employees traveled to the Northern District of Oklahoma since January 1998 on one visit. Otherwise, the facts do not establish any contacts between Defendant and the Northern District of Oklahoma or Oklahoma.

Based upon the facts presented, the Court concludes that Plaintiff has not established that Defendant has contacts with Oklahoma that are so continuous and systematic that the Court may exercise personal jurisdiction over the Defendant when the claims are unrelated to the Defendant's contacts with Oklahoma. *Helicopteros Nacionales de Columbia, F.A. v. Hall*, 466 U.S. 408 (1984).

Plaintiff's Request for Discovery

The complaint was filed by Plaintiff in this matter on May 19, 1999. On September 7, 1999, Defendant filed its motion to dismiss for lack of personal jurisdiction. In Plaintiff's opposition brief filed September 21, 1999, Plaintiff included a request that the Court permit discovery on the issue of jurisdiction should it have any question concerning this issue. Plaintiff has not supplemented its brief with any further information concerning Defendant's contacts with Oklahoma. And, as late as April 12, 2000, Plaintiff declined an opportunity offered by the Court to conduct a deposition to supplement the record on this issue. In light of the foregoing, the Court denies Plaintiff's request to conduct further discovery prior to the Court ruling upon Defendant's motion to dismiss.

Conclusion

Based upon the foregoing analysis, the undersigned FINDS that Plaintiff has failed to establish that the Court has either specific or general personal jurisdiction over

the Defendant. The undersigned United States Magistrate Judge therefore RECOMMENDS that Defendant's Motion To Dismiss under Fed. R. Civ. P. 12(b)(2) be GRANTED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the District Court for the Northern District of Oklahoma within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Haney v. Addison*, 175 F.3d 1217, 1219-20 (10th Cir. 1999), *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 28th day of April, 2000.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 1st Day of May, 2000, at OK.

~~The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 1st Day of May, 2000, at OK.~~

CERTIFICATE OF SERVICE

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

F I L E D

APR 28 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NELLIE E. CRITSER,
SSN: 442-48-9827,

Plaintiff,

v.

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

Defendant.

CASE NO. 99-CV-343-M ✓

ENTERED ON DOCKET

MAY 01 2000

DATE

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 28th day of APRIL, 2000.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 28 2000 *SA*

NELLIE E. CRITSER,)
SSN: 442-48-9827,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PLAINTIFF,)

vs.)

CASE No. 99-CV-343-M ✓

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

ENTERED ON DOCKET

DEFENDANT.)

DATE MAY 01 2000

ORDER

Plaintiff, Nellie E. Critser, 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 February 27, 1996, application for Supplemental Security Income benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held November 12, 1997. By decision dated November 24, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 12, 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 November 24, 1947, and was 49 years old at the time of the hearing. [R. 28, 65]. She claims to have been unable to work since 1979 due to back injury, head injury, muscle problems in legs, migraine headaches, right hand and arm pain. [R. 38, 75].

The ALJ determined that Plaintiff does not have any medically determinable anatomical, physiological or psychological abnormality demonstrable by medical signs and laboratory findings or any impairment or impairments which significantly limit her ability to perform basic work-related activities. He found, therefore, that Plaintiff was not disabled as defined by the Social Security Act. [R. 17]. The case was thus decided at step two of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ erred in finding Plaintiff did not have a severe impairment and requests remand of the case for further development. [Plaintiff's Brief]. The Court disagrees with Plaintiff's contention and affirms the decision of the Commissioner denying Plaintiff benefits at step two.

It is well-settled that Plaintiff has the burden to prove disability. *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997). To demonstrate that an impairment is severe at step two, the claimant must show that it significantly limits [her] physical or mental ability to do basic work activities. 20 C.F.R. § 416.920(c); *Bowen v. Yuckert*, 482 U.S. 137, 146 & n.5(1987). The Tenth Circuit has characterized the step two showing as "de minimis." *Hawkins*, 113 F.3d at 1169. However, the mere presence of a condition or ailment documented in the record is not sufficient to prove that the claimant is significantly limited in the ability to do basic work activities. The claimant must establish by objective medical evidence that she has a medically determinable physical or mental impairment and that the impairment could reasonably be expected to produce the alleged symptoms. *See Hinkle v. Apfel.*, 132 F.3d 1349, 1352 (10th Cir. 1997)(citing *Bowen*, 482 U.S. at 153).

In this case, Plaintiff refers to reports by several DDU examiners and her testimony as support for her claim of severe impairment due to pain and depression. See Plaintiff's Brief at p. 3. Plaintiff's references to specific portions of the medical record are addressed below in turn:

Plaintiff asserts: "Dr. Dalessandro opined that the evidence suggested Ms. Critser was suffering from chronic lumbar strain." Dr. Dalessandro examined Plaintiff

on April 8, 1996 and wrote an extensive history of Plaintiff's subjective complaints. [R. 172-174]. Upon musculoskeletal examination, he wrote: "There appears to be slight paravertebral tenderness to palpation bilaterally. All range of motion of her joints are within normal limits and there is no swelling of any joints." [R. 174]. Dr. Dalessandro's assessment was: "This is a 48-year-old female in no apparent distress. Her gait is normal to speed, stability and safety. Dexterity of gross and fine manipulation is present. Grip strength is right 22 kg, left 18 kg. There are no joint deformities or swelling. Medical care would help this individual." *Id.* Although his impression was written as: "Rule out chronic lumbar strain," there is no indication that Dr. Dalessandro was of the opinion that Plaintiff's back pain met the criteria for a severe impairment. Nor does his comment that Plaintiff's "affect is flat" qualify as an evaluation of Plaintiff's mental condition. The Court finds Dr. Dalessandro's report, taken as a whole, does not provide sufficient evidence of a significant limitation of Plaintiff's ability to do basic work activities.

Plaintiff's next contention: "Dr. Karathanos opined that Ms. Critser was probably suffering from fibromyalgia that limited her to sedentary/light work" is equally without merit. On September 24, 1997, Michael Karathanos, M.D., reported his examination of Plaintiff revealed no neurological deficits, that her symptoms suggest probable fibromyalgia and that "[h]er symptoms are essentially subjective without any objective evidence of any neurological disturbance." [R. 220]. There is no indication in the body of Dr. Karathano's narrative report that he considered Plaintiff to have the limitations Plaintiff claims. The Physical Medical Source Statement, a form of residual functional

capacity assessment, attached to his report contains checkmarks for frequent lifting and carrying capacity up to 10 pounds, occasionally up to 20 pounds and never 21 pounds and over.² However, his objective findings do not support the restrictions checkmarked on the form. The Court finds Dr. Karathano's report, taken as a whole, does not provide sufficient evidence of a significant limitation upon Plaintiff's ability to do basic work activities.

Plaintiff states: "Dr. McGovern had no diagnosis but opined that Ms. Crister (sic) was limited to lifting consistent with light work." Again, it is not clear what prompted J.D. McGovern, M.D., to checkmark lifting and carrying restrictions on the form attached to his report, as his narrative, like that of Dr. Karathano's, supports the ALJ's conclusion that Plaintiff does not have a medically determinable impairment. [R. 211-218]. Among Dr. McGovern's examination notes are found the following comments: "standing passive same as active" [R. 214, emphasis in the original]; "all are normal!" [R. 215]; "healthy on & off table" [R. 215]; "the objective medical findings were normal" [R. 217]; "there were no objective findings to support allegations of pain" [R. 217]; "the pain the claimant complained of was not consistent with my diagnosis; no arthritic condition detected; therefore not causing any limitations." [R. 218]. Dr. McGovern's narrative report contains questions as to the validity of Plaintiff's complaints: "Test # 1, back flexion 90 degrees with knees bent did not agree with #6, hip flexion with knee extended, 50 degrees. These same tests in different positions

² "Occasionally" means up to 1/3 of an 8-hour workday; "frequently" means from 1/3 to 2/3 of an 8-hour work day. [R. 221] Also see: Social Security Ruling SSR 96-9p.

should give similar results to be believable; they did not" and "No objective orthopedic evidence supported the subjective complaints." [R. 212]. The Court finds Dr. McGovern's report, taken as a whole, does not provide sufficient evidence of a significant limitation upon Plaintiff's ability to do basic work activities.

Finally, Plaintiff points to Dr. Blake's report and states that he "opined that Ms. Critser was suffering from a depressive disorder apparently associated with her pain." On the contrary, George Blake, M.D., who examined Plaintiff on April 6, 1996, [R. 169-170] wrote: "This claimant would be able to manage her disability funds. From an emotional standpoint, she is coping very well with her physical problems. Her depression is only slight, it does not affect her cognitive abilities and she has a good way of dealing with people. She should be able, from an emotional standpoint, be clear for work." [R. 170]. As is required at every adjudicative step of the disability determination process where a mental impairment is alleged, the ALJ completed a PRT form which he attached to his decision. His findings on the PRT are supported by the evaluative report of Dr. Blake. Accordingly, there is substantial evidence to support the Commissioner's conclusion that Plaintiff's depression is not a severe impairment.

Likewise, there is support for the Commissioner's decision in the portion of the medical records not cited by Plaintiff. Treatment notes from Neighbor for Neighbor Clinic, dated May 13, 1997, indicate the examination revealed "no obvious cause of pain in either hip or arm." [R. 209]. Daypro was prescribed for probable osteoarthritis which Plaintiff quit taking on her own. [R. 148]. Subsequent treatment records indicate she was on no medications [R. 169, 172, 209, 211] although Plaintiff

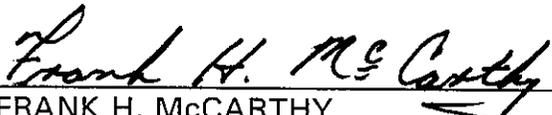
testified at the hearing that she was taking medication prescribed by a doctor which she couldn't name. [R. 32].

There is nothing in the treatment records regarding Plaintiff's mental condition. And, as discussed above, there is no evidence of any functional limitation due to Plaintiff's physical complaints. The regulations provide that the existence of a medically determinable physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings. The regulations further provide that under no circumstances may the existence of an impairment be established on the basis of symptoms alone. Thus, regardless of how many symptoms an individual alleges, or how genuine the individual's complaints may appear to be, the existence of a medically determinable physical or mental impairment cannot be established in the absence of objective medical abnormalities; i.e., medical signs and laboratory findings. Social Security Ruling 96-4p, (1996 WL 374187).

Plaintiff requests remand of her claim for the purpose of conducting additional objective testing "such as x-rays." Given the overwhelmingly normal results of Plaintiff's range of motion studies and the absence of any neurological deficits or objective findings consistent with Plaintiff's complaints by treating physicians and four DDU consultative physicians, there is no need to remand on this basis. See *Hawkins*, 113 F.3d at 1167.

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 28th day of APRIL, 2000.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE