

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**JUL 20 2000**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MICHAEL LYNN LAWSON, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 H. N. SCOTT, Warden, )  
 )  
 Respondent. )

Case No. 97-CV-0372-K (E)

ENTERED ON DOCKET

DATE **JUL 21 2000**

**REPORT AND RECOMMENDATION**

Pursuant to 28 U.S.C. § 2254, petitioner Michael Lynn Lawson filed a Petition for Writ of Habeas Corpus (Dkt. # 1). Acting *pro se*, petitioner challenges the forty-year sentence he received in state court for second degree felony murder after former conviction of two or more felonies. This case was referred to the undersigned for a report and recommendation. See 28 U.S.C. § 636, and 28 U.S.C. § 2254, Rules 8, 10. For the reasons set forth below, the undersigned recommends that the Petition for Writ of Habeas Corpus (Dkt. # 1) be **DENIED**.

**BACKGROUND AND PROCEDURAL HISTORY**

In December 3, 1990, petitioner and his co-defendants, Douglas Charles Shaffer and Jessica Evonne Terry, were arrested for the murder of Ralph Nelson. At trial the prosecution presented evidence to show that petitioner lured Nelson from Nelson's house so that Shaffer and Terry could burglarize the house while Nelson was away. When Nelson returned, Shaffer and Terry tied him up and gagged him. He ultimately died of strangulation.

Petitioner's trial strategy was to show that Mike Fallen, an ex-roommate of the victim, was the actual perpetrator of the crime, and the items taken from the house were items previously stolen by the victim. Petitioner planned to show that Fallen and another party were involved with the

victim in an insurance fraud scheme involving the stolen merchandise. Petitioner claims that a witness, Mitchell Hauke, “would have testified that he entered the victim’s house with Fallen by breaking a window after the police had roped off the residence.” (Pet. Br., Dkt. # 2, at 7.)<sup>1</sup>

Petitioner contends that testimony from co-defendant Douglas Shaffer’s brother, David Shaffer, implicated petitioner in the insurance scam and would have contradicted Hauke’s testimony if Hauke had been permitted to testify. David Shaffer testified that he followed a truck from petitioner’s house to the victim’s house and saw an individual enter and exit through the front door. David Shaffer also testified that co-defendant Douglas Shaffer asked him to watch petitioner so that petitioner would not “do anything crazy.” (Pet. Br., Dkt. # 2, at 8-9.)

Petitioner was convicted after a jury trial in the Tulsa County District Court, State of Oklahoma, Case No. CV-90-5022, on November 6, 1991. He received a 40-year sentence. Douglas Shaffer received a 60-year sentence. In return for testifying against Shaffer, Terry received a 10-year sentence. Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals (“OCCA”), Case No. F-92-807. The OCCA affirmed on August 31, 1994.

Petitioner filed his petition for writ of habeas corpus in this Court on April 21, 1997. As grounds for his petition, petitioner claims that:

- (1) the trial court erred in denying petitioner’s request for a continuance when evidence was presented by a co-defendant which amounted to surprise and prevented petitioner from receiving a fair trial;
- (2) the trial court erred in refusing to allow petitioner’s witness to testify;

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<sup>1</sup> It is not clear how this testimony would have exculpated defendant or inculpated Fallen if Hauke and Fallen entered the residence “after the police had roped off the residence.” Petitioner’s statement implies that Hauke and Fallen entered the residence *after* the burglary and murder occurred.

- (3) the state failed to comply with petitioner's motion to produce prior to trial;
- (4) the trial court erred in denying the petitioner's motion to dismiss for denial of his right to a speedy trial;
- (5) the trial court erred in refusing petitioner's requested jury instructions; and
- (6) the state's evidence at trial was insufficient to warrant petitioner's conviction.

In defense, respondent argues that petitioner's grounds one, two, and five are purely issues of state law and do not merit federal habeas review. Respondent asserts that the OCCA's determination as to grounds three, four, and six was not contrary to, or an unreasonable application of, clearly established federal law. Respondent admits that petitioner has exhausted his state court remedies through his direct appeal and that petitioner filed his petition within the applicable limitations period. However, respondent claims that petitioner has merely copied his Oklahoma appellate court brief, and the Court should not re-litigate petitioner's direct appeal.<sup>2</sup>

### **DISCUSSION AND LEGAL ANALYSIS**

Habeas corpus actions requiring the review of state court judgments and sentences are governed by 28 U.S.C. § 2254. Section 2254 was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, tit. I, § 101 (1996). The AEDPA's amendments to 28 U.S.C. § 2254 became effective on April 24, 1996. Since petitioner's state conviction became final prior to the enactment of the AEDPA, he had one year from April 24, 1996, to file an application for federal habeas relief. *See* 28 U.S.C. § 2244(d)(1); *Hoggro v. Boone*, 150 F.3d 1223, 1225 (10th Cir. 1998). Petitioner filed his application on April 21, 1997, within the one-

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<sup>2</sup> Although respondent states that he "will request this Court to facilitate Petitioner's attempt to re-litigate his failed state appeal," (Resp. Br., Dkt. # 6, at 3), it appears from the context that respondent meant to request that the Court *refuse to* facilitate such attempt.

year limitations period. The AEDPA established a more deferential standard of review of state court decisions in habeas corpus cases.

Under the AEDPA, a federal court may entertain an application for writ of habeas corpus from a prisoner held in state custody only on the ground that the prisoner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. §§ 2241, 2254(a). In cases governed by the AEDPA,

[t]he appropriate standard of review depends on whether a claim was decided on the merits in state court. “If the claim was not heard on the merits by the state courts, and the federal district court made its own determination in the first instance, we review the court’s conclusions of law de novo and its findings of fact if any, for clear error.” LaFevers v. Gibson, 182 F.3d 705, 711 (10th Cir. 1999). If a claim was adjudicated on its merits by the state courts, a petitioner will be entitled to federal habeas relief only if he can establish that the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” 28 U.S.C. § 2254(d)(1), or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings,” *id.*, § 2254(d)(2). Thus, we may grant the writ if we find the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law; decided the case differently than the Supreme Court has on a set of materially indistinguishable facts; or unreasonably applied the governing legal principle to the facts of the prisoner’s case. Williams v. Taylor, \_\_\_ U.S. \_\_\_, 120 S. Ct. 1495, 1523, 146 L.Ed.2d 389 (2000).

Van Woudenberg ex rel. Foor v. Gibson, 211 F.3d 560, 566 (10th Cir. 2000); *see also* Paxton v. Ward, 199 F.3d 1197, 1204 (10th Cir. 2000); Aycox v. Lytle, 196 F.3d 1174, 1178 (10th Cir. 1999).

The Van Woudenberg court also noted that, to grant the writ, the Court must be convinced that the application was objectively unreasonable. 211 F.3d at 567 n. 4. Otherwise, a federal habeas court owes “deference to the state court’s result, even if its reasoning is not expressly stated.” *Id.* at 569 (quoting Aycox, 196 F.3d at 1177) (summary decision can constitute adjudication on the merits if decision was reached on substantive rather than procedural grounds).

The Tenth Circuit recognizes that an error of state law might rise to the level of a constitutional violation required for habeas relief if it resulted in a fundamentally unfair trial. Boyd v. Ward, 179 F.3d 904, 921 (10th Cir. 1999). The standard for determining whether habeas corpus relief must be granted for constitutional trial errors is whether the error “had substantial and injurious effect or influence in determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)); Crespin v. New Mexico, 144 F.3d 641, 649 (10th Cir.1998). However, this “does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury’s verdict.” Brecht, 507 U.S. at 638 n. 9. When a judge is in “grave doubt” about the likely effect of an error on the jury’s verdict, the judge should not treat the error as if it were harmless, but should grant relief. O’Neal v. McAninch, 513 U.S. 432, 445 (1995); Crespin, 144 F.3d at 649.

#### **1. Petitioner’s Request for a Continuance**

Petitioner alleges that Douglas Shaffer’s counsel did not respond to the prosecution’s motion to produce and thus, petitioner was unaware of the substance of testimony by Shaffer’s witnesses which ultimately damaged petitioner’s trial strategy. Petitioner complains that he was granted a continuance of only one hour after he heard the testimony of David Shaffer implicating petitioner in the insurance scam. He claims that he would have requested a severance of the proceedings if he had known that Douglas Shaffer would present such testimony.

Petitioner cites Brady v. Maryland, 373 U.S. 83 (1963), for the proposition that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process

where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87; see also Allen v. District Court of Washington County, 803 P.2d 1164, 1167-68 (Okla. Crim. App. 1990).<sup>3</sup> However, in this case, it was not the prosecution that withheld evidence from petitioner; it was a co-defendant. There is some question as to whether the prosecution even possessed the evidence petitioner claims it withheld because, according to petitioner, Shaffer’s counsel did not respond to the prosecution’s motion to produce (filed September 27, 1991). Petitioner could have requested information from Shaffer or his counsel as to the substance of Shaffer’s trial testimony before the trial, but there is no evidence that he did.

Further, petitioner has not shown that the evidence allegedly withheld was favorable to him. Indeed, it appears that such evidence was unfavorable. David Shaffer implicated petitioner in an insurance fraud scheme. Evidence is material, under the dictates of Brady, only if there is a reasonable probability that, had the evidence been disclosed to the defense, “the result of the trial would have been different.” United States v. Bagley, 473 U.S. 667, 684 (1985). The mere possibility that an item of undisclosed information might have helped the defense or affected the outcome does not establish materiality. A defendant need not show the evidence was insufficient to convict in light of the withheld evidence; he need only show the favorable evidence could “reasonably be taken to put the whole case in such a different light as to undermine confidence in

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<sup>3</sup> At the time of petitioner’s trial, Allen set forth disclosure requirements for the prosecution and defense in criminal cases. Allen was subsequently modified by Richie v. Beasley, 837 P.2d 479, 480 (Okla. Crim. App. 1992), and superceded by the Oklahoma Criminal Discovery Code, Okla. Stat. tit. 22, § 2001 *et seq.* (1994). Petitioner argues that Allen should be expanded to require disclosure from one co-defendant to another, but the undersigned finds no authority for this position and, at any rate, a federal court has no authority to “expand” Oklahoma law in this manner.

the verdict . . .” Kyles v. Whitley, 514 U.S. 419, 435 (1995). The withholding of material evidence cannot be found to be harmless. Id. at 436.

Petitioner contends that David Shaffer’s testimony contradicted the proposed testimony of petitioner’s witness as to whether someone went through the front door or the window “after the police had roped off the residence,” and thus David Shaffer’s testimony damaged petitioner’s theory that the electronic items in the victim’s residence were “hot” before they were stolen and the underlying felony, grand larceny, could not be proven beyond a reasonable doubt. (Pet. Br., Dkt. # 2, at 7-8.) However, as shown below, whether the items stolen from the residence were “hot” is irrelevant to grand larceny in Oklahoma. Petitioner has not shown a reasonable probability that the result of the proceeding would have been different if he had known of David Shaffer’s testimony before the trial.

Petitioner’s attorney asked to approach the bench before cross-examination of the David Shaffer. Petitioner claims that his attorney objected to the testimony and requested a continuance, but the objection and request were not recorded, and the Court granted an continuance of only one hour. The trial transcript indicates that petitioner’s attorney “claimed surprise” at the damaging testimony and “requested to have an hour continuance to further examine this witness if necessary. . . .” (Pet. Br., Dkt. # 2, at 9.) It does not indicate that petitioner’s counsel requested and was denied a longer continuance or that petitioner indicated to the trial court that he wanted a severance of the trial so that co-defendants would not be tried together.

In any event, a denial of a motion for continuance does not warrant habeas relief unless it is shown that the denial was arbitrary and unreasonable and that it rendered the trial fundamentally unfair. Scott v. Roberts, 975 F.2d 1473, 1476 (10th Cir. 1992). In determining whether the denial

was fundamentally unfair, the Court “focuses on the petitioner's need for a continuance and the prejudice or lack of prejudice resulting from its denial.” Lucero v. Kerby, 133 F.3d 1299, 1309 (10th Cir. 1998) (quoting Case v. Mondragon, 887 F.2d 1388, 1397 (10th Cir. 1989)). Petitioner has not shown that he was prejudiced by the trial court's refusal to grant more than a one-hour continuance. Thus, the trial court's “denial of a continuance” did not undermine the fundamental fairness of petitioner's trial.

Petitioner claims that Shaffer did not list any witnesses before trial and he assumed that Shaffer's counsel, a public defender, planned merely to cross-examine all other witnesses. If he had known of the substance of Shaffer's evidence, or even the names of Shaffer's witnesses, he claims that he would have requested a separate trial under Okla. Stat. tit. 22, § 439 (1991), because Shaffer's defenses were antagonistic to, or at least inconsistent with, his own. Defenses are “mutually antagonistic,” requiring judicial severance, “where each defendant attempts to exculpate himself and inculpate his co-defendant.” Jones v. State, 899 P.2d 635, 644 (Okla. Crim. App. 1995) (citations omitted). “An attempt to cast blame on one's co-defendant is not in itself a sufficient reason to require separate trials. Each defendant must blame the other in an attempt to exonerate himself. Therefore, a showing that defenses conflict is not sufficient to show the requisite prejudice necessary for judicial severance.” Id. (citations omitted).

Under Tenth Circuit law, “whether the trial court erred in denying severance is generally a question of state law that is not cognizable on federal habeas appeal . . . [for] a criminal defendant has no constitutional right to severance unless there is a strong showing of prejudice caused by the joint trial.” Fox v. Ward, 200 F.3d 1286, 1292 (10th Cir. 2000) (quoting Cummings v. Evans, 161 F.3d 610, 619 (10th Cir.1998)). Further, it is clear that “[m]utually antagonistic defenses are not

prejudicial per se.” Id. at 1293 (citation omitted). A defendant must show actual prejudice. It is not enough that each defendant is trying to exculpate himself while inculpating the other. Id. Actual prejudice is shown if “the jury could not believe the core of one defense without discounting entirely the core of the other.” Id. (citation omitted).

The testimony presented by petitioner does not demonstrate that he and Shaffer had mutually antagonistic defenses. At most, it shows that their defenses may have conflicted. Petitioner has not shown that he was attempting to inculcate Shaffer, or that Shaffer was attempting to inculcate him. It shows that Shaffer was trying to inculcate petitioner in the insurance fraud scheme whereas petitioner was trying to show that the *victim's ex-roommate* was involved in the scheme. Defendants were not being tried for insurance fraud; they were being tried for murder. More important, the evidence does not show that petitioner ever requested a separate trial. See Okla. Stat. tit. 22, § 439; Neill v. State, 827 P.2d 884, 890 (Okla. Crim. App. 1992). Habeas relief is not warranted on this ground.

## **2. Petitioner's Witness**

Shortly before trial, petitioner's counsel located a witness, John Eric Housewright, whose testimony petitioner claims was crucial to his defense. According to petitioner, Housewright would have testified that he was approached by Mike Fallen (the victim's ex-roommate) to rob the victim, Ralph Nelson. Housewright would have also testified that Fallen was a thief. Petitioner contends that Housewright's testimony would have “bolstered” his case although Housewright was serving a sentence for embezzlement as part of the insurance scam. (Pet. Br., Dkt. # 2, at 16.)

The prosecution objected to Housewright's testimony because petitioner's counsel failed to list Housewright as a witness in response to the prosecution's motion to produce prior to trial. The

prosecution also objected on grounds of relevance. The trial court sustained the prosecution's objection after petitioner's attorney made an offer of proof. Petitioner contends that the trial court's refusal to admit Housewright's testimony amounted to unfair prejudice.

Moreover, Petitioner points out that the trial court allowed the testimony of two witnesses who testified on behalf of co-defendant Shaffer although those witnesses were not listed on any witness list prior to trial. Petitioner argues that the prosecution was thus able to pick and choose which evidence would be admitted and which would be rejected by deciding to object or not to object. Petitioner insists that the trial court should have admitted the testimony of all witnesses whose names were not produced before trial, or should have denied all of them.

"Habeas relief may not be granted on the basis of state court evidentiary rulings unless they rendered the trial so fundamentally unfair that a denial of constitutional rights results." Mayer v. Gibson, 210 F.3d 1284, 1293 (10th Cir. 2000) (citing Smallwood v. Gibson, 191 F.3d 1257, 1275 (10th Cir. 2000)). Excluding witnesses for failure to comply with discovery rules does not constitute a violation of constitutional rights unless the district court abused its discretion. Russell v. United States, 109 F.3d 1503, 1509 (10th Cir. 1997). Testimony from a person serving time for his role in an insurance scam in which petitioner himself may have been involved does not necessarily disprove that petitioner played a role in robbing and murdering Nelson. Whether Housewright was approached by Fallen to rob Nelson or whether Housewright thought Fallen was a thief is irrelevant. The trial court's refusal to permit Housewright to testify was not an abuse of discretion and does not constitute a violation of petitioner's constitutional rights. Accordingly, it does not warrant federal habeas relief.

### 3. Petitioner's Motion to Produce

Petitioner filed a motion to produce, requesting the “names and addresses of witnesses together with the relevant oral, written or recorded statement and summaries of the same.” (Pet. Br., Dkt. # 2, at 16-17.) Petitioner alleges that the prosecution failed to list the address of Mike Fallen or Detective R. C. Morrison and withheld the names of two more witnesses, Mitchell Hauke and Shawn Bresahan, who were interviewed by detectives in connection with the case. Petitioner asserts that the prosecution’s suppression of this evidence violated his due process rights. See Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995).

Respondent counters that the prosecution was not required to produce the names of persons whom the police interviewed because those persons were not prosecution witnesses at trial and their statements were not exculpatory to petitioner. Respondent relies primarily upon Brady, 373 U.S. at 87, and Allen, 803 P.2d at 1167. Allen required the prosecution to disclose to defense counsel “the names and addresses of witnesses, together with their relevant oral, written or recorded statement, or summaries of same.” Id. at 1167. After petitioner’s trial, Allen was subsequently clarified and modified by Richie v. Beasley, 837 P.2d 479 (Okla. Crim. App. 1992), which required the prosecution “to disclose the names and addresses of all persons known to the State having knowledge of relevant facts or information about the case.” Id. at 480. The defense, by contrast, was required to disclose only those witnesses whom it intended to call at trial. Id. It was not until 1994 that the Oklahoma Criminal Discovery Code limited discovery from the prosecution (state) to witnesses it intended to call at trial. Okla. Stat. tit. 22, § 2002. Thus, the Allen (1990) standard in effect until Richie (1992) was ambiguous (hence requiring clarification) as to the breadth of disclosure required for prosecution “witnesses.” In any event, whether the prosecution intended to

call Fallen, Morrison, Hauke, or Bresahan at trial is not determinative of whether the prosecution was required to disclose their names and addresses.

“[F]ederal habeas review is not available to correct state law evidentiary errors; rather it is limited to violations of constitutional rights.” Smallwood v. Gibson, 191 F.3d 1257, 1275 (10th Cir. 1999) (citing Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)). Under Brady and its progeny, as set forth above, the prosecution has a duty to disclose only that evidence which is favorable to the accused, or “exculpatory.” See Banks, 54 F.3d at 1517. Accordingly, whether the statements of the witnesses at issue were exculpatory to petitioner is the determinative factor. Suppressed evidence is not deemed exculpatory unless there is a reasonable probability that, had the evidence been disclosed to the defendant, the result of the proceeding would have been different. Bagley, 473 U.S. at 684.<sup>4</sup> A “reasonable probability” is a probability sufficient to undermine the confidence of the outcome. See Kyles, 514 U.S. at 435.

Petitioner has not shown a reasonable probability that the outcome of his trial would have been different if the prosecution had listed the addresses of Fallen or Morrison and the names of Hauke and Bresahan. There is no evidence to suggest that the prosecution had a better address for Mike Fallen than the one given (“c/o of [sic] R. C. Morrison”), that petitioner filed a motion to compel a better address, or that Fallen’s testimony would have been exculpatory. In fact, it appears that Fallen’s testimony would have been inculpatory, given petitioner’s statement that “[d]uring the

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<sup>4</sup> Note that the judgment in United States v. Thornbrugh, 962 F.2d 1438, 1444 (10th Cir. 1992), cited by respondent for this proposition, was vacated. U.S. v. Abreu, 508 U.S. 935 (1993). Moreover, Drinkard v. Johnson, 97 F.3d 751, 767-68 (5th Cir. 1996), upon which respondent urges this Court to rely, was decided before the effective date of the AEDPA and is no longer good law. See Williams v. Taylor, --- U.S. ---, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000); Lindh v. Murphy, 521 U.S. 320 (1997). Further, the Northern District of Oklahoma is not bound by Fifth Circuit precedent.

course of pre-trial discovery, [p]etitioner learned that Mike Fallen had provided the police with most of the information about him which led to his becoming a suspect.” (Pet. Br., Dkt. # 2, at 17.)

Although petitioner claims that “[f]inding Detective Morrison also proved to be difficult” (id.), apparently petitioner found him because he testified. (See id. at 17-18.) It also appears that petitioner’s counsel located Mitchell Hauke, given petitioner’s representation that Hauke was prepared to testify in his behalf (see id. at 7), and Hauke in fact testified (see id. at 18-20).<sup>5</sup> Hauke testified that he knew Shawn Bresahan, and that he thought Bresahan gave a statement to the police because Bresahan was “with us when we all gave a statement.” (Id. at 18.) Yet, the prosecution stated that it had no statement from Hauke, and Hauke then stated that he did not know of any other witnesses who gave statements at that time. (Id.) There is no evidence that Bresahan’s testimony was exculpatory.

Petitioner has not shown a reasonable probability that, had the names and addresses been disclosed to the defendant, the result of the proceeding would have been different. Bagley, 473 U.S. at 684. Petitioner’s third ground for relief does not provide a legitimate basis for granting his petition for writ of habeas corpus.

#### **4. Petitioner’s Right to a Speedy Trial**

Petitioner claims that the court violated his Sixth Amendment right to a speedy trial due to the length of time which elapsed between his arrest and the trial. He was arrested on December 3, 1990. His trial was originally scheduled for June 17, 1991, but he was actually tried on November

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<sup>5</sup> Petitioner claims that Hauke testified he was present when petitioner was interrogated. Hauke stated that the interrogation took two to three hours, instead of forty-five minutes as detectives had earlier testified. The fact that the interrogation may have taken longer than detectives testified is not exculpatory evidence and, in any event, is irrelevant to the issue of whether the prosecution failed to produce exculpatory evidence.

6, 1991. Seven continuances were granted before that date, which included a one-month continuance requested by petitioner. That continuance was granted on March 15, 1991. When another continuance was granted after that date, petitioner filed a motion to dismiss due to denial of his right to a speedy trial under both the United States and Oklahoma Constitutions.<sup>6</sup>

A determination of whether a defendant has been afforded his right to a speedy trial requires consideration of four factors: (1) length of the delay; (2) reason for the delay; (3) defendant's assertion of the right; and (4) prejudice to the defendant as a result of the delay. See Barker v. Wingo, 407 U.S. 514, 530 (1972); United States v. Gomez, 67 F.3d 1515, 1521 (10th Cir. 1995); Conley v. State, 798 P.2d 1088, 1089 (Okla. Crim. App. 1990). Speedy trial claims must be evaluated on an ad hoc basis. Barker, 407 U.S. at 530. If the length of the delay is "presumptively prejudicial," the Court then inquires into the remaining factors. Id. Although there is no "bright line" time period triggering the Barker analysis, Gomez, 67 F.3d at 1521, the Supreme Court has observed that "lower courts have generally found postaccusation delay, 'presumptively prejudicial' at least as it approaches one year." United States v. Doggett, 505 U.S. 647, 652 n. 2 (1992).

Petitioner argues that the trial was delayed six months<sup>7</sup> past the original trial date without explanation, and that he had did not contribute to the delay or waive his right to a speedy trial. (Pet. Br., Dkt. # 2, at 21.) Relying on Wilson v. District Court of Oklahoma County, 471 P.2d 939, 943 (Okla. Crim. App. 1970), petitioner argues that prejudice may be presumed. The Wilson case

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<sup>6</sup> Petitioner does not assert a claim pursuant to Okla. Stat. tit. 22, § 812.1 ("Right to speedy trial -- Time limits"). The time limit under Oklahoma law is one year after arrest if the accused is held in jail and 18 months if the accused is charged with a felony and held on an appearance bond.

<sup>7</sup> The original trial date was June 17, 1991 and the trial occurred on November 6, 1991 -- a difference of less than five months.

involved a delay of seven years, however, and the defendant was being held outside the state. Petitioner's trial took place eleven months<sup>8</sup> after his arrest. While petitioner's case was not a particularly complex, there was more than one defendant. Eleven months is not long enough to warrant a presumption of prejudice in this instance.

Even if it were, the remaining Barker factors do not weigh in petitioner's favor. Respondent has not indicated the reason for the delay and neither party submitted evidence of any reason, although petitioner suggests turnover in the district attorney's office may have been a factor. In fact, petitioner requested one of the continuances. The Tenth Circuit analyzes "prejudice to the defendant in terms of three interests: preventing oppressive pretrial incarceration; minimizing concern and anxiety to the defendant; and limiting the possibility that the defense will be impaired." Gomez, 67 F.3d at 1522 (citations omitted). Petitioner has not shown that any of these interests were prejudiced in this case. In fact, petitioner argues that his defense was impaired because the trial judge failed to grant yet another continuance. He has shown no prejudice, presumed or otherwise. Petitioner's right to a speedy trial was not violated. His fourth ground for relief is without merit.

##### **5. Petitioner's Requested Jury Instructions**

Petitioner submitted three proposals for jury instructions concerning the issue of what constitutes a principal or participant in a crime. The court accepted only one of the three instructions. The two instructions that were not accepted are as follows:

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<sup>8</sup> Respondent asserts that trial took place within ten months of his arrest (Resp. Br., Dkt. # 6, at 12-13), but petitioner was arrested on December 3, 1990 and tried on November 6, 1991 -- a difference of more than eleven months.

[Instruction No. 2]

To be concerned in the commission of a crime as a principal, one must either commit the crime itself, or procure it to be done, or aid or assist, or encourage its commission.

Mere mental assent to or acquiescence in commission of a crime by one who does not procure or advise its perpetration, who takes no part therein, gives no counsel and utters no word of encouragement to the perpetrator, however wrong morally, does not make such a person a participant in the crime.

[Instruction No. 3]

In order for the accused to be convicted as a principal in a crime, the state must show that he either directly committed the crime or aided and abetted its commission.

Petitioner claims that “the jury deadlocked on this very issue, and returned to the courtroom at least partly to ask for clarification on the difference between an accomplice and principal.” (Pet. Br., Dkt. #2, at 22.) Actually, the trial judge read several notes that had been sent to him by the jury.

[L]ast note I have says we are deadlocked on one defendant, what do we do? That’s signed by the jury. And you’ve previously sent me a note that you’ve reached a verdict on one defendant. And I want to go back to one note that you previously issued to the Court? [sic] Is the definition of burglary as applies to this case in general or each defendant? [sic] Also please clarify the difference between accomplice and principal. We have reached a verdict on one of the defendants.

(Pet. Br., Dkt. # 2, at 23.) Petitioner states that the trial judge then gave a supplemental instruction.

Petitioner concludes that the jury was deadlocked on his guilt or innocence, and that his proposed instructions were “exactly what the jury wanted . . . .” (Id.)

“A trial judge retains extensive discretion in tailoring jury instructions, provided that they correctly state the law and fairly and adequately cover the issues presented.” United States v. Conway, 73 F.3d 975, 980 (10th Cir. 1995). In federal habeas cases, a petitioner bears a greater burden of “demonstrating that an erroneous instruction was so prejudicial that it will support a

collateral attack on the constitutional validity of a state court's judgment . . . ." Henderson v. Kibbe, 431 U.S. 145, 154 (1977); see also Neely v. Newton, 149 F.3d 1074, 1985 (10th Cir. 1998). It is not enough to show the instruction "undesirable, erroneous, or even universally condemned"; rather, it must have "so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughton, 414 U.S. 141, 146-47 (1973); see also Stanley v. State, 762 P.2d 946, 949 (Okla. Crim. App. 1988). It is even more difficult to challenge the failure to give an instruction than the giving of an erroneous one. Henderson, 431 U.S. at 155.

Under Oklahoma law, "a conviction will not be reversed unless the record demonstrates that the failure to instruct has deprived the defendant of a substantial right." Hainey v. State, 740 P.2d 146, 149 (Okla. Crim. App. 1987); Wolf v. State, 375 P.2d 283, 287 (Okla. Cir. 1962); see Okla. Stat. tit. 20, § 3001.1. Petitioner indicates the authority for his proposed instructions as Turner v. State, 477 P.2d 84 (Okla. Crim. App. 1970). Respondent points out that the instructions actually given by the trial court on this issue were Oklahoma Uniform Jury Instructions - Criminal. (OUJI-CR 204, 205.)<sup>9</sup> Oklahoma courts have specifically held that these instructions are not erroneous. Fritz v. State, 730 P.2d 535, 537 (Okla. Crim. 1986).

These instructions correctly state the law and fairly and adequately cover the issues presented. Petitioner has not been deprived of a substantial right, and certainly not a constitutional right. He has not shown that the trial judge's failure to give his requested instructions "so infected the entire trial that the resulting conviction violates due process." Cupp, 414 U.S. at 147 (1973). Accordingly,

---

<sup>9</sup> These instructions were renumbered when the OUJI - CR was revised in 1996. Instructions 204 and 205 now appear as Instruction Nos. 2-5 and 2-6. See OUJI-CR (2d ed. 1996), at xvii.

habeas relief is not warranted based on petitioner's contention that the trial court erred in refusing petitioner's requested jury instructions.

#### **6. The State's Evidence at Trial**

Petitioner alleges that the prosecution failed to prove the underlying felonies of burglary or grand larceny, and such proof was required to convict petitioner of Second Degree Felony Murder. The jury based its verdict on the underlying felony of grand larceny. Petitioner alleges that the property taken did not belong to the victim, but was, in fact, stolen, and thus the prosecution did not prove ownership, one of the elements of grand larceny. Petitioner relies on the testimony of detectives who stated that some of the property in the victim's residence may have been embezzled or stolen and sold to the victim, but the allegations of embezzlement were never confirmed. The property at issue was stereo equipment or property taken from a store called "Video Concepts."

Petitioner is entitled to relief on insufficiency of the evidence claim only "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324 (1979); see also Moore v. Gibson, 195 F.3d 1152, 1176-77 (10th Cir.1999); Cudjo v. State, 925 P.2d 895, 899 (Okla. Crim. App. 1996). Under Jackson, "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the

record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.” Id. at 326.<sup>10</sup>

Neither party has submitted the record below (although respondent submitted the preliminary hearing transcript), but even if the items stolen from the victim were “hot,” as petitioner contends,<sup>11</sup> a rational trier of fact could have found proof of guilt beyond a reasonable doubt. Under Oklahoma law, it is well established that “the actual status of the legal title to stolen property is of no concern to the thief; so far as he is concerned, one may be taken as the owner who is in possession of the property and whose possession was unlawfully disturbed by the taking.” Borrelli v. State, 453 P.2d 312, 313 (Okla. Crim. App. 1969) (quoting Sherfield v. State, 252 P.2d 165, 166 (Okla. Crim. App. 1952)); Davidson v. State, 330 P.2d 607, 620 (Okla. Crim. App. 1958) (quoting Hilyard v. State, 214 P.2d 953, 954 (Okla. Crim. App. 1950)). Petitioner is not entitled to habeas relief on his insufficiency of the evidence claim.

---

<sup>10</sup> Citing Williamson v. Reynolds, 904 F. Supp. 1529 (E.D. Okla. 1995), abrogated on other grounds by Nguyen v. Reynolds, 131 F.3d 1340, 1352-54 (10th Cir.1997), petitioner also claims that he was entitled to instructions on the defenses and lesser included offenses supported by the evidence whether or not they were inconsistent with each other. However, there is no evidence that he requested such instructions, that the judge did not give such instructions, or that such instructions were supported by the evidence. In any event, the issue of whether petitioner was entitled to instruction on defenses and lesser included offenses appears inapposite, given the law discussed infra regarding the ownership element of grand larceny and the evidence at trial regarding the origin of products taken from the home.

<sup>11</sup> As the respondent points out, only the electronic goods were of questionable origin. The victim was a hairdresser who had a salon in his home. It is undisputed that hair care products taken from the salon belonged to him.

## CONCLUSION

Adjudication on the merits of this case in state court proceedings did not result 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 a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Accordingly, the undersigned recommends that the Petition for Writ of Habeas Corpus (Dkt. # 1) be **DENIED**.

## OBJECTIONS

Within ten days after being served with a copy of this Report and Recommendation, a party may serve and file specific, written objections with the Clerk of the District Court. 28 U.S.C. § 636(b)(1); Rules Governing § 2254 Cases in the United States District Courts; Rule 8(b). If such objections are timely filed, 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. *Id.* As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. If no objections are timely filed, the district court may adopt the Report and Recommendation without any review. **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); United States v. One Parcel of Real Property, with Buildings, Appurtenances, Improvements, and Contents, Known as: 2121 East 30th Street, Tulsa Oklahoma, 73 F.3d 1057 (10th Cir. 1996).

Dated this 20<sup>th</sup> day of July, 2000.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

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

OKLAHOMA MUNICIPAL POWER  
AUTHORITY,

Plaintiff,

vs.

SOUTHWESTERN ELECTRIC POWER  
COMPANY,

Defendant.

ENTERED ON DOCKET

DATE JUL 20 2000

Case No. 98-CIV-0063-BU(E) ✓

**FILED**

JUL 20 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Pursuant to the Joint Stipulation of Dismissal With Prejudice filed by the parties herein, the court hereby orders that this case is dismissed with prejudice, each side to bear its own costs, fees and expenses.

Dated this 20<sup>th</sup> day of July, 2000.

  
\_\_\_\_\_  
Judge Michael Burrage

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

ST. PAUL RE-INSURANCE, LTD., )  
)  
Plaintiff, )  
)  
v. )  
)  
GLENDA ANN McCORMICK, )  
CHRISTINA V. WILEY, and STATE )  
INSURANCE FUND, )  
)  
Defendants. )

ENTERED ON DOCKET  
DATE JUL 20 2000  
Case No. 99-CV-484-K (M)

**FILED**  
JUL 19 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Before the Court are the objections of Plaintiff St. Paul Re-Insurance, Ltd., to the Magistrate Judge's Report and Recommendation, filed June 22, 2000, recommending that declaratory judgment be entered for Plaintiff but that this judgment not include the reimbursement of state court defense costs, damages, or attorney fees. Plaintiff argues that the Court's Order, filed August 18, 1999, constituted judgment against Defendants Wiley and McCormick and awarded the state court defense costs. Plaintiff asserts that the only issue was the reasonableness of the amount requested. Plaintiff also objects to the Magistrate's failure to propose a journal entry of judgment against State Insurance Fund. Having conducted an independent review and taking into consideration Plaintiff's objections, the Court finds the Magistrate Judge's Report and Recommendation to be correct, including its characterization of the Court's August 18, 1999, Order. For the sake of clarity, however, the Court will amend the proposed order of judgment to more explicitly indicate that, as

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Defendant State Insurance Fund has admitted all the allegations in the complaint and as the Court has found that Plaintiff has no duty to defend Defendant McCormick or pay any judgment to Defendant Wiley, that Plaintiff owes no indemnity to Defendant State Insurance Fund for any subrogated interest it may have in Defendant Wiley's state court suit against Defendant McCormick.

IT IS THEREFORE ORDERED that the Report and Recommendation (# 19) is ADOPTED as the Order of the Court and Plaintiff's Motion for Judgment as to State Insurance Fund and Attorney Fees as to Glenda Ann McCormick and Christina V. Wiley (# 11) is GRANTED IN PART and DENIED IN PART as set out in the Report and Recommendation.

ORDERED this 18 day of JULY, 2000.

  
TERRY C. KERN, Chief  
United States District Judge

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

ST. PAUL RE-INSURANCE, LTD.,

Plaintiff,

v.

GLEND A N N M c C O R M I C K,  
C H R I S T I N A V. W I L E Y, and S T A T E  
I N S U R A N C E F U N D,

Defendants.

ENTERED ON DOCKET

DATE JUL 20 2000

Case No. 99-CV-484-K (M)

**F I L E D**

JUL 19 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JUDGMENT

This action was commenced by the filing of a Complaint for Declaratory Judgment and Issuance of Summons, copies of which were served on Defendants by certified mail. Defendant State Insurance Fund filed its answer admitting all allegations of the Complaint. Defendants McCormick and Wiley failed to appear, answer, or otherwise move with respect to the Complaint before the time therefor expired. Pursuant to Plaintiff's application for default pursuant to Fed. R. Civ. P. 55(b)(2),

IT IS HEREBY ADJUDGED AND DECLARED that Plaintiff, St. Paul Insurance, Ltd., owes no duty to defend Defendant McCormick or pay any judgment to Defendant Wiley or indemnity to Defendant State Insurance Fund for the claims made by Defendant Wiley in the State District Court action brought by Defendant Wiley against Defendant McCormick.

ORDERED this 18 day of JULY, 2000.



TERRY C. KERN, Chief  
United States District Judge

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ENTERED ON DOCKET  
DATE JUL 20 2000

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

SOUTHWESTERN ELECTRIC POWER )  
COMPANY, )

Plaintiff, )

vs. )

OKLAHOMA MUNICIPAL POWER )  
AUTHORITY, )

Defendant. )

Case No. 99-CIV-568-BU(E) ✓

**FILED**

JUL 20 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Pursuant to the Joint Stipulation of Dismissal With Prejudice filed by the parties herein, the court hereby orders that this case is dismissed with prejudice, each side to bear its own costs, fees and expenses.

Dated this 20<sup>th</sup> day of July, 2000.

  
\_\_\_\_\_  
Judge Michael Burrage

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

**FILED**

JUL 20 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA ex )  
rel. General Services Administration, )

Plaintiff, )

v. )

WYANDOTTE INDIAN TRIBE, )  
of Oklahoma, )

Defendant. )

CIVIL CASE

Case No. 00 CV 0177 H

REGISTERED ON DOCKET  
DATE JUL 20 2000

STIPULATION FOR DISMISSAL WITH PREJUDICE

The Plaintiff, United States of America, and the Defendant Wyandotte Indian Tribe, as set forth above, pursuant to FED. R. CIV. P. 41(a), hereby stipulate that the claims asserted by the United States of America against the Wyandotte Indian Tribe in the above captioned matter may be and are hereby dismissed with prejudice to their refiling.

*Keith A. Ward*

Keith A. Ward, OBA # 9346  
RICHARDSON, STOOPS, RICHARDSON & WARD  
6555 South Lewis, Suite 200  
Tulsa, Oklahoma 74136  
Attorney for Defendant, Wyandotte Tribe of Oklahoma

*Phil Pinnell*

Phil Pinnell, OBA # 7169  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103-7463  
Attorney for Plaintiff, United States of America

*215*

MW

**FILED**

JUL 20 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

ELIZABETH JACKSON, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ERLANGER TUBULAR )  
 CORPORATION, )  
 )  
 Defendant. )

Case Number: 99-CV-0623K(J)

*[Handwritten signature]*

ENTERED ON DOCKET

DATE ~~JUL 20 2000~~

**STIPULATION OF DISMISSAL WITH PREJUDICE AS TO  
ERLANGER TUBULAR CORPORATION**

COME NOW Plaintiff and Defendant, by and through their respective attorneys of record, and stipulate to the dismissal of the above styled and numbered cause with prejudice against Erlanger Tubular Corporation, each party to bear its own fees and costs.

Respectfully submitted,

*[Handwritten signature of Kevin P. Doyle]*

Kevin P. Doyle OBA 13269  
Pray, Walker, Jackman, Williamson &  
Marlar, Attorneys at Law  
900 ONEOK Plaza  
100 West Fifth Street  
Tulsa, OK 74103-4218  
(918) 581-5500  
(918) 581-5599 (fax)

and

Keith P. Spiller  
Tanya A. Hubanks  
THOMPSON HINE & FLORY LLP  
312 Walnut Street, 14<sup>th</sup> Floor  
Cincinnati, OH 45202  
(513) 352-6700

Attorneys for Defendant  
Erlanger Tubular Corporation

*[Handwritten initials]*

*[Handwritten number 49]*



---

Robert S. Coffey; OBA #17001  
1927 South Boston  
Tulsa, OK 74119  
(918) 582-1249

Attorney for Plaintiff  
Elizabeth Jackson

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

ARMOND DAVIS ROSS, )  
)  
Plaintiff, )  
)  
vs. )  
)  
UNITED STATES OF AMERICA; )  
STANLEY GLANZ, Sheriff; )  
TULSA COUNTY JAIL, )  
)  
Defendants. )

No. 99-CV-572-E (M)

FILED

JUL 18 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
JUL 18 2000  
DATE \_\_\_\_\_

**ORDER**

On July 14, 1999, Plaintiff, a prisoner presently in federal custody and appearing *pro se*, filed a pleading entitled "Application for Post-Conviction Relief" (Docket #1). After curing multiple deficiencies in his pleadings, Plaintiff filed, on May 19, 2000, his Second Amended Civil Rights Complaint. Plaintiff has paid in full the \$150.00 filing fee required to commence this civil rights action.

As an initial matter, the Court finds that Defendant United States of America should be dismissed. Section 1983 claims against the United States are barred by the doctrine of sovereign immunity. See Hall v. United States, 704 F.2d 246, 251-52 (6th Cir. 1983) (citing United States v. Mitchell, 445 U.S. 535, 538 (1980)). Plaintiff also cannot bring his claims against the United States under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) because the federal government enjoys sovereign immunity against such claims unless expressly waived. See Nuclear Transp. & Storage, Inc. v. United States, 890 F.2d 1348, 1352 (6th Cir. 1989). Therefore, the Court finds that Defendant United States of America should be dismissed.

Pursuant to Fed. R. Civ. P. 4(c)(1) and (m), the plaintiff is responsible for service of a summons and complaint within 120 days after the filing of the complaint. Service upon an

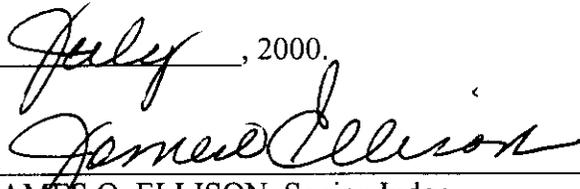
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individual or a corporation or business association may be effected in any judicial district of the United States pursuant to the law of the state in which the district court is located. See Fed. R. Civ. P. 4(e)(1), (h)(1). Oklahoma law provides that service may be accomplished by mailing a copy of the summons and complaint by certified mail, return receipt requested and delivery restricted to the addressee. See Okla. Stat. tit. 12, § 2004C(2)(b). The Court finds that even though Plaintiff is presently incarcerated, he may nonetheless effect service on the defendants by mailing a copy of the summons and complaint by certified mail, return receipt requested and delivery restricted to the addressee.<sup>1</sup>

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) Defendant United States of America is **dismissed** from this action.
- (2) The Clerk is directed to issue the summons previously provided by Plaintiff.
- (3) The Clerk shall **return** the summons and a copy of the second amended complaint (Docket #5), along with a copy of this Order to Plaintiff, for service on Defendant.
- (4) Within 120 days of the May 19, 2000 filing of the second amended complaint, Plaintiff must effect service of process by **mailing** in a separate envelope to each Defendant a summons, a copy of the complaint and a copy of this Order, via "certified mail, return receipt requested and delivery restricted," or show cause for his failure to do so.

SO ORDERED this 17<sup>th</sup> day of July, 2000.

  
\_\_\_\_\_  
JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT

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<sup>1</sup>Should Plaintiff be unable to effect service of process within 120 days of the May 19, 2000 filing of the Second Amended Complaint, the Court may, pursuant to Fed. R. Civ. P. 4(m), extend the time for service for an appropriate period provided Plaintiff demonstrates good cause for the failure.

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

**FILED**  
JUL 18 2000  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

REV. HERBERT LEWIS, )  
)  
Plaintiff, )  
)  
vs. )  
)  
CORRECTIONS CORPORATION OF )  
AMERICA; PRISON HEALTH SERVICES )  
COMPANY; LT. BLAETON; )  
MICHAEL VESCH, RN, )  
)  
Defendants. )

No. 00-CV-369 C (E) /

ENTERED ON DOCKET  
DATE JUL 18 2000

**ORDER**

On May 1, 2000, Plaintiff, a prisoner appearing *pro se*, filed a civil rights complaint (#1). When he filed his complaint, Plaintiff was incarcerated at the David L. Moss Criminal Justice Center. Plaintiff names as defendants Corrections Corporation of America ("CCA"), Prison Health Services Company, Lt. Blaeton, and Michael Vesch, RN. By Order filed May 10, 2000, Plaintiff was granted leave to proceed *in forma pauperis*. Plaintiff has now submitted the initial partial filing fee as directed by the Court. However, as stated in the May 10, 2000 Order, Plaintiff remains responsible for full payment of the \$150.00 filing fee.

After reviewing Plaintiff's complaint, the Court finds this action should be dismissed without prejudice to the filing of an amended complaint based on Plaintiff's failure to state a claim upon which relief may be granted.

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## ANALYSIS

### A. Standards

As stated above, Plaintiff has been granted leave to proceed *in forma pauperis*. In cases where the plaintiff is proceeding *in forma pauperis*, § 1915(e) applies and 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).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110. See also 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).<sup>1</sup>

---

<sup>1</sup>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." Conley, 355 U.S. at 45-46. The Court finds that this same standard should be applied when deciding whether to dismiss a claim *sua sponte* under either 28 U.S.C. § 1915(e)(2)(B)(ii) or § 1915A(b)(1).

**B. Plaintiff's claims**

In his complaint, Plaintiff states that "I was representing myself pro se and I filled out my motions, writs and petitions and handed them to Lt. Blaeton which is where this started as to the violation of my civil rights." (#1 at 5). As grounds for relief, Plaintiff states as follows:

Count I: My 5<sup>th</sup> & 14<sup>th</sup> Amendments were violated early February I was allowed by the court to proceed pro se in my case I requested access to Law Library was denied filed motions they were trashed or put into my property.

Count II: Obstruction of Justice being that the defendants were acting in color of the law CCA Lt. Blaeton.  
Lt. Blayton acting officer were confined took upon herself not to give me due process of the law by the law.

(#1 at 5-6).

The Court finds that, even if the allegations in Plaintiff's complaint are accepted as true, the complaint fails to state a claim upon which relief can be granted as to Defendants CCA and Blaeton. The Court liberally construes Plaintiff's complaint, see Haines v. Kerner, 404 U.S. 517 (1972), as alleging that he was denied his right to access the courts by Defendants CCA and Blaeton. Although an inmate's right of access to the courts has long been recognized as a constitutional right, the United States Supreme Court first outlined the general requirements of that right in Bounds v. Smith, 430 U.S. 817, 828 (1977). According to the Supreme Court, that right "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Id. at 828 (emphasis added). Such assistance is necessary only to file "meaningful legal papers"; that phrase has been interpreted to mean only those legal filings that present constitutional claims challenging the inmate's conviction or the conditions of confinement. Lewis v. Casey, 518 U.S. 343, 355 (1996) ("In other words, [the right of access to the courts] does not guarantee inmates the

wherewithal to transform themselves into litigating engines capable of filing everything from shareholder-derivative actions to slip-and-fall claims.”); see also Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985). In addition, the Supreme Court has stated that an inmate does not have standing or the right to sue simply because he was not provided access to the courts. Lewis, 518 U.S. at 351. An inmate “must go one step further and demonstrate that the [denial of access to the courts] hindered his efforts to pursue a legal claim.” Id. That is, an inmate like Plaintiff must demonstrate an “actual injury” resulting from the denial of his right of access to the courts. See also Twyman v. Crisp, 584 F.2d 352, 357 (10th. Cir. 1978).

In this case, Plaintiff alleges that Defendants CCA and Blaeton interfered with his right to access the courts by denying his request to access the law library and by trashing his motions. Significantly, however, the Court finds that Plaintiff has failed to allege any specific facts establishing that he was actually prejudiced in connection with any pending or contemplated legal proceeding by any alleged act or omission by either Defendant CCA or Blaeton. Thus, Plaintiff has alleged no “actual injury” related to his denial of access to courts claim and the Court finds that Plaintiff fails to state a claim upon which relief can be granted. Therefore, his claims that he has been denied access to the courts should be dismissed.

The Court also finds that although Plaintiff identifies two (2) other defendants in the caption of his complaint, Prison Health Services and Michael Vesch, RN, none of the allegations in the complaint relates in any way to those defendants. As a result, the Court finds that any claim against defendants Prison Health Services and Michael Vesch should be dismissed for failure to state a claim upon which relief may be granted.

**CONCLUSION**

Plaintiff's conclusory allegations fail to state a claim upon which relief may be granted. Therefore, Plaintiff's complaint should be dismissed without prejudice to the filing of an amended complaint. The Court will reopen this action should Plaintiff file an amended complaint within twenty (20) days of the entry of this Order.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. Plaintiff's complaint (Docket #1) is **dismissed without prejudice** to the filing of an amended complaint.
2. The Court will reopen this action should Plaintiff file an amended complaint within twenty (20) days of the entry of this Order.

SO ORDERED THIS 17 day of July, 2000.

  
H. DALE COOK, Senior Judge  
UNITED STATES DISTRICT COURT

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

**F I L E D**

JUL 18 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Patricia Poupore,

Plaintiff,

vs.

Federal Express, Corp,

Defendant.

No. 99-CV-218-C /

ENTERED ON DOCKET

DATE JUL 18 2000

**ORDER**

Currently pending before the Court is the motion filed by Defendant, Federal Express, Corp., to dismiss for lack of subject matter jurisdiction.

Standing is a threshold issue in every case before a federal court. A plaintiff who does not have standing has failed to meet the jurisdictional requirements necessary to maintain a cause of action in federal court. Hutchinson v. Pfeil, 211 F.3d 515, 523 (10<sup>th</sup> Cir. 2000).

Defendant alleges plaintiff does not have standing to bring this cause of action and therefore this court does not have subject matter jurisdiction.

Plaintiff, in November 1997, filed a complaint with the Equal Employment Opportunity Commission alleging discriminatory conduct on the part of defendant. The EEOC issued a right to sue letter in January 1999. Plaintiff filed the present action June 9, 1999.

Plaintiff filed a Chapter 7 bankruptcy petition with the United States Bankruptcy Court for the Northern District of Oklahoma on December 2, 1997. Plaintiff did not schedule her employment claim against defendant as an asset of the bankruptcy estate. The Bankruptcy Court issued an order discharging plaintiff as debtor on February 26, 1998. The Bankruptcy Court issued a final decree

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discharging the Trustee and closing the case March 5, 1998.

After a debtor files for bankruptcy protection, any cause of action belonging to the debtor at the time the bankruptcy case is commenced constitutes property of the estate under 11 U.S.C. § 541(a)(1). In re Stat-tech International Corp., 47 F.3d 1054, 1057 (10<sup>th</sup> Cir. 1995). The Trustee in a Chapter 7 case is the sole representative of the estate 11 U.S.C. § 323(a). The Trustee has the capacity to sue and be sued. 11 U.S.C. § 323(b). After a Trustee is appointed, the debtor no longer has standing pursue a cause of action which existed at the time the Chapter 7 petition was filed. Cain v. Hyatt, 101 B.R. 440, 442 (Bankr. E.D. Pa. 1989).

As the defendant argues in its motion to dismiss and the plaintiff concedes in her response, only the Trustee has standing to bring this cause of action. Despite plaintiff's stated intention to substitute the Trustee as a proper party with standing to sue, plaintiff has taken no action to do so.

Because plaintiff does not have standing to bring this cause of action, defendant's motion to dismiss is GRANTED.

IT IS SO ORDERED this 17<sup>th</sup> day of July, 2000.



H. Dale Cook  
Senior United States District Judge

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

**FILED**

JUL 13 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

PROGRESSIVE CASUALTY )  
INSURANCE COMPANY, )

Plaintiff, )

vs. )

Case No. 00-C-181-B ✓

MEL-O-DY, INC., d/b/a )  
MEL-O-DY ICE CREAM )  
COMPANY, an Oklahoma )  
corporation, MARK A. SMITH, )  
MISTY GODWIN, a minor, by and )  
through her next friend, LORI )  
TILLEY, and JOHN PAUL )  
STAFFORD, )

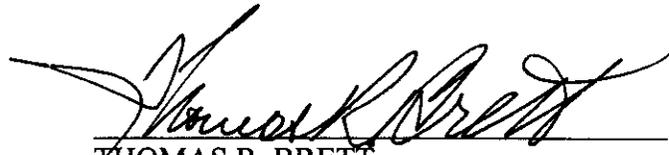
Defendants. )

ENTERED ON DOCKET  
DATE JUL 14 2000

ORDER

Before the Court is the motion to dismiss this action without prejudice based on the jurisdictional amount in controversy filed by Plaintiff Progressive Casualty Insurance Company (Docket No. 18). Plaintiff advises the Court there are no objections from any other party concerning a dismissal without prejudice of this action. Accordingly, the Court dismiss the lawsuit without prejudice.

IT IS SO ORDERED, this 13<sup>th</sup> day of July, 2000.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JUL 13 2000

*mw*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARVIN HOPSON, )  
)  
Plaintiff, )  
)  
vs. )  
)  
)  
)  
K. STAATS; J. POWELL; )  
J.T. SPITLER; and R. OWENS, )  
)  
Defendants. )

Case No. 95-CV-670-C ✓

ENTERED ON DOCKET

DATE JUL 14 2000

**AMENDMENT TO  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On June 15, 2000, defendants filed a Motion to Amend Findings of Fact and Conclusions of Law pursuant to Rule 52(b) F.R.Cv.P. Defendants requested the Court to add to its Findings certain testimony sponsored by the defendant officers and conclusions which could be drawn therefrom. As set forth in the Court's Findings of Fact and Conclusions of Law filed on June 5, 2000, the Court did not find credible the testimony offered by defendant police officers and such testimony was disputed by plaintiff. Accordingly, such evidence was not incorporated in the Findings and Conclusions. The Court denies the officers' motion to amend as requested.

For clarification, the Court hereby enters the following Amendment to the Findings and Conclusions entered on June 5, 2000:

1. All four defendant officers were jointly and actively involved in the apprehension and use of excessive force against the plaintiff. All four officers were in forceful physical contact with the plaintiff.

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2. All four officers admitted that they were present at the scene of the apprehension. Officer Powell testified at Hobson's state court arraignment that all four officers were involved in the scuffle. The Court finds this prior statement consistent with Hopson's testimony and credible.

3. The combined actions of four armed police officers in the apprehension and arrest of the plaintiff increased the vulnerability of the plaintiff and eliminated plaintiff's ability to resist the excessive force used against him.

4. At the moment that plaintiff was struck with the flashlight, all four police officers were in physical contact with the plaintiff and were active in the struggle.

5. The Court finds that it is not necessary to identify the individual officer who actually struck Hopson with the flashlight in order to impose liability because it was the interactions of all four officers in physically restraining plaintiff which enabled one of the officers to strike the disabling blows to plaintiff's collar bone.

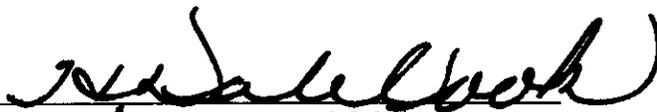
6. Officer Owens admitted to the use of pepper spray, while Officers Straats, Spitler and Powell restrained plaintiff. All four officers were armed with flashlights, had the occasion to strike plaintiff and one of these officers did so. It is undisputed that Hopson's collar bone was fractured in two locations incident to these events.

7. None of the defendant officers withdrew from the struggle or attempted to intercede to prevent the excessive use of force against Hopson.

8. The Court concludes that the defendant officers are jointly liable for the damage and injuries sustained by plaintiff because the excessive use of force was a joint undertaking by the four officers charged herein. All four officers actively participated in the events which led to the damage and injuries sustained by plaintiff Hopson.

ACCORDINGLY IT IS THE ORDER OF THE COURT, that the FINDINGS OF FACT AND CONCLUSIONS OF LAW entered herein on June 5, 2000 are AMENDED to incorporate the above referenced additional FINDINGS AND CONCLUSIONS.

IT IS SO ORDERED this 13 day of July, 2000.

  
HONORABLE H. DALE COOK  
Senior U.S. District Judge

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

**FILED**

JUL 17 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DWIGHT W. BIRDWELL, )  
 and )  
 BARBARA STARR SCOTT, et al., )  
 )  
 Consolidated Plaintiffs, )  
 )  
 vs. )  
 )  
 CHARLIE ADDINGTON, et al., )  
 )  
 Defendants. )  
 )  
 and )  
 )  
 MELVINA SHOTPOUCH and )  
 NICK LAY, )  
 )  
 Third-Party Plaintiffs, )  
 )  
 vs. )  
 )  
 GARLAND EAGLE, et al., )  
 )  
 Third-Party Defendants. )

Case No. 99-CV-0156(B) /

ENTERED ON DOCKET  
DATE JUL 18 2000

ORDER FOR DISMISSAL WITH PREJUDICE

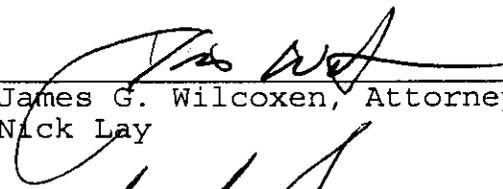
THIS MATTER coming on for hearing this 7th day of July, 2000, and it being announced that full, final and complete settlement has been reached by the Third Party Plaintiff and Cross- Claimant, Nick Lay, against Third Party Defendants, Denise Honawa, Billy Heath, Tina Jordan and Mark McCollough.

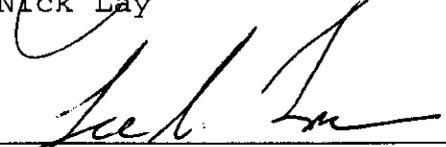
IT IS THEREFORE THE ORDER OF THIS COURT that all claims of Nick Lay against Denise Honawa, Billy Heath, Tina Jordan and Mark McCollough, are hereby dismissed with prejudice and IT IS FURTHER ORDERED that Denise Honawa, Billy Heath, Tina Jordan and Mark McCollough are hereby dismissed from this action.

  
U.S. DISTRICT JUDGE

299

APPROVED AS TO FORM:

  
James G. Wilcoxon, Attorney for  
Nick Lay

  
Lee I. Levinson, Attorney for  
Mark McCollough

  
Donn F. Baker, Attorney for  
Denise Honawa, Billy Heath and  
Tina Jordan

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

JUL 17 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA

**AMENDED JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)  
Correction for Clerical Mistake (Fed. R. Crim. P. 36)

V.

Victor Cornell Miller

Case Number: 99-CR-125-001-C ✓

Cindy Cunningham  
Defendant's Attorney

ENTERED ON DOCKET

DATE 7/17/00

**THE DEFENDANT:**

Was found guilty by jury trial on Counts 1 through 9 and 12 through 16 of the Superseding Indictment, on January 6, 2000 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

<u>Title and Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count s</u>
18 U.S.C. § 371	Conspiracy	9-9-99	1
18 U.S.C. § 1951	Interference with Interstate Commerce	6-22-99	2
18 U.S.C. § 924(c)	Possession of a Firearm During a Crime of Violence	6-22-99	3
18 U.S.C. §§ 1951 & 2	Interference with Interstate Commerce and Aiding & Abetting	8-21-99	4
18 U.S.C. §§ 924(c) & 2	Possession of a Firearm During a Crime of Violence and Aiding & Abetting	8-21-99	5
18 U.S.C. § 1951	Interference with Interstate Commerce	8-22-99	6
18 U.S.C. § 924(c)	Possession of a Firearm During a Crime of Violence	8-22-99	7
18 U.S.C. §§ 1951 & 2	Interference with Interstate Commerce and Aiding & Abetting	8-23-99	8
18 U.S.C. §§ 924(c) & 2	Possession of a Firearm During a Crime of Violence and Aiding & Abetting	8-23-99	9
18 U.S.C. §§ 1951 & 2	Interference with Interstate Commerce and Aiding & Abetting	9-3-99	12

18 U.S.C. §§ 924(c) & 2	Possession of a Firearm During a Crime of Violence and Aiding & Abetting	9-3-99	13
18 U.S.C. §§ 2113 & 2	Bank Robbery and Aiding & Abetting	9-8-99	14
18 U.S.C. §§ 924(c) & 2	Possession of a Firearm During a Crime of Violence and Aiding & Abetting	9-8-99	15
18 U.S.C. § 922(g)(1)	Possession of a Firearm After Former Conviction of a Felony	9-9-99	16

As pronounced on June 16, 2000, the defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

**IT IS FURTHER ORDERED** that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Signed this the 17<sup>th</sup> day of July, 2000.

  
The Honorable H. Dale Cook  
U.S. District Judge

Defendant's Soc. Sec. No.: 445 64 7488  
Defendant's Date of Birth: 01-18-63  
Defendant's USM No.: 08584-062  
Defendant's Residence and Mailing Address: David L. Moss Criminal Justice center, 300 North Denver, Tulsa, Oklahoma 74103

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of life to be followed by a consecutive sentence of 1,584 months. That term consists of the following: a term of life imprisonment as to Count 16, five years as to Count 1, twenty years as to each of Counts 2, 4, 6, 8, and 12, and twenty-five years as to Count 14. Counts 1, 2, 4, 6, 8, 12, 14 and 16 shall run concurrently. A term of 84 months is imposed as to Count 3, and 300 months as to each of Counts 5, 7, 9, 13, and 15. Counts 3, 5, 7, 9, 13 and 15 shall run consecutively, each to the other and to the sentence imposed in Counts 1, 2, 4, 6, 8, 12, 14, and 16.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_ at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal

By: \_\_\_\_\_  
Deputy Marshal

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years; three years as to each of Counts 1, 2, 4, 6, 8, and 12, and five years as to each of Counts 3, 5, 7, 9, 13, 14, 15 and 16, all terms to run concurrently, each with the other, for a total term of five (5) years .

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

### STANDARD CONDITIONS OF SUPERVISION

1. You will not leave the judicial district without permission of the Court or probation officer.
2. You will report to the probation officer and submit a truthful and complete written report within the first five days of each month.
3. You will answer truthfully all inquiries by the probation officer, and follow the instructions of the probation officer.
4. You will successfully participate in cognitive/life skills training or similar programming as directed by the probation officer.
5. You will support your dependents and meet other family responsibilities, to include complying with any court order or order of administrative process requiring the payment of child support.
6. You will work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
7. You will notify the probation officer ten days prior to any change of residence or employment.
8. You will not frequent places where controlled substances are illegally sold, or administered; you shall refrain from excessive use of alcohol and will not purchase, possess, use, or distribute any controlled substance or paraphernalia related to such substances, except as prescribed by a physician.
9. You will submit to urinalysis or other forms of testing to determine illicit drug use as directed by the probation officer; if directed by the probation officer, you will successfully participate in a program of testing and treatment (to include inpatient) for substance abuse until released from the program by the probation officer.
10. You will not associate with any persons engaged in criminal activity, and will not associate with any person convicted of a crime unless granted permission to do so by the probation officer.
11. You will permit a probation officer to visit at any time at your home, employment or elsewhere and will permit confiscation of any contraband observed in plain view by the probation officer.
12. You will provide access to all personal and business financial information as requested by the probation officer; and you shall, if directed by the probation officer, not apply for or acquire any credit unless permitted in advance by the probation officer.
13. You will notify the probation officer within seventy-two hours of being arrested, questioned, or upon having any contact with a law enforcement officer.
14. You will not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.
15. As directed by the probation officer, you will notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm your compliance with such notification requirements.
16. You will not possess a firearm, destructive device, or other dangerous weapon.

### ADDITIONAL CONDITIONS:

1. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgment shall be provided to the U. S. Probation Office immediately upon taking residency.
2. The defendant shall abide by the "Special Financial Conditions" enumerated in General Order Number 99-12, filed with the Clerk of the Court on July 13, 1999.

**CRIMINAL MONETARY PENALTIES**

The defendant shall pay the following total criminal monetary penalties; payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

ASSESSMENT	RESTITUTION	FINE
\$1,400.00	\$13,757.00	\$0.00

**ASSESSMENT**

It is ordered that the defendant shall pay to the United States a special assessment of \$1,600 for Count(s) 1 - 16 of the Superseding Indictment, which shall be due immediately.

**RESTITUTION**

The defendant shall make restitution in the total amount of \$13,757.00. The interest for restitution is waived by the Court.

The defendant shall make restitution to the following persons in the following amounts:

<u>Name of Payee</u>	<u>Payee Address</u>	<u>City, State, Zip</u>	<u>Amount</u>
West Highland Liquor	6161 South 33 <sup>rd</sup> West Avenue	Tulsa OK 74107	\$ 512.50
Neighborhood Liquor Store	4910 South Union Avenue	Tulsa OK 74107	\$ 1,235.00
Jeff Graves	5012 South 31 <sup>st</sup> West Avenue	Tulsa OK 74107	\$ 31.00
Smoke Shop	728B North Sheridan Road	Tulsa OK 74105	\$ 199.00
Apache Liquor	2472 North Yale Avenue	Tulsa OK 74115	\$ 2,484.00
Maggie Mendez	3249 South Braden	Tulsa OK 74115	\$ 640.00
Dreamland Video	8807 East Admiral Blvd.	Tulsa OK 74115	\$ 441.54
Kevin Williams	10170 East Admiral Blvd.	Tulsa OK 74116	\$ 142.00
Darrin Lewis	2711 South 136 <sup>th</sup> East Avenue	Tulsa OK 74134	\$ 17.00
Tulsa Federal Employees Credit Union	3207 South Norwood	Tulsa OK 74135	\$ 4,896.00
Fox Run Liquor	1613 South Memorial Drive	Tulsa OK 74112	\$ 298.69
Grapevine Liquor	2751 South Memorial Drive	Tulsa OK 74129	\$ 250.00
Western Finance	814 North Sheridan Road	Tulsa OK 74115	\$ 382.00
Janice Hamilton	108 North Richmond	Tulsa OK 74115	\$ 250.00
Signature Loan Service	1501 South Sheridan Road	Tulsa OK 74112	\$ 1,978.27

Restitution shall be paid jointly and severally with co-defendant George Hanson and is due in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release, except that no further payment shall be required after the sum of the amounts actually paid by all defendants has fully covered the compensable injury. The defendant shall notify the Court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution.

If a victim has received compensation from insurance or any other source with respect to a loss, restitution shall be paid to the person who provided or is obligated to provide the compensation, but all restitution of victims shall be paid to the victims before any restitution is paid to such a provider of compensation.

Unless the interest is waived, the defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

If the fine and/or restitution is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614. The defendant shall notify the Court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay the fine.

All criminal monetary penalty payments are to be made to the United States District Court Clerk, 333 West 4<sup>th</sup> Street, Rm. 411, Tulsa, Oklahoma 74103, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

**STATEMENT OF REASONS**

The Court adopts the factual findings and guidelines application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	45	
Criminal History Category:	VI	
Imprisonment Range:	5 years	Count 1
	20 years	Counts 2, 4, 6, 8, & 12
	25 years	Count 14
	84 months	Count 3
	300 months	Counts 5, 7, 9, 13 & 15
	life	Count 16
Supervised Release Range:	2 to 3 years	Counts 1, 2, 4, 6, 8, & 12
	5 years	Counts 3, 5, 7, 9, 13, 14, 15 & 16
Fine Range:	\$25,000 to \$250,000	Counts 1-16

Total amount of Restitution: \$ 13,757.00

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months and the court finds no reason to depart from the sentence called for by application of the guidelines.

BJS

JUL 17 2000 <sup>B</sup>

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

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA

**AMENDED JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)  
Correction for Clerical Mistake (Fed. R. Crim. P. 36)

V.

Case Number: 99-CR-125-002-C ✓

George John Hanson

F. L. Dunn, III  
Defendant's Attorney

ENTERED ON DOCKET

DATE 7/17/00

**THE DEFENDANT:**

Was found guilty by jury trial on Counts 1, 4, 5, 8, 9, 12 through 15, & 17 of the Superseding Indictment on January 6, 2000 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

<u>Title and Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Counts</u>
18 U.S.C. § 371	Conspiracy	9-9-99	1
18 U.S.C. §§ 1951 & 2	Interference with Interstate Commerce and Aiding & Abetting	8-21-99	4
18 U.S.C. §§ 924(c) & 2	Possession of a Firearm During a Crime of Violence and Aiding & Abetting	8-21-99	5
18 U.S.C. §§ 1951 & 2	Interference With Interstate Commerce and Aiding & Abetting	8-23-99	8
18 U.S.C. §§ 924(c) & 2	Possession of a Firearm During a Crime of Violence and Aiding & Abetting	8-23-99	9
18 U.S.C. §§ 1951 & 2	Interference with Interstate Commerce and Aiding & Abetting	9-3-99	12
18 U.S.C. §§ 924(c) & 2	Possession of a Firearm During a Crime of Violence and Aiding & Abetting	9-3-99	13
18 U.S.C. §§ 2113 & 2	Bank Robbery and Aiding & Abetting	9-8-99	14
18 U.S.C. §§ 924(c) & 2	Possession of a Firearm During a Crime of Violence and Aiding & Abetting	9-8-99	15
18 U.S.C. § 922(g)(1)	Possession of a Firearm After Former Conviction of a Felony	9-9-99	17

As pronounced on June 16, 2000, the defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

**IT IS FURTHER ORDERED** that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Signed this the 17<sup>th</sup> day of July, 2000.



The Honorable H. Dale Cook  
U.S. District Judge

Defendant's Soc. Sec. No.: 440-80-9179

Defendant's Date of Birth: 4/8/64

Defendant's USM No.: 08585-062

Defendant's Residence and Mailing Address: c/o David L. Moss Criminal Justice Center, 300 N. Denver Avenue, Tulsa OK 74103

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of life to be followed by a consecutive sentence of 984 months. That term consists of the following: a term of life imprisonment as to Count 17, five years as to Count 1, twenty years as to each of Counts 4, 8, and 12, and twenty-five years as to Count 14. Counts 1, 4, 8, 12, 14 and 17 shall run concurrently. A term of 84 months is imposed as to Count 5, and 300 months as to each of Counts 9, 13, and 15. Counts 5, 9, 13 and 15 shall run consecutively, each to the other and to the sentence imposed in Counts 1, 4, 8, 12, 14, and 17.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this Judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_ at \_\_\_\_\_, with a certified copy of this Judgment.

\_\_\_\_\_  
United States Marshal

By: \_\_\_\_\_  
Deputy Marshal

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years; three years as to each of Counts 1, 4, 8, and 12, and five years as to each of Counts 5, 9, 13, 14, 15 and 17, all terms to run concurrently, each with the other, for a total term of five (5) years .

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event later than 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

### STANDARD CONDITIONS OF SUPERVISION

1. You will not leave the judicial district without permission of the Court or probation officer.
2. You will report to the probation officer and submit a truthful and complete written report within the first five days of each month.
3. You will answer truthfully all inquiries by the probation officer, and follow the instructions of the probation officer.
4. You will successfully participate in cognitive/life skills training or similar programming as directed by the probation officer.
5. You will support your dependents and meet other family responsibilities, to include complying with any court order or order of administrative process requiring the payment of child support.
6. You will work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
7. You will notify the probation officer ten days prior to any change of residence or employment.
8. You will not frequent places where controlled substances are illegally sold, or administered; you shall refrain from excessive use of alcohol and will not purchase, possess, use, or distribute any controlled substance or paraphernalia related to such substances, except as prescribed by a physician.
9. You will submit to urinalysis or other forms of testing to determine illicit drug use as directed by the probation officer; if directed by the probation officer, you will successfully participate in a program of testing and treatment (to include inpatient) for substance abuse until released from the program by the probation officer.
10. You will not associate with any persons engaged in criminal activity, and will not associate with any person convicted of a crime unless granted permission to do so by the probation officer.
11. You will permit a probation officer to visit at any time at your home, employment or elsewhere and will permit confiscation of any contraband observed in plain view by the probation officer.
12. You will provide access to all personal and business financial information as requested by the probation officer; and you shall, if directed by the probation officer, not apply for or acquire any credit unless permitted in advance by the probation officer.
13. You will notify the probation officer within seventy-two hours of being arrested, questioned, or upon having any contact with a law enforcement officer.
14. You will not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.
15. As directed by the probation officer, you will notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm your compliance with such notification requirements.
16. You will not possess a firearm, destructive device, or other dangerous weapon.

### ADDITIONAL CONDITIONS:

1. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall not reside at any location without having first advised other residents that the premises may be subject to searches pursuant to this condition. Additionally, the defendant shall obtain written verification from other residents that said residents acknowledge the existence of this condition and that their failure to cooperate could result in revocation. This acknowledgment shall be provided to the U. S. Probation Office immediately upon taking residency.
2. The defendant shall abide by the "Special Financial Conditions" enumerated in General Order Number 99-12, filed with the Clerk of the Court on July 13, 1999.

**CRIMINAL MONETARY PENALTIES**

The defendant shall pay the following total criminal monetary penalties; payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

ASSESSMENT	RESTITUTION	FINE
\$1,000.00	\$12,544.81	\$0.00

**ASSESSMENT**

It is ordered that the defendant shall pay to the United States a special assessment of \$1200 for Counts 1, 2, 5, 8 through 15, & 17 of the Superseding Indictment, which shall be due immediately.

**RESTITUTION**

The defendant shall make restitution in the total amount of \$12,544.81. The interest for restitution is waived by the Court.

The defendant shall make restitution to the following persons in the following amounts:

<u>Name of Payee</u>	<u>Payee Address</u>	<u>City, State, Zip</u>	<u>Amount</u>
Neighborhood Liquor Store	4910 South Union Avenue	Tulsa OK 74107	\$ 1,235.00
Jeff Graves	5012 South 31 <sup>st</sup> West Avenue	Tulsa OK 74107	\$ 31.00
Apache Liquor	2472 North Yale Avenue	Tulsa OK 74115	\$ 2,282.00
Maggie Mendez	3249 South Braden	Tulsa OK 74115	\$ 640.00
Dreamland Video	8807 East Admiral Blvd.	Tulsa OK 74115	\$ 441.54
Kevin Williams	10170 East Admiral Blvd.	Tulsa OK 74116	\$ 142.00
Darrin Lewis	2711 South 136 <sup>th</sup> East Avenue	Tulsa OK 74134	\$ 17.00
Tulsa Federal Employees Credit Union	3207 South Norwood	Tulsa OK 74135	\$ 4,896.00
Grapevine Liquor	2751 South Memorial Drive	Tulsa OK 74129	\$ 250.00
Western Finance	814 North Sheridan Road	Tulsa OK 74115	\$ 382.00
Janice Hamilton	108 North Richmond	Tulsa OK 74115	\$ 250.00
Signature Loan Service	1501 South Sheridan Road	Tulsa OK 74112	\$ 1,978.27

Restitution shall be paid jointly and severally with co-defendant Victor Miller and is due in full immediately. Any amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program. Upon release from custody, any unpaid balance shall be paid as a condition of supervised release, except that no further payment shall be required after the sum of the amounts actually paid by all defendants has fully covered the compensable injury. The defendant shall notify the Court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution.

If a victim has received compensation from insurance or any other source with respect to a loss, restitution shall be paid to the person who provided or is obligated to provide the compensation, but all restitution of victims shall be paid to the victims before any restitution is paid to such a provider of compensation.

Unless the interest is waived, the defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

If the fine and/or restitution is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614. The defendant shall notify the Court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay the fine.

All criminal monetary penalty payments are to be made to the United States District Court Clerk, 333 West 4<sup>th</sup> Street, Rm. 411, Tulsa, Oklahoma 74103, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

**STATEMENT OF REASONS**

The Court adopts the factual findings and guidelines application in the presentence report.

**Guideline Range Determined by the Court:**

Total Offense Level:	45	
Criminal History Category:	VI	
Imprisonment Range:	5 years	Count 1
	20 years	Counts 4, 8 & 12
	25 years	Count 14
	Life	Count 17
	84 months	Count 5
	300 months	Counts 9, 13 & 15
Supervised Release Range:	2 to 3 years	Counts 1, 4, 8 & 12
	5 years	Counts 5, 9, 13, 14, 15 & 17
Fine Range:	\$ 25,000 to \$ 250,000	Counts 1, 4, 5, 8, 9, 12, 13, 14, 15 & 17

Total amount of Restitution: \$12,544.81.

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months and the court finds no reason to depart from the sentence called for by application of the guidelines.

BJS

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

**F I L E D**

JUL 17 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA )

Plaintiff, )

v. )

JAMES LEVI EDMONDSON, )

Defendant. )

No. 97-CR-171-C  
99-CV-1020-C

ENTERED ON DOCKET

ORDER

DATE JUL 17 2000

Defendant, James Levi Edmondson ("Edmondson"), filed a petition pursuant to Title 25, United States Code, Section 2255 raising, among other issues, the claim of ineffective assistance of counsel. Edmondson was represented by attorney, Stephen Greubel. In his petition, Edmondson claimed that Mr. Greubel was ineffective in that he allegedly failed to file a timely Notice of Appeal from the Judgment of Conviction and Sentence entered against him on December 4, 1998. In a response affidavit, Mr. Greubel attested that he addressed the issue of appeal with Edmondson, and Edmondson voluntarily elected not to have Mr. Greubel file a direct appeal. The government also filed a response to Edmondson's petition and attached Mr. Greubel's affidavit in support.

Thereafter, the district court set an evidentiary hearing on July 13, 2000 to resolve the factual assertions raised in the petition and in the responses.

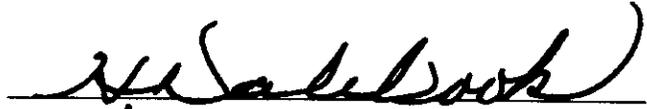
At the evidentiary hearing Edmondson, <sup>*in person and*</sup> through counsel, Ms. Beverly Atterberry, requested that the Section 2255 motion be withdrawn, and that all pending matters before the court

JD  
7-14-00

349 / 2

be withdrawn. With no objection from the government, the district court thereby withdrew Edmondson's pending § 2255 motion, and any and all other pending matters before the court.

IT IS SO ORDERED this ~~17<sup>th</sup>~~ day of July, 2000.

  
\_\_\_\_\_  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

**FILED**  
JUL 17 2000  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

VIRGIL LEON SITSLER, )  
)  
Plaintiff, )  
)  
vs. )  
)  
PATRICK BULLARD, Sheriff of )  
Washington County; C.E. STINNETT, )  
Sheriff of Nowata County; and )  
BILL CODY, Deputy Sheriff of )  
Nowata County, Oklahoma, )  
)  
Defendants. )

Case No. 98-CV-641-E (M) /

ENTERED ON DOCKET  
DATE JUL 17 2000

**ORDER**

By Order entered April 8, 1999, Plaintiff's claims against Defendants in their individual capacities were dismissed. In addition, Plaintiff's claims against Defendants in their official capacities for lack of medical care and lack of grievance procedure were dismissed. Those decisions were premised on the Court's conclusion that Plaintiff's medical care claims constituted nothing more than a disagreement about the medical care provided by Defendants and, as a result, his claims did not rise to the level of a constitutional violation cognizable under § 1983. However, Plaintiff's claims against Defendants in their official capacities under the Americans with Disabilities Act ("ADA") and Rehabilitation Act were not dismissed and Plaintiff was directed to submit a second amended complaint as to those claims. Plaintiff was advised that to establish a violation of the ADA, he would have to show that (1) he is a "qualified individual" with a disability as defined in 42 U.S.C. § 12131(2); (2) he was either excluded from participation in or denied benefits of services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. See #10 at 14.

On May 3, 1999, Plaintiff filed his Second Amended Civil Rights Complaint (Docket #11). The only named defendant in the second amended complaint is Patrick Bullard, Sheriff of Washington County, State of Oklahoma. Plaintiff identifies his only claim for relief as follows:

Count I: Discrimination under the Americans with Disabilities Act.

In support of his claim, Plaintiff provides the following statement:

Plaintiff was a pre-trial detainee within the Washington County Jail. During his stay the facility forced Plaintiff to sleep on elevated (sic) bunks located at eye level. Further, since Plaintiff was a pre-trial detainee he should have been offered (sic) the same medical assistance that any other non-incarcerated person could have received.

Plaintiff on several occasions (sic) sought assistance from the defendant and his staff to be examined and evaluated by specialist to determine whether he needed to participate in a rehabilitation program or not. All requests were denied by the facility.

Plaintiff understand (sic) that Washington County may have "their" special doctors in which they have their inmates examined, but their doctors are not specialists (sic) in Plaintiff's area of medical assistance. Defendant's doctors only examine and prescribe medication that is affordable to the County Jail Facility, and not for the best interests of the Plaintiff's serious medical needs.

Do (sic) to Plaintiff's requests being denied, Plaintiff has had and still is to the present day have had difficulty walking, running, standing, bending over, and etc. Plaintiff is now unable to participate in the daily activities that he once conducted, due to his improper medical assistance that he received from Washington County. The medical staff associated with Washington County believe that antibiotics and IB Prophin (sic) is the answer to everything. It is not, in some cases, such as plaintiff's, rehabilitation methods must be accompanied regardless the fact that he is incarcerated or not.

(#11 at 5-6 and attached page). In his request for relief, Plaintiff asks for "injunctive (sic) relief requiring the Defendant to be in compliance with the ADA, attorney fees, cost of this action, and to have an attorney appointed to represent me as well as others that may or now have this current problem within the County." (#11 at 8).

## *ANALYSIS*

28 U.S.C. § 1915A, entitled “Screening,” directs the court to review prisoner complaints brought against governmental entities or employees of governmental entities, before docketing or soon thereafter, to identify cognizable claims or dismiss the complaint or any portion of it if it is frivolous or malicious, fails to state a claim on which relief can be granted, or seeks monetary relief from a defendant immune from such relief. See 28. U.S.C. § 1915A. Furthermore, a district court may dismiss an *in forma pauperis* complaint under 28 § 1915(e)(2)(B)(ii) at any time, regardless of whether Plaintiff has paid any portion of the filing fee, if the court determines that “(A) the allegation of poverty is untrue; or (B) the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” In addition, while *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers and must be liberally construed, Haines v. Kerner, 404 U.S. 519, 520 (1972), the court should not assume the role of advocate and should dismiss claims which are supported only by vague and conclusory allegations. Hall v. Bellmon, 935 F.2d 1109, 1110 (10th Cir. 1991).

After careful review of the second amended complaint, the Court finds Plaintiff has failed to state a claim upon which relief may be granted under either 42 U.S.C. § 1983 or the ADA. Plaintiff’s core complaint continues to be that he did not receive the medical treatment he desired while he was incarcerated at the Washington County Jail. His claim is nothing more than a challenge to the medical care provided while in Defendant Bullard’s custody. Those § 1983 medical care claims were dismissed in the April 8, 1999 Order. Nothing alleged in the second amended complaint alters the Court’s prior conclusion that Plaintiff has failed to state a claim under § 1983.

The Court also finds that Plaintiff has not stated a claim for relief under the ADA. As explained in Moore v. Prison Health Services, Inc., 24 F. Supp.2d 1164, 1167 (D. Kan. 1998), the ADA contains three separate titles prohibiting discrimination against persons with disabilities in three contexts: Title I bars employment discrimination, 42 U.S.C. § 12112, Title II bars discrimination in services offered by public entities, 42 U.S.C. § 12132, and Title III bars discrimination in public accommodations engaged in interstate commerce, 42 U.S.C. § 12182. The title relevant to Plaintiff's claims in the instant case is Title II. A plaintiff proceeding under Title II must show he is a qualified individual who, because of a disability, has been denied the opportunity to participate in or to obtain the benefits of services, programs, or activities offered by a public entity. Id. (citing Layton v. Elder, 143 F.3d 469, 472 (8th Cir. 1998)).

In this case, Plaintiff has failed to state a claim under the ADA because he does not complain he has been "denied the benefit of the services, programs, or activities" of the prison system due to discrimination based upon his disability. See id. at 1168. Plaintiff merely complains that he has been denied the medical care, namely rehabilitation, which he believes he needs. In other words, Plaintiff continues to voice disagreement with the medical care provided to him. Because Plaintiff's claim under the ADA is no more than a challenge to his medical care, he has failed to state a claim for relief under the ADA and his second amended complaint should be dismissed with prejudice.

Lastly, the Court notes that even if Plaintiff had stated a claim for relief under the ADA, his request for injunctive relief requiring Defendant Bullard "to be in compliance with the ADA" would be denied as moot. Inmate claims against prison officials for prospective injunctive relief are mooted by the inmate's transfer to another facility in the absence of a demonstration of the likelihood of retransfer (which may not be based on "mere speculation."). McAlpine v. Thompson, 187 F.3d 1213,

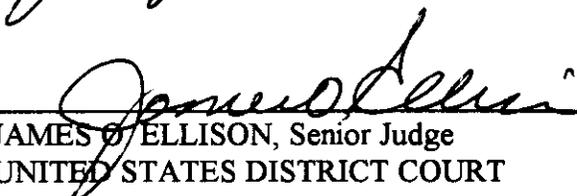
1218 (10th Cir. 1999); see also Higgason v. Farley, 83 F.3d 807, 811 (7th Cir.1995); Knox v. McGinnis, 998 F.2d 1405, 1412-15 (7th Cir.1993) (prisoner failed to establish "real and immediate" threat of being returned to segregation unit, and hence his suit complaining of segregation practices is moot.). At the time Plaintiff filed his original complaint, he was no longer in Defendant's custody at the Washington County Jail. He had already been transferred to the custody of the Oklahoma Department of Corrections and was incarcerated at the James Crabtree Correctional Center, Helena, Oklahoma. Plaintiff has not alleged that there is any likelihood that he may be again incarcerated at the Washington County Jail. As a result, his request for injunctive relief is moot.

#### *CONCLUSION*

Plaintiff's second amended complaint fails to state a claim upon which relief may be granted under either 42 U.S.C. § 1983 or the Americans with Disabilities Act. Therefore, his complaint should be dismissed with prejudice under 28 U.S.C. § 1915(e)(2)(B).

**ACCORDINGLY, IT IS HEREBY ORDERED** that the second amended complaint (Docket #11) is **dismissed with prejudice**, pursuant to 28 U.S.C. § 1915(e)(2)(B), for failure to state a claim upon which relief may be granted.

SO ORDERED THIS 14<sup>th</sup> day of July, 2000.

  
\_\_\_\_\_  
JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT

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

**FILED**

JUL 19 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

OKLAHOMA MUNICIPAL POWER )  
AUTHORITY, )

Plaintiff, )

vs. )

SOUTHWESTERN ELECTRIC POWER )  
COMPANY, )

Defendant. )

Case No. 98-CIV-0063-BU(E) ✓

ENTERED ON DOCKET

DATE JUL 19 2000

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the parties jointly stipulate and agree that all claims and counterclaims in this action should be and are hereby dismissed with prejudice. Each side will bear its own costs, attorneys' fees, and expenses.

Respectfully submitted,



D. KENT MEYERS, OBA #6168  
TERRY M. THOMAS, OBA #8951  
PAIGE S. BASS, OBA #17572  
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(918) 592-9801 (Facsimile)

ATTORNEYS FOR PLAINTIFF  
OKLAHOMA MUNICIPAL POWER AUTHORITY



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ATTORNEYS FOR DEFENDANT  
SOUTHWESTERN ELECTRIC  
POWER COMPANY

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

**FILED**

JUL 19 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SOUTHWESTERN ELECTRIC POWER )  
COMPANY. )

Plaintiff. )

vs. )

OKLAHOMA MUNICIPAL POWER )  
AUTHORITY. )

Defendant. )

Case No. 99-CIV-568-BU(E)

ENTERED ON DOCKET

DATE JUL 19 2000

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the parties jointly stipulate and agree that all claims and counterclaims in this action should be and are hereby dismissed with prejudice. Each side will bear its own costs, attorneys' fees, and expenses.

Respectfully submitted,



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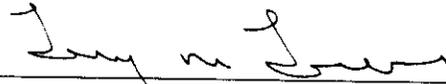
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---

D. KENT MEYERS, OBA #6168  
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ATTORNEYS FOR DEFENDANT  
OKLAHOMA MUNICIPAL POWER AUTHORITY

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE **JUL 19 2000**

UNITED STATES OF AMERICA, )  
on behalf of the Secretary of Veterans Affairs, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
DRENDA L. JEFFERSON, a single person; )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma, )  
 )  
Defendants. )

**FILED**  
IN OPEN COURT

**JUL 19 2000**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 99-CV-0698-K (M)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 19th day of July, 2000, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on April 24, 2000, pursuant to an Order of Sale dated February 9, 2000, of the following described property located in Tulsa County, Oklahoma:

Lot Four (4) Block Sixteen (16) VALLEY VIEW ACRES  
ADDITION to the City of Tulsa, Tulsa County, State of  
Oklahoma, according to the recorded plat thereof.

Appearing for the United States of America is Cathryn D. McClanahan, Assistant United States Attorney. Notice was given the Defendant, Drenda L. Jefferson, a single person, by mail; and the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District

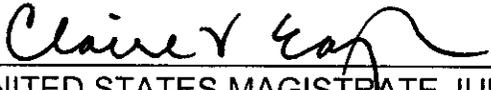
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Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

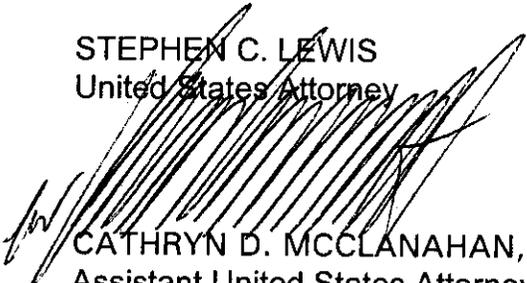
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



CATHRYN D. MCCLANAHAN, OBA #014853  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

Report and Recommendation of United States Magistrate Judge  
Case No. 99-CV-0698-K (M) (Jefferson)

CDM:css

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

19<sup>th</sup> Day of July, 192000

C. Portillo

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

JANET THORNTON,

Plaintiff,

vs.

EMCARE OF NORTH TEXAS,  
INC.,

Defendants.

ENTERED ON DOCKET

DATE JUL 19 2000

No. 99-CV-995-K ✓ **F I L E D**

JUL 19 2000

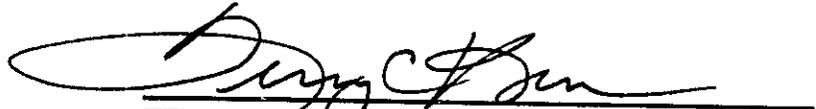
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

On May 10, 2000, Magistrate Judge Eagan entered her Report and Recommendation, which recommended that defendant's motion to transfer venue be granted and that this action be transferred to the United States District Court for the Eastern District of Oklahoma. No objection to the Report and Recommendation has been filed and the time limit provided by Rule 72(b) F.R.Cv.P. has expired. The Court has independently reviewed the record and sees no basis for reversal.

It is the Order of the Court that the Report and Recommendation of the United States Magistrate Judge (#20) is hereby adopted and affirmed. This action is hereby transferred to the United States District Court for the Eastern District of Oklahoma.

ORDERED this 19 day of July, 2000.



TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

1/2

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

**F I L E D**

JUL 18 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

Plaintiffs,

vs.

HOWARD CAVANESS, et al.

Defendants.

ENTERED ON DOCKET

DATE JUL 19 2000

Case No. 97-CV-338-E (M)

AGREED JOURNAL ENTRY

NOW on this 18<sup>th</sup> day of July, 2000, the Plaintiffs, Defendant Bank One Trust Company, N.A. (formerly known as Liberty Bank and Trust Company of Tulsa, N.A.), and Intervenor Benefit Resources, Inc., a Texas corporation, hereby submit this Agreed Journal Entry, with reference to the following circumstances and findings by the Court:

A. The Administration of Resilient Floor Coverers Local #1533 Pension Plan of Tulsa, Oklahoma, (the "Plan") filed with this Court its Complaint on April 14, 1997, requesting that the Court appoint Bank One Trust Company, N.A. (formerly known as Liberty Bank and Trust Company of Tulsa, N.A.) as Trustee of the Plan, terminate the existing Trustees of the Plan and transfer all fiduciary duties, administration and assets of the Plan to Bank One Trust Company, N.A.

Subsequently, Bank One Trust Company, N.A. has filed its answer declining to accept the transfer of the administration and trustee duties of the Plan.

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Intervenor, Benefit Resources, Inc., has intervened in this cause agreeing with the Plaintiffs' Complaint and informs the Court it accepts the transfer of all fiduciary duties, administration and assets of the Plan to Benefit Resources, Inc.

B. The Court finds that the Plaintiffs have dismissed without prejudice as to the following Defendants:

- a. John Seal, Acting Executive Director, Pension Benefit Guaranty Corporation;
- b. Cynthia Metzler, Acting Secretary of Labor, Department of Labor of the United States;
- c. Robert E. Rubin, Secretary of Treasury, Department of Internal Revenue Service of the United States.

C. The Court further finds that all other Defendants not dismissed have either filed an answer herein or have been served the Summons and Complaint, either by personal service or certified mail, return receipt requested, or by notice by publication, on affidavit of Plaintiffs' counsel.

D. The Court further finds that pursuant to 29 U.S.C. § 1342(b)(2)(A) and 29 U.S.C. § 1342(g) the Court has jurisdiction over the parties and subject matter herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. Benefit Resources, Inc., a Texas corporation, is hereby appointed as Trustee and Plan Administrator of the Plan (herein referred to in such capacity as the "Plan Trustee") and all fiduciary duties, administration and assets of the Plan are hereby transferred and delivered to such Plan Trustee from and after the date hereof. The responsibilities and duties of the Plan Trustee as provided herein shall become effective as of the date of this Agreed Journal Entry. The Plan Trustee shall have all the powers of a trustee found in 29 U.S.C. § 1342(d), et seq.

2. The current Trustees and Administrators of the Plan are hereby relieved and are hereby discharged from such responsibilities and fiduciary duties with respect to the administration of the Plan from and after the date hereof.

A. Further, all Plan assets currently in the possession of Bank One Trust Company, N.A. should immediately be transferred with an accounting of all such assets to the Plan Trustee.

B. Any objections to such accounting of assets shall be made within forty-five (45) days from the date it is submitted to the Plan Trustee and, if no such objections are timely made, such accounting shall be deemed accepted. Acceptance of such accounting shall discharge Bank One Trust Company, N.A. from any liability associated with or attributable to any matter covered in such accounting.

3. In its capacity as Plan Trustee and Plan Administrator of the Plan, the Plan Trustee shall discharge its duties with respect to the Plan solely in the interest of the Plan participants and beneficiaries and for the exclusive purpose of providing benefits to Plan participants and their beneficiaries and defraying reasonable expenses of administering the Plan, with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

4. In recognition of the fact that there is no longer an employer association or union to appoint trustees of the Plan, the Plan cannot be, and therefore shall not be, jointly administered as required by Section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C.

§ 302(c)(5), but shall be administered by the Plan Trustee as provided herein and in the Plan document and that certain Trust Agreement dated April 8, 1997 (the "1997 Trust Agreement").

5. The 1997 Trust Agreement shall be merged with and into the Plan documents and, to the extent not inconsistent with this Agreed Journal Entry, the provisions thereof shall continue to apply. In the event there is any inconsistency between the Plan document (including the merged 1997 Trust Agreement) and this Agreed Journal Entry, the terms and provisions of this Agreed Journal Entry shall prevail.

6. The Plan Trustee shall have the power to establish and, as the Plan Trustee may deem appropriate from time to time, modify the Plan's investment policy and method.

7. The Plan Trustee shall have the power to appoint one or more investment managers who shall have the power to manage, acquire, dispose of and direct the investment of all or any portion of the Plan assets and the Plan Trustee may determine a reasonable compensation to be paid to any such investment managers out of Plan assets.

8. In the event one or more investment managers are so appointed, the Plan Trustee shall segregate in its records that portion of the Plan assets which the investment managers shall manage. The Plan Trustee shall be under no duty or obligation to review or make recommendations with respect to any investment decision of the investment managers. The Plan Trustee shall not be liable for any acts or omissions of an investment manager, or be under any obligation to invest or otherwise

manage any asset which is the subject to the management of the investment managers, provided the Plan Trustee does not knowingly participate in or knowingly undertake to conceal an act or omission of an investment manager when the Plan Trustee knows such act or omission is a breach of the investment manager's fiduciary responsibility.

9. The Plan Trustee is authorized to employ actuaries, attorneys, accountants or any other agents or advisors as it deems advisable in the discharge of its duties. The Plan Trustee may retain or consult counsel, which may be counsel to the Plan Trustee, with respect to the meaning or construction of the Plan, with respect to its obligations or duties under the Plan, or with respect to any claim, action, proceeding or question of law. Subject to ERISA Section 410(a), the Plan Trustee shall be fully protected in any action taken or not taken by it in good faith pursuant to or in reliance upon advice of counsel or other agents or advisors, provided the Plan Trustee exercised due care in selection of such counsel or other agents or advisors. The Plan Trustee shall have the power to terminate any such attorneys, accountants or other agents or advisors from time to time as it deems advisable.

10. The Plan Trustee shall keep accurate and detailed records of all receipts, investments, disbursements and other transactions required to be performed under the Plan. Within sixty (60) days after the close of each Plan Year, the Plan Trustee shall mail to all Plan participants such written reports which shall indicate the receipts, disbursements and other transactions affected by it during such Plan Year and the assets and liabilities of the Plan at the close of such period. Any objections to such periodic reports shall be made within thirty (30) days from the date such reports are

mail and, if no such objections are timely made, such reports shall be deemed accepted. Acceptance of such periodic reports shall discharge the Plan Trustee from any liability associated with or attributable to any matter covered in such reports.

11. The Plan Trustee is authorized to prepare, sign and submit all reports and other information required to be supplied to any governmental agency including, without limitation, the Internal Revenue Service, the Department of Labor and the Pension Benefit Guaranty Corporation, and to participants, former participants, beneficiaries and alternate payees and may pay all associated fees and expenses out of Plan assets.

12. The Plan Trustee is authorized to pay the reasonable and necessary fees and expenses of administration of the Plan out of the Plan assets, including, without limitation, the fees and expenses of the Plan Trustee (which may be modified by the Plan Trustee from time to time), the fees and expenses of actuaries, accountants, attorneys, investment advisors, investment managers and other agents and advisors, premiums and other charges required by the Pension Benefit Guaranty Corporation and any other fees, expenses and costs of administering the Plan and fulfilling its duties as Plan Trustee.

13. To the maximum extent permitted by applicable law, the Plan shall indemnify and hold harmless the Plan Trustee from and against any and all liability, loss, claims, damages and expenses arising out of or resulting from any action or omission of any action by the Plan Trustee, provided that the action or omission of action was in good faith and did not result from the gross negligence or willful misconduct of the Plan

Trustee. To the maximum extent permitted by applicable law, such indemnity shall be satisfied out of Plan assets, without Court approval of the payment of any such indemnity.

14. The Plan Trustee is authorized to distribute Plan benefits in accordance with the terms and provisions of the Plan.

15. The Plan Trustee is authorized to construe and interpret the Plan and shall determine all questions arising in the administration, interpretation and application of the Plan. The Plan Trustee may retain or consult counsel with respect to the meaning or construction of the Plan. Any construction or interpretation of the terms of the Plan made by the Plan Trustee in good faith shall be binding upon the participants, beneficiaries and any other persons claiming a right or benefit by, through or under the Plan. The Plan Trustee may petition this Court, to the extent the Plan Trustee deems appropriate, for interpretation or guidance in discharging its responsibilities, either prior to or subsequent to taking any action or omitting to take any action.

16. The Plan Trustee shall not be liable for any failure to perform any of its obligations as Plan Trustee or for any diminution or loss of Plan assets due to strikes, riot, fire, Act of God or any other contingency beyond its reasonable control.

17. The Plan Trustee is authorized to amend the Plan as and when the Plan Trustee deems necessary or appropriate from time to time including, without limitation, as may be required in order to maintain or restore the tax qualification of the Plan and take any other actions necessary or appropriate to maintain or restore the tax qualification of the Plan. All fees and expenses associated with any such amendments

and such actions including, without limitation, attorneys' fees and costs of requesting any determination letters from the Internal Revenue Service and all fees or costs of maintaining or restoring the tax qualification of the Plan shall be paid from Plan assets. Unless required to comply with the requirements of the Internal Revenue Service, this Court or other governmental bureau or agency, no amendment to the Plan shall decrease any Plan participant's accrued benefit.

18. Subject to the rules and restrictions imposed by the Internal Revenue Code and ERISA, the Plan Trustee is authorized to liquidate, in whole or in part, as the Plan Trustee deems appropriate, the trust holding the Plan assets at any time and from time to time.

19. The Plan Trustee shall serve as Plan Trustee so long as there are sufficient assets to pay benefits to Plan participants. If Plan assets cease to be sufficient to pay benefits, the Plan Trustee is authorized to deal with the Pension Benefit Guaranty Corporation to ensure that Plan participants receive the benefits provided by law through the Pension Benefit Guaranty Corporation. If, at any time, the Plan Trustee wishes to resign, it may do so upon notice to all Plan participants in the Plan provided the resigning Plan Trustee finds and provides an alternate Plan Trustee to take over all the administrative and fiduciary duties listed herein, and upon approval of such substitution by this Court. Any Successor Plan Trustee shall succeed to the rights, powers, duties and responsibilities of the Plan Trustee under the Plan upon receipt of the Plan assets from the Plan Trustee. The resigning or removed Plan Trustee shall transfer and deliver the Plan assets to the Successor Plan Trustee upon order of this

Court. If such order is not provided on or before the effective date of the Plan Trustee's removal or resignation, the Plan Trustee may transfer administration of the Plan to this Court and transfer and deliver the Plan assets to this Court for disposition as this Court shall determine, whereupon this Court (or its designee) shall succeed to the rights, powers, duties and responsibilities of the Plan Trustee under the Plan upon receipt of the Plan assets from the Plan Trustee. A final account shall be submitted to this Court by the resigning or removed Plan Trustee at the time the administration of the Plan is turned over to a Successor Plan Trustee or this Court, as the case may be. Any objections to the final account of a resigning Plan Trustee shall be made within forty-five (45) days from the date it is submitted to this Court and, if no such objections are timely made, the final account shall be deemed accepted. Acceptance of the final account shall discharge the Plan Trustee from any liability associated with or attributable to any matter covered in such account.

20. The Plan Trustee is authorized and empowered to execute and deliver such other instruments, certificates or documents, in the name and on behalf of the Plan, in such form and with such terms and provisions as the Plan Trustee may approve, the Plan Trustee's execution thereof to be conclusive evidence of such approval, and to take such other action as the Plan Trustee may deem necessary, desirable, advisable or appropriate to administer the Plan and to carry out the intent and to accomplish the purposes of the foregoing Agreed Journal Entry.

21. The omission from this Agreed Journal Entry of any action to be taken in accordance with any requirements of the Plan shall in no manner derogate from the

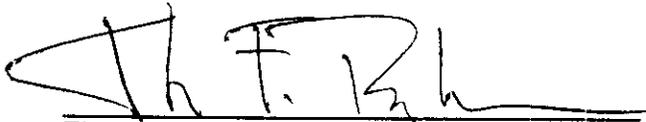
authority of the Plan Trustee to take all actions necessary, desirable, advisable or appropriate to administer the Plan and to carry out the intent and to accomplish the purposes of the foregoing Agreed Journal Entry.

22. Unless otherwise expressly provided in this Agreed Journal Entry, the Plan Trustee may take any and all such actions and pay all such amounts from Plan assets as are authorized or permitted herein or in the Plan document (including the merged Trust Agreement) without any specific approval by this Court or any third party.

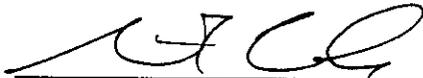
SO ORDERED THIS 18<sup>th</sup> DAY OF JULY, 2000.

  
\_\_\_\_\_  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT JUDGE

APPROVED:



THOMAS F. BIRMINGHAM OBA #811  
Birmingham, Morley, Weatherford &  
Priore, P.A.  
1141 East 37th Street  
Tulsa, Oklahoma 74105-3162  
(918) 743-8355  
Attorney for Plaintiffs



R. MICHAEL COLE OBA #14698

Crowe & Dunlevy

321 South Boston Avenue

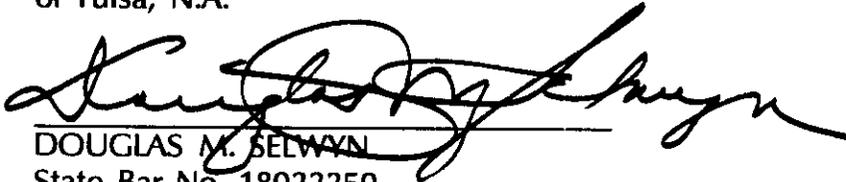
Suite 500

1800 Mid-America Tower

Tulsa, Oklahoma 74103-3313

(918) 592-9800

Attorney for Defendant, Bank One Trust Company,  
N.A., formerly Liberty Bank and Trust Company  
of Tulsa, N.A.



DOUGLAS M. SELWYN

State Bar No. 18022250

S.D. TX No. 0507

1221 McKinney Street

3850 One Houston Center

Houston, Texas 77010-2028

(713) 650-3850

Attorney for Intervenor,  
Benefit Resources, Inc.

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

FILED

JUL 18 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

PETROLEUM DEVELOPMENT COMPANY,  
an Oklahoma corporation,  
  
Plaintiff,

vs.

Case No. 99-CIV-0149-E

RED MOUNTAIN EXPLORATION, L.L.C., a  
Colorado L.L.C., MEWBOURNE OIL  
COMPANY, a Delaware corporation, MPP  
1998, a Texas Partnership, CURTIS W.  
MEWBOURNE, CURTIS W. MEWBOURNE,  
Trustee, MEWBOURNE ENERGY  
PARTNERS 98-A, a Texas partnership, and  
3MG CORPORATION, a foreign corporation,  
  
Defendants.

ENTERED ON DOCKET

DATE JUL 18 2000

**JOINT NOTICE AND STIPULATION OF DISMISSAL WITH PREJUDICE  
OF ALL CAUSES OF ACTION**

The Parties, Petroleum Development Company as Plaintiff, and Red Mountain Exploration, L.L.C., a Colorado L.L.C., Mewbourne Oil Company, a Delaware Corporation, MPP 1998, a Texas Partnership, Curtis W. Mewbourne, Curtis W. Mewbourne, Trustee, Mewbourne Energy Partners 98-A, a Texas Partnership, and 3MG Corporation, a foreign corporation, Defendants and Counterclaimants, by their counsel, hereby inform the Court that the Parties have stipulated to a voluntary dismissal with prejudice of the present causes of action, inclusive of all counterclaims of the Defendants/Counterclaimants, pursuant to Rule 41(a)(1) Federal Rules of Civil Procedure. Counsel for all Parties agree that they will not suffer any legal prejudice by this voluntary dismissal with prejudice.

Counsel for the Parties have approved this joint notice and stipulation of dismissal with

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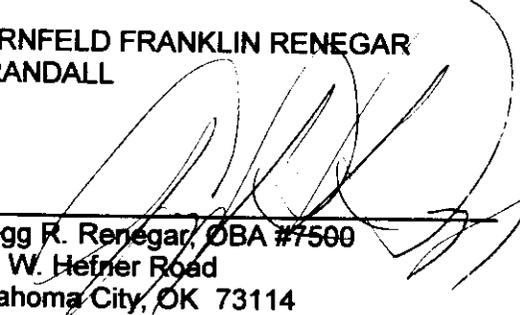
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prejudice of all causes of action as to form and content.

Respectfully submitted,

**KORNFELD FRANKLIN RENEGAR  
& RANDALL**

**MAHAFFEY & GORE, P.C.**

By: 

By: 

Gregg R. Renegar, OBA #7500  
128 W. Hefner Road  
Oklahoma City, OK 73114  
Telephone: 405-475-6326  
Facsimile: 405-475-6315  
Attorney for Defendants/Counterclaimants  
Red Mountain Exploration, L.L.C., a  
Colorado L.L.C., Mewbourne Oil Company,  
a Delaware Corporation, MPP 1998, a  
Texas Partnership, Curtis W. Mewbourne,  
Curtis W. Mewbourne, Trustee, Mewbourne  
Energy Partners 98-A, a Texas Partnership,  
and 3MG Corporation, a foreign Corporation

Gregory L. Mahaffey, OBA # 5624  
Two Leadership Square, Suite 1100  
211 North Robinson Avenue  
Oklahoma City, OK 73102  
Telephone: (405) 236-0478  
Facsimile: (405) 236-1520  
Attorney for Plaintiff Petroleum  
Development Company

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUL 18 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 JUL 18 2000

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

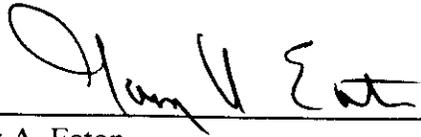
Plaintiff Dorothy Smith, by counsel, and defendants DePuy Inc., DePuy Motech, Inc.,  
and Johnson & Johnson, by counsel, stipulate as follows:

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

CJT

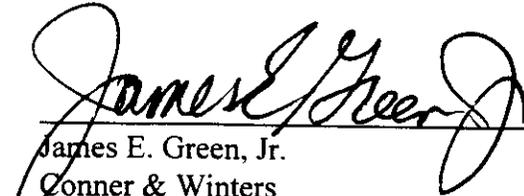
25

4. No costs are awarded.



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

Attorney for Plaintiff  
Dorothy Smith



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

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

SAC  
2/14/00  
SA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 REAL PROPERTY AND PROPERTY )  
 LOCATED AT 7706 N. 169<sup>TH</sup> E. AVE., )  
 OWASSO, OKLAHOMA, LOCATED IN )  
 THE SE/4 OF THE SW/4 OF SECTION )  
 26, TOWNSHIP 21 NORTH, RANGE 14 )  
 EAST OF THE I.B.& M., ROGERS )  
 COUNTY, OKLAHOMA, AND ALL )  
 CONTENTS, BUILDINGS, )  
 APPURTENANCES, AND )  
 IMPROVEMENTS THEREON; )  
 et al., )  
 )  
 Defendants. )

ENTERED ON DOCKET  
DATE JUL 18 2000

Case No. 99-CV-588-K(E)

**F I L E D**

JUL 18 2000 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture as to the defendant real and personal properties and all entities and/or persons interested in the defendant real and personal properties, the Court finds as follows:

The verified Complaint for Forfeiture *In Rem* was filed in this action on the 20th day of July, 1999, alleging that the defendant real and personal properties are subject to seizure and forfeiture to the United States of America, pursuant to 21 U.S.C. §§ 881(a)(4), 881 (a)(6) and 881 (a)(7), because they are properties which were used or intended to be used in any manner to facilitate violations of Title 21, or are properties traceable thereto, and/or because they are properties which constitute or are derived

from proceeds traceable to a violation of Title 21, United States Code and/or pursuant to 18 U.S.C. § 981 because they are properties which were involved in money laundering.

A Warrant of Arrest of Real Properties and Notice *In Rem* and a Warrant of Arrest of Personal Properties and Notice *In Rem* (hereinafter "Warrants of Arrest and Notices *In Rem*") were issued on the 23rd day of July 1999, by this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant real and personal properties and for publication in the Northern District of Oklahoma.

The United States Marshals Service served a copy of the Complaint for Forfeiture *In Rem* and the Warrants of Arrest and Notices *In Rem* on the defendant real and personal properties as follows:

**A. REAL PROPERTY AND PROPERTY LOCATED AT 7706 N. 169<sup>TH</sup> E. AVE., OWASSO, OKLAHOMA, MORE PARTICULARLY DESCRIBED AS FOLLOWS:**

**A tract of land being part of the SE/4 of the SW/4 of Section 26, Township 21 North, Range 14 East of the I.B.& M., Rogers County, Oklahoma, said tract being further described as follows: Beginning at a point on the East boundary line of said SE/4 of the SW/4, said point being 500.00 feet North of the SE corner of said SE/4 SW/4; thence N. 89°53'41" W. a distance of 304.42 feet to the true point of beginning; thence N. 00°03'35" E. a distance of 249.28 feet; thence N. 89°54'01" W. a distance of 304.68 feet; thence due South a distance of 249.25 feet, thence S. 89°53'33" E. a distance of 304.42 feet to the true point of beginning:**

Served: August 12, 1999;

**AND ALL CONTENTS, BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON, INCLUDING, BUT NOT LIMITED TO:**

1. SANYO Television, S/N V6400809006302;
2. HOWARD MILLER Grandfather clock, S/N 62520318;
3. Master Bedroom Furnishings, including:  
 MÖBEL 6751-20, 9 Drawer Mule Chest,  
 MÖBEL 6751-81, Mule Chest Mirror,  
 MÖBEL 6751-27, 6 Drawer Lingerie Chest,  
 KELLER G15 3637HB, Column Post Head Board,  
 KELLER G15 3637, Column Foot Board,  
 MÖBEL 6751-88, Tri-View Mirror,  
 MÖBEL 6751-18, Triple Dresser,  
 MÖBEL 6751-222TOP, Armoire w/Mirror Top,  
 MÖBEL 6751-23, Armoire Base,  
 2 CRYSTAL & BRASS Table Lamp, 3512045-830,  
 KELLER G15 3619 King Bed Rails,  
 KELLER G15 3637 King Bed Canopy;
4. SUN QUEST Tanning Bed, S/N ALIA20596 (Bottom)  
 and S/N ALIA10634 (Top);
5. SANYO Television, S/N V6470815915057;
6. EXXIS VCR, S/N 50201889B;
7. VIDEOCIPHER Receiver, S/N A040D3598;
8. SONY Laser Disc, S/N 370362062;
9. SONY CD Player, S/N 8145035;
10. SONY CD Player, S/N 8147863;
11. KENWOOD Receiver, S/N 40202782;
12. SONY Cassette Player, S/N 8828321;
13. SHARP Speakers, S/N 9409;
14. Roll Top Desk;
15. MITSUBISHI Television, S/N 500400;
16. RADIO SHACK Metal Speaker Stand, SKU number 40-1351;
17. a pair of RADIO SHACK Pro LX5 shelf speakers, SKU 40-4061;
18. RADIO SHACK Pro SW-10P Sub-Woofer speaker, SKU 40-4070;
19. ENGLAND/CORSAIR Living Room Furniture, including;  
 (2) two E700-03 Rectangular End Tables,  
 an E700-04 Sofa Table,  
 an E700-07 Rectangular Cocktail Table;
20. BEACH 20-31540 Sierra Oak Game Table;
21. Six (6) HIPPOPOTAMUS 258C Side Chairs w/ Tawny Oak  
 finish and Route 66 Upholstery;
22. CRISLOYD 604 Wood Rack w/Chips, Price \$99.99;
23. Personal Computer system, including:

**IBM compatible mini tower, no serial,  
DELL Monitor, S/N 8250615,  
CREATIVE LABS computer camera, S/N G4598C16987E,  
DELL keyboard, S/N 12741-67M-6763,  
BELKIN mouse, S/N 980585333,  
WINGMAN joystick, S/N LZB83910006,  
CREATIVE LABS microphone, no serial,  
2 ALTEC LANSING speakers, S/N FMW0035883, w/AC  
adapter,  
MEMOREX power center, S/N 335009,  
APC Uninterruptable power supply, S/N 096087481030,  
HP LASERJET printer, S/N USHC053605, w/ printer cable,  
and miscellaneous computer diskettes, computer CD's,  
and manuals seized March 11, 1999:**

**Served: August 12 and 26, 1999;**

- B. REAL PROPERTY AND PROPERTY LOCATED AT 11839 S. 87TH  
E. AVENUE, BIXBY, OKLAHOMA, MORE PARTICULARLY  
DESCRIBED AS FOLLOWS:**

**LOT NINETEEN (19), BLOCK ELEVEN (11), SOUTHERN  
MEMORIAL ACRES EXTENDED, AN ADDITION TO THE  
CITY OF BIXBY, TULSA COUNTY, STATE OF OKLAHOMA,  
ACCORDING TO THE RECORDED PLAT THEREOF;**

**AND ALL BUILDINGS, APPURTENANCES, AND  
IMPROVEMENTS THEREON:**

**Served: September 10, 1999;**

- C. ONE 1978 CESSNA 172N AIRCRAFT, SERIAL NUMBER (SN)  
17270154, FEDERAL AVIATION ADMINISTRATION (FAA)  
REGISTRATION N806DA:**

**Served: August 11, 1999;**

- D. ONE 1992 CHEVROLET PICKUP, VIN 2GCEC19K4N1145996:**

**Served: August 11, 1999;**

- E. PROCEEDS OF CITIZENS SECURITY BANK AND TRUST, CO.  
(CSB) CHECKING ACCOUNT NUMBER 541714 IN THE AMOUNT  
OF \$1,584.83:**

**Served: August 19, 1999;**

- F. PROCEEDS OF CITIZENS SECURITY BANK AND TRUST, CO.**

**(CSB) CHECKING ACCOUNT NUMBER 51920 IN THE AMOUNT OF \$1,017.91:**

Served: August 19, 1999;

**G. PROCEEDS OF PUTNAM INVESTMENT ACCOUNT NO. A02-1-446-74-7748-BBBR:**

Served: August 19, 1999;

**H. PROCEEDS OF PUTNAM INVESTMENT ACCOUNT NO. A45-1-446-74-7748-BBB1:**

Served: August 19, 1999;

**I. JOHN DEERE 15 HORSEPOWER HYDROSTATIC LAWN TRACTOR, MODEL STX46, SN M00STXL292807:**

Served: August 12, 1999.

Steve Moore, Ellen Marie Moore, Citizens Security Bank and Trust Company, Bank of Oklahoma, Texas Commerce Bank, N.A. (now Meritech Mortgage Services, Inc., as servicer and agent for Chase Bank of Texas, N.A., f/k/a Texas Commerce Bank, N.A., (hereinafter Meritech), Rogers County Treasurer and Tulsa County Treasurer were determined to be the only individuals with possible standing to file a claim to the defendant real and personal properties, and, therefore the only individuals to be served with process in this action. United States Marshals Service forms reflecting personal service on the potential claimants are on file herein.

All persons and/or entities interested in the defendant real and personal properties were required to file their claims herein within ten (10) days after service upon them of the Complaint and Warrants of Arrest and Notices *In Rem*, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant real and personal properties, and no persons or entities have plead or otherwise defended in this suit as to said defendant real and personal properties, save and except Steve Moore, who filed his Stipulation for Forfeiture herein; Ellen Marie Moore, who filed her Stipulation for Forfeiture and Withdrawal of Claim herein; Rogers County Treasurer and Board of County Commissioners of Rogers County, alleging no taxes due; Tulsa County Treasurer, alleging certain taxes due; Bank of Oklahoma, who has entered into a Stipulated Expedited Settlement with the Government; Citizens Security Bank and Trust Company, who has entered into a Stipulated Expedited Settlement with the Government; and Meritech, who has entered into a Stipulated Expedited Settlement with the Government, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant real and personal properties and all persons and/or entities interested therein, save and except Steve Moore, Ellen Marie Moore, Rogers County Treasurer and Board of County Commissioners of Rogers County, Tulsa County Treasurer, Bank of Oklahoma, Citizens Security Bank and Trust Company, and Meritech.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant real property located at 11839 S. 87th E. Ave., Bixby, Oklahoma, and certain personal properties are located, on January 13, 20 and 27, 2000. Proof of Publication was filed February 11, 2000.

Steve Moore executed a Stipulation for Forfeiture herein whereby he stipulated to the forfeiture of all defendant real and personal properties as properties subject to forfeiture, pursuant to 21, United States Code, Sections 881(a)(4), 881(a)(6) and 881 (a)(7), since they are properties which were used or intended to be used in any manner to facilitate violations of Title 21, or are properties traceable thereto, and/or because they are properties which constitute or are derived from proceeds traceable to a violation of Title 21, United States Code and/or pursuant to 18 U.S.C. § 981 because they are properties which were involved in money laundering. The Stipulation for Forfeiture was filed herein on July 20, 1999.

Ellen Marie Moore filed her Answer on September 3, 1999, and Claim of Ownership on September 13, 1999, to the defendant real property located at 11839 S. 87th E. Avenue, Bixby, Oklahoma. Thereafter, Ellen Marie Moore executed her Stipulation for Forfeiture and Withdrawal of Claim wherein she stipulates and agrees that the defendant real property located at 11839 S. 87th E. Avenue, Bixby, Oklahoma, is subject to forfeiture for the reasons stated in the Complaint for Forfeiture, because it is property which was used or intended to be used in any manner to facilitate violations of Title 21, or is property traceable thereto, and/or because it is property which constitutes or was derived from proceeds traceable to a violation of Title 21, United States Code and/or pursuant to 18 U.S.C. § 981 because it is property which was involved in money laundering. The Stipulation for Forfeiture and Withdrawal of Claim by Claimant Ellen M. Moore was filed herein on December 15, 1999.

Citizens Security Bank and Trust Company filed its Claim and Answer on August

30, 1999, whereby it claimed an interest in the defendant 1978 Cessna 172 N Aircraft, serial number 17270154. Thereafter, on February 14, 2000, the Court approved a Stipulated Expedited Settlement Agreement entered into between Citizens Security Bank and Trust Company and the Government.

Bank of Oklahoma filed its Claim and Answer on September 7, 1999, whereby it claimed an interest in the defendant real property located at 11839 South 87th East Avenue, Bixby, Oklahoma. Thereafter, on March 9, 2000, the Court approved a Stipulated Expedited Settlement Agreement entered into between Bank of Oklahoma and the Government.

On September 26, 1999, Dennis Semler, Tulsa County Treasurer filed his answer herein. The Government acknowledges the claim of Dennis Semler, Tulsa County Treasurer, and stipulates to the payment of any unpaid ad valorem taxes on the defendant real property located at 11839 S. 87th E. Ave., Bixby, Oklahoma, which are due and payable on or before the date of entry of a judgment of forfeiture.

On September 17, 1999, Rogers County Treasurer and County Commissioners of Rogers County, Oklahoma, filed their answer stating no taxes due on the defendant real property located at 7706 N. 169th E. Ave., Owasso, Oklahoma. The Government acknowledges the claim of Rogers County Treasurer and County Commissioners of Rogers County and stipulates to the payment of any unpaid ad valorem taxes on the defendant real property located at 7706 N. 169th E. Ave., Owasso, Oklahoma, which are due and payable on or before the date of entry of a judgment of forfeiture.

Meritech filed its Claim on December 13, 1999, whereby it claimed an interest in the

defendant real property located at 7706 N. 169th E. Ave., Owasso, Oklahoma. Thereafter, on May 19, 2000, the Court approved a Stipulated Expedited Settlement Agreement entered into between Meritech and the Government.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant real and personal properties:

**A. REAL PROPERTY AND PROPERTY LOCATED AT 7706 N. 169<sup>TH</sup> E. AVE., OWASSO, OKLAHOMA, MORE PARTICULARLY DESCRIBED AS FOLLOWS: AND ALL CONTENTS, BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON, INCLUDING, BUT NOT LIMITED TO:**

1. SANYO Television, S/N V6400809006302;
2. HOWARD MILLER Grandfather clock, S/N 62520318;
3. Master Bedroom Furnishings, including:  
MÖBEL 6751-20, 9 Drawer Mule Chest,  
MÖBEL 6751-81, Mule Chest Mirror,  
MÖBEL 6751-27, 6 Drawer Lingerie Chest,  
KELLER G15 3637HB, Column Post Head Board,  
KELLER G15 3637, Column Foot Board,  
MÖBEL 6751-88, Tri-View Mirror,  
MÖBEL 6751-18, Triple Dresser,  
MÖBEL 6751-222TOP, Armoire w/Mirror Top,  
MÖBEL 6751-23, Armoire Base,  
2 CRYSTAL & BRASS Table Lamp, 3512045-830,  
KELLER G15 3619 King Bed Rails,  
KELLER G15 3637 King Bed Canopy;
4. SUN QUEST Tanning Bed, S/N ALIA20596 (Bottom)  
and S/N ALIA10634 (Top);
5. SANYO Television, S/N V6470815915057;
6. EXXIS VCR, S/N 50201889B;
7. VIDEOCIPHER Receiver, S/N A040D3598;
8. SONY Laser Disc, S/N 370362062;
9. SONY CD Player, S/N 8145035;
10. SONY CD Player, S/N 8147863;
11. KENWOOD Receiver, S/N 40202782;
12. SONY Cassette Player, S/N 8828321;
13. SHARP Speakers, S/N 9409;
14. Roll Top Desk;

15. **MITSUBISHI Television, S/N 500400;**
16. **RADIO SHACK Metal Speaker Stand, SKU number 40-1351;**
17. **a pair of RADIO SHACK Pro LX5 shelf speakers, SKU 40-4061;**
18. **RADIO SHACK Pro SW-10P Sub-Woofer speaker, SKU 40-4070;**
19. **ENGLAND/CORSAIR Living Room Furniture, including;  
(2) two E700-03 Rectangular End Tables,  
an E700-04 Sofa Table,  
an E700-07 Rectangular Cocktail Table;**
20. **BEACH 20-31540 Sierra Oak Game Table;**
21. **Six (6) HIPPOPOTAMUS 258C Side Chairs w/ Tawny Oak finish and Route 66 Upholstery;**
22. **CRISLOYD 604 Wood Rack w/Chips, Price \$99.99;**
23. **Personal Computer system, including:  
IBM compatible mini tower, no serial,  
DELL Monitor, S/N 8250615,  
CREATIVE LABS computer camera, S/N G4598C16987E,  
DELL keyboard, S/N 12741-67M-6763,  
BELKIN mouse, S/N 980585333,  
WINGMAN joystick, S/N LZB83910006,  
CREATIVE LABS microphone, no serial,  
2 ALTEC LANSING speakers, S/N FMW0035883, w/AC adapter,  
MEMOREX power center, S/N 335009,  
APC Uninterruptable power supply, S/N 096087481030,  
HP LASERJET printer, S/N USHC053605; w/ printer cable,  
and miscellaneous computer diskettes, computer CD's,  
and manuals seized March 11, 1999;**

**B. REAL PROPERTY AND PROPERTY LOCATED AT 11839 S. 87TH E. AVENUE, BIXBY, OKLAHOMA, MORE PARTICULARLY DESCRIBED AS FOLLOWS:**

**LOT NINETEEN (19), BLOCK ELEVEN (11), SOUTHERN MEMORIAL ACRES EXTENDED, AN ADDITION TO THE CITY OF BIXBY, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF;**

**AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON;**

- C. ONE 1978 CESSNA 172N AIRCRAFT, SERIAL NUMBER (SN) 17270154, FEDERAL AVIATION ADMINISTRATION (FAA) REGISTRATION N806DA;
- D. ONE 1992 CHEVROLET PICKUP, VIN 2GCEC19K4N1145996;
- E. PROCEEDS OF CITIZENS SECURITY BANK AND TRUST, CO. (CSB) CHECKING ACCOUNT NUMBER 541714 IN THE AMOUNT OF \$1,584.83;
- F. PROCEEDS OF CITIZENS SECURITY BANK AND TRUST, CO. (CSB) CHECKING ACCOUNT NUMBER 51920 IN THE AMOUNT OF \$1,017.91;
- G. PROCEEDS OF PUTNAM INVESTMENT ACCOUNT NO. A02-1-446-74-7748-BBBR;
- H. PROCEEDS OF PUTNAM INVESTMENT ACCOUNT NO. A45-1-446-74-7748-BBB1;
- I. JOHN DEERE 15 HORSEPOWER HYDROSTATIC LAWN TRACTOR, MODEL STX46, SN M00STXL292807;

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States Marshals Service shall distribute the proceeds of the sale of the defendant at 7706 N. 169th E. Avenue, Owasso, Oklahoma, as follows:

- 1) First, from the sale of the defendant property, payment to the United States of America of all expenses of forfeiture of the defendant real property, including, but not limited to expenses of seizure, custody, advertising, and sale;
- 2) Second, from the sale of the defendant real property, any unpaid ad valorem taxes on the defendant real property which are due and payable on or before the date of entry of a judgment of forfeiture;

- 3) Third, from the sale of the defendant real property, payment of the stipulated settlement to Meritech pursuant to the terms of the Stipulated Expedited Settlement Agreement submitted to the Court on May 16, 2000;
- 4) The remaining proceeds from the sale of the defendant property shall be deposited in the asset forfeiture fund according to law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States Marshals Service shall distribute the proceeds of the sale of the defendant property located at 11839 S. 87th E. Avenue, Bixby, Oklahoma, as follows:

- 1) First, from the sale of the defendant property, payment to the United States of America of all expenses of forfeiture of the defendant real property, including, but not limited to expenses of seizure, custody, advertising, and sale;
- 2) Second, from the sale of the defendant real property, any unpaid ad valorem taxes on the defendant real property which are due and payable on or before the date of entry of a judgment of forfeiture;
- 3) Third, from the sale of the defendant real property, payment of the stipulated settlement to Bank of Oklahoma pursuant to the terms of the Stipulated Expedited Settlement Agreement filed herein on March 9, 2000;
- 4) The remaining proceeds from the sale of the defendant property shall be deposited in the asset forfeiture fund according to law.

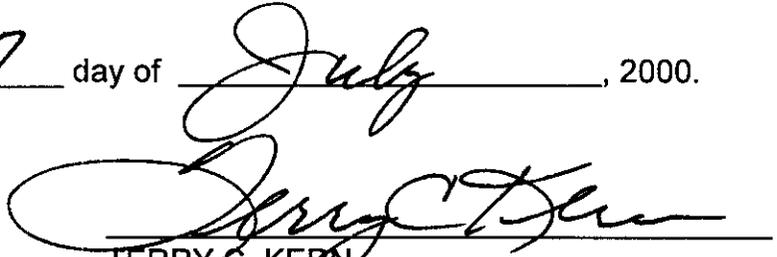
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States Marshals Service shall distribute the proceeds of the sale of the defendant 1978 Cessna 172 N. Aircraft as follows:

- 1) First, from the sale of the defendant aircraft, payment to the United States of America of all expenses of forfeiture of the defendant aircraft, including, but not limited to expenses of

seizure, custody, advertising, and sale;

- 2) Second, from the sale of the defendant aircraft, payment of the stipulated settlement to Citizens Security Bank pursuant to the terms of the Stipulated Expedited Settlement Agreement filed herein on February 14, 2000;
- 3) The remaining proceeds from the sale of the defendant aircraft shall be deposited in the asset forfeiture fund according to law.

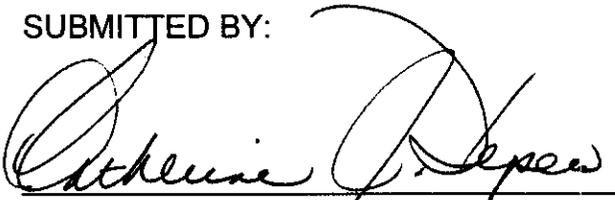
Entered this 17 day of July, 2000.



TERRY C. KERN

Chief Judge for the United States District Court  
for the Northern District of Oklahoma

SUBMITTED BY:



CATHERINE J. DEPEEW  
Assistant United States Attorney

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

ROBERT and CHERYL McCARTNEY, )  
as parents and next friends of their minor )  
daughter, ALLISON McCARTNEY; )  
DEBORAH and MICHAEL JOHNSON, )  
as parents and next friends of their minor )  
daughter, RIKEE JOHNSON; and )  
DANIEL and KELLY JANTZ, as parents )  
and next friends of their minor daughter, )  
SHELBY SHEATS, )

Plaintiffs, )

vs. )

INDEPENDENT SCHOOL DISTRICT )  
NO. 32 of MAYS COUNTY, a/k/a )  
CHOUTEAU PUBLIC SCHOOLS; )

Defendant. )

**F I L E D**

JUL 17 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE ~~JUL 17 2000~~

Case No.: 99-CV-0660 BU (J)  
CLASS ACTION

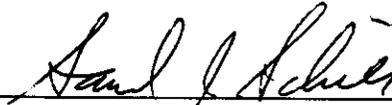
**JOINT STIPULATION OF DISMISSAL**

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiffs, Robert and Cheryl McCartney, as parents and next friend of their minor daughter, Allison McCartney; Deborah and Michael Johnson, as parents and next friend of their minor daughter, Rikee Johnson; and Daniel and Kelly Jantz, as parents and next friend of their minor daughter, Shelby Sheats, hereby stipulate with the Defendant, Independent School District No. 32 of Mays County, a/k/a Chouteau-Mazie Public Schools, that this action shall be dismissed with prejudice.

C/S

Dated this 17TH day of JULY, 2000.

Respectfully submitted,



Samuel J. Schiller, OBA #016067

Ray Yasser, OBA #009944

SCHILLER LAW FIRM

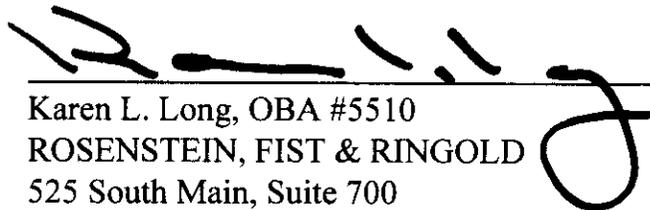
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Haskell, OK 74436

(918) 482-5942 Telephone

(918) 482-1264 Facsimile

Attorneys for Plaintiffs



Karen L. Long, OBA #5510

ROSENSTEIN, FIST & RINGOLD

525 South Main, Suite 700

Tulsa, Oklahoma 74103-4500

(918) 585-9211

(918) 583-5617 (facsimile)

Attorneys for Defendants Except

Does 1 through 50

ML  
7-7-00  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
DONALD L. GRIMES, )  
)  
Defendant. )

JUL 17 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 00CV0443BU(E) ✓

ENTERED ON DOCKET

DATE JUL 17 2000

AGREED JUDGMENT AND ORDER OF PAYMENT

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

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.
2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.
3. The defendant hereby agrees to the entry of Judgment in the principal amounts of \$2,006.51 and \$622.90, plus accrued interest of \$1,176.76 and \$1,006.53, plus interest thereafter at the rates of 8.41% and 9.13% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate 6.375 until paid, plus costs of this action, until paid in full.
4. In addition to the regular monthly payment, the defendant hereby agrees to the submission of this debt to the Department of Treasury for inclusion in the Treasury Offset Program. Under this program, any federal payment the defendant would normally receive may be offset and applied to this debt.

3

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that Donald L. Grimes will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the fifteenth day of August, 2000, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$400.00, and a like sum on or before the fifteenth day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

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

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

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

(e) The defendant shall provide the United States with current, accurate evidence of his/her assets, income and expenditures (including, but not limited to his/her Federal income tax

returns) within fifteen (15) days for the date of a request for such evidence by the United States Attorney.

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

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

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Donald L. Grimes, in the principal amounts of \$2,006.51 \$622.90, plus accrued interest in the amounts of \$1,176.76 and \$1,006.53, plus interest at the rates of 8.41% and 9.13% until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 6.375 percent per annum until paid, plus the costs of this action.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis

United States Attorney



PHIL PINNELL, OBA #7169

Assistant United States Attorney



DONALD L. GRIMES

PEP/lif

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

HAROLD GREEN, JANELLE  
GREEN, husband and wife,  
JAYNIE GREEN and SUZANNE  
GREEN,

Plaintiffs,

vs.

STATE FARM MUTUAL  
AUTOMOBILE INSURANCE  
COMPANY,

Defendant.

**FILED**

JUL 17 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

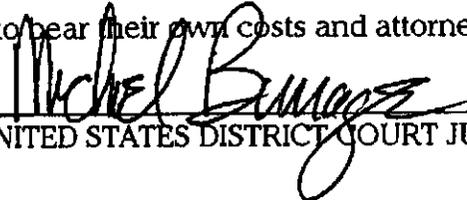
Case No. 00 CV 0184BU(M)

ENTERED ON DOCKET

DATE JUL 17 2000

ORDER OF DISMISSAL

Upon review of the Plaintiffs, Jaynie Green and Suzanne Green and Defendant, State Farm Mutual Automobile Insurance Company's Stipulation of Dismissal for reason of settlement of the above-styled matter, it is ordered that the action be dismissed, with prejudice, with the parties to bear their own costs and attorney fees.

  
UNITED STATES DISTRICT COURT JUDGE

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

**F I L E D**

JUL 17 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DONNA G. BURGESS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CLASSIC CHEVROLET, INC., )  
 )  
 Defendant. )

Case No. 99CV0409K (J) ✓

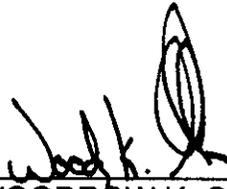
ENTERED ON DOCKET

DATE **JUL 17 2000**

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The parties, by and through their counsel of record, hereby stipulate that the above-entitled cause of action by the Plaintiff be dismissed with prejudice, each party to bear her/its own costs and attorney fees incurred to date.

Dated this 12 day of ~~June~~ <sup>July</sup>, 2000.



WOODROW K. GLASS, OBA#15690  
STANLEY M. WARD, OBA#9351  
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629 24<sup>th</sup> Avenue S.W.  
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ATTORNEYS FOR PLAINTIFF



THOMAS G. MARSH, OBA#5706  
DAVID T. MARSH, OBA#14505  
MARSH & MARSH, P.C.  
Attorneys-at-Law  
15 W. Sixth Street, Suite 2626  
Tulsa, Oklahoma 74119-5420  
ATTORNEY FOR DEFENDANT

015

KL

21

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES H. COUTS, )  
 )  
 Plaintiff, )  
 )  
 v. ) 97-CV-336-H  
 )  
 CENTRILIFT, )  
 )  
 Defendant. )

ENTERED ON DOCKET

DATE JUL 17 2000

**FILED**

JUL 14 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT**

This matter came before the Court on a Defendant's Motion for Partial Summary Judgment and on a Defendant's Motion to Dismiss. The Court duly considered the issues and rendered decisions in accordance with the orders filed on December 3, 1999 and March 3, 2000, respectively.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendant and against Plaintiff on all of Plaintiff's claims.

IT IS SO ORDERED.

This 13<sup>TH</sup> day of July, 2000.



Sven Erik Holmes  
United States District Judge

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

**FILED**

JUL 17 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

KIM JAMISON, an individual, )  
)  
)  
Plaintiff, )  
)  
)  
vs. )  
)  
)  
HILLCREST HEALTHCARE SYSTEM, )  
INC., a corporation, et al., )  
)  
Defendants. )

Case No. 99-CV-1045-BU(E)

ENTERED ON DOCKET  
DATE JUL 17 2000

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 17th day of July, 2000.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAY WHITE, )  
)  
Plaintiff, )  
)  
v. )  
)  
ASEC MANUFACTURING CO., )  
)  
Defendant. )

ENTERED ON DOCKET  
DATE JUL 17 2000  
98-CV-823-H(J)  
**FILED**  
JUL 14 2000 *SL*  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

This matter comes before the Court on Defendant ASEC Manufacturing Company's ("ASEC's") Renewed Motion for Summary Judgment and Brief in Support (Docket # 29). For the reasons set forth herein, the Court finds that the motion should be granted.

I

ASEC is a manufacturer of emission control catalysts and has a plant located at the Port of Catoosa, Oklahoma. Plaintiff Jay White was employed by ASEC as a Utilities Operator. Plaintiff volunteered to cover the 9:00 P.M. to 9:00 A.M. shift beginning August 31, 1997 over the Labor Day weekend. On September 1, 1997, Plaintiff clocked out and left the plant at approximately 1:00 A.M. Plaintiff admitted that he did not obtain permission from his supervisor to leave prior to his shift ending. Upon reviewing time records the next week, an ASEC manager discovered that Plaintiff had left his shift early. ASEC reviewed the incident and terminated Plaintiff. Plaintiff, who is black, alleges that ASEC impermissibly terminated him based on his race.

The termination occurred at a September 6, 1997 meeting with David Hearn, ASEC's manufacturing manager. Mr. Hearn informed Plaintiff that he was being terminated for leaving

the job site without supervisor permission. Mr. Hearn explained to Plaintiff that the Utilities position is critical in regulating the effluent from the plant and that any effluent problems could result in discharges in excess of legally acceptable limits and large fines for the company. Mr. Hearn further indicated that he felt Plaintiff made a serious error in judgment by deciding to leave the plant without consulting his supervisor. According to Mr. Hearn, Plaintiff's actions constituted job abandonment, based on past company practice.

Plaintiff concedes that he was aware that company policy required supervisor permission in order to leave a job shift early. Plaintiff also does not dispute that he left the job site without the permission of his regular supervisor. However, Plaintiff adds additional facts that he contends are relevant. First, he states that he was not working in the Utilities area on the night in question because the Utilities operation was shut down.<sup>1</sup> In fact, it is uncontroverted that the waste treatment operations were shut down that night. Second, Plaintiff, at the direction of a superior, went to work in the calcine operations area. Third, one of the regular workers for that area did not show up that night to work a two-person operation, leaving Plaintiff without work in the calcine area. Fourth, Plaintiff states that he went to get his supervisor's phone number from Crystal Woolman, who he characterized as the "leadperson" in the calcine area, but she denied him the number and told him she was left in charge. According to Plaintiff, Ms. Woolman gave him permission to go home. Ms. Woolman and ASEC dispute this fact, stating that Ms. Woolman was not a "leadperson" and had no authority to give employees permission to leave.

---

<sup>1</sup>According to Mr. Hearn, Plaintiff told him there was "very little water coming into the waste treatment plant." Def's Renewed Motion for Summary Judgment, Ex. B -- Attachment. Plaintiff, on the other hand, contends that he told Mr. Hearn there was "no" water coming into waste treatment. See Pl's Response to Renewed Motion for Summary Judgment, Ex. F.

Moreover, Ms. Woolman stated that she never gave Plaintiff permission to leave and was never asked for a supervisor's phone number by Plaintiff. See Def's Renewed Motion for Summary Judgment, Ex. A. The parties further disagree over whether the supervisor's phone number was posted openly in the plant on the night in question. Defendant contends the number was posted, while Plaintiff counters that it was kept only in a locked office in order to stop prank calls that had occurred. Finally, Plaintiff and other witnesses stated that it was common practice for the company to leave somebody in charge at the plant as acting supervisor. On the other hand, ASEC contends its policy is that all employees must contact their actual supervisor to obtain permission for leaving the plant during a shift.

## II

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, see 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).

### III

In this case arising under Title VII of the Civil Rights Act of 1964 ("Title VII"), Defendant moves for summary judgment on the grounds that Plaintiff cannot establish a prima facie case of discrimination because he cannot prove disparate treatment, and further argues that Plaintiff cannot rebut ASEC's legitimate, non-discriminatory reasons for his termination with

evidence of pretext.

Title VII prohibits an employer from discharging or otherwise discriminating against an employee because of his or her race. See 42 U.S.C. § 2000e, et seq. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court established a three-part analysis for Title VII disparate treatment claims. First, the plaintiff must establish a prima facie case of discrimination. Second, if the plaintiff establishes a prima facie case, the burden shifts to the defendant to state a legitimate nondiscriminatory reason for the workplace decision. Third, if the defendant carries this burden, the plaintiff must show that the defendant's reason was merely a pretext for discrimination. Id. at 802. However, the plaintiff always bears the ultimate burden of proving discriminatory intent by the defendant. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

“To establish a prima facie case on a claim of discriminatory discharge, where the plaintiff was discharged for the purported violation of a work rule, the plaintiff must show that (1) he is a member of a protected class, (2) that he was discharged for violating a work rule, and (3) that similarly situated non-minority employees were treated differently.” Aramburu v. The Boeing Co., 112 F.3d 1398, 1403 (10th Cir. 1997); accord Trujillo v. University of Colorado Health Sciences Center, 157 F.3d 1211, 1215 (10th Cir. 1998). Plaintiff's establishment of a prima facie case creates a presumption of unlawful discrimination. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). If Plaintiff establishes a prima facie case, Defendant then has the burden of producing evidence that it discharged him "for a legitimate, nondiscriminatory reason." Id. at 254. If the employer offers such a reason, the burden shifts back to Plaintiff to “show that there is a genuine dispute of material fact as to

whether the employer's reason for the challenged action is pretextual and unworthy of belief. Trujillo, 157 F.3d at 1215. "Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." Morgan v. Hilti, 108 F.3d 1319, 1323 (10th Cir. 1997) (internal quotation marks and citations omitted).

Ultimately, to prevail on his claim in the instant case, Plaintiff must demonstrate "that the proffered reason was not the true reason for the employment decision," Burdine, 450 U.S. at 256, and that his race was. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). At all times, Plaintiff retains the "ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination." Burdine, 450 U.S. at 256. However, if Plaintiff establishes a prima facie case and presents evidence that Defendant's nondiscriminatory reason was pretextual, Plaintiff has presented enough evidence to survive a motion for summary judgment. See Randle v. City of Aurora, 69 F.3d 441, 452-53 (10th Cir. 1995).

Assuming arguendo, for purposes of the instant motion only, that Plaintiff has established a prima facie case of discrimination under the McDonnell Douglas framework, the Court finds that Defendant has proffered evidence that it discharged Plaintiff for the legitimate, nondiscriminatory reason of job abandonment. Thus, Plaintiff must present evidence showing Defendant's nondiscriminatory reason for termination was pretextual in order to survive Defendant's motion for summary judgment. After a careful review of the record, and taking all disputed facts in the light most favorable to Plaintiff, the Court concludes that Plaintiff has presented insufficient evidence to support a finding of pretext.

#### IV

Plaintiff suggests three general areas that support a finding of pretext. First, he claims that Crystal Woolman, under the common practice of the plant, had authority as acting supervisor to permit him to go home. Second, Plaintiff maintains that white employees who were allegedly similarly situated to him were not discharged. Third, he argues that other instances of racial discrimination at ASEC support the finding of pretext. The Court reviews the evidence in support of each of these arguments in turn.

#### A

Defendant asserts that its policy was that employees should not leave during their shift without permission from their supervisor. Defendant makes reference to an employee handbook containing this policy but has not provided it in the record. Nevertheless, Plaintiff conceded in his deposition that he knew that leaving the plant without authority was grounds for termination and that his actual supervisor for the night in question was Paula Pettit. However, according to Plaintiff, ASEC's policy was to always maintain an on-site or acting supervisor who had authority to send employees home. Plaintiff claims that Crystal Woolman was the acting supervisor in charge of the calciner operation on the night that he left his job and that she gave him permission to leave. Under this theory, Plaintiff did not leave his shift without permission and therefore could not have been properly discharged. As noted above, Defendant disputes both the fact that Ms. Woolman gave Plaintiff permission to leave and the fact that Ms. Woolman had any official authority to give that permission.

In support of his assertion, Plaintiff provides his own affidavit claiming that "[d]uring . . . holiday work periods, **there was always an acting supervisor at the job site with the**

**authority to make decisions, including the decision of when to send an employee home for lack of work.”** Pl’s Response to Renewed Motion for Summary Judgment, Ex. F, ¶ 3 (emphasis in original). Plaintiff has also submitted affidavits of other employees who were at the plant that night who state that ASEC always maintained an “on-site” supervisor. See id., Ex. C (affidavit of McKinley Warren), Ex. D (affidavit of Ollie Williams), Ex. E (affidavit of Maurice Blake). However, none of the affidavits except for Plaintiff’s makes the statement that an “on-site” supervisor has the authority under company policy to send an employee home. On the contrary, Maurice Blake discussed the common practice for “phoning an actual supervisor.” The policy described by Mr. Blake of phoning an actual supervisor for permission to leave, rather than asking an acting supervisor, is consistent with Plaintiff’s deposition, in which he acknowledged that Ms. Woolman had given him Paula Pettit’s number once before so that he could call her at home and get permission to leave.

Q: On this Code of Conduct, does it state -- does it list some action that would result in immediate termination?

A: Leaving the plant without authority, yes.

Q: So you knew that at the time you left.

A: Yes, I knew that, but I can’t beat the number out of the woman. She gave me the number once in April, when my dad passed away. I had to call Paula at home because she didn’t give me my funeral leave.

Id., Ex. A, p. 46. Plaintiff went on to concede in his deposition that he left without the permission of his “supervisor” but claimed he had permission from a nonsupervisor.

Thus, the only evidence in the record that an “acting” or “on-site” or “non” supervisor could give permission for an employee to leave during his or her shift is Plaintiff’s affidavit.

That affidavit is inconsistent with Plaintiff's own deposition testimony. It is also contradicted by the affidavit of Maurice Blake and by Defendant's evidence that employees could only obtain permission to leave from their actual supervisor. Facts generally cannot be controverted by bare self-serving allegations such as those in Plaintiff's affidavit dealing with the authority of an "acting" or "on-site" supervisor. See Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995). Thus, the Court finds there is no evidence that Plaintiff had proper permission under ASEC's policy to leave the plant.<sup>2</sup> Accordingly, Plaintiff's first argument raises no inference that Defendant's proffered reason for terminating Plaintiff was pretext.<sup>3</sup>

## B

Plaintiff next contends that ASEC, by firing him, treated him differently than similarly situated white employees who were not discharged for the same offense. Differential treatment of similarly-situated non-minority employees can help show pretext of racial discrimination. See, e.g., Aramburu, 112 F.3d at 1404. However, the other employees must be similarly situated

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<sup>2</sup>The Court observes that if in fact the on-site supervisor had the authority to permit employees to leave the plant, this fact would have been easy to establish by including it in any one of the affidavits from the various employees who submitted affidavits in this matter.

<sup>3</sup>Plaintiff makes much of David Hearn's claim that Plaintiff's absence could have presented a real threat for the company. Plaintiff states that if Mr. Hearn had done a real investigation, he would have found that there was no threat of waste discharge on the night in question and that Plaintiff had nothing to do in the utility department or the calcine department. These facts do not change the Court's analysis. Defendant's decision to terminate Plaintiff may or may not have been based on all relevant facts. Regardless, this Court may not pass on the wisdom of Defendant's decision to terminate Plaintiff. That decision is left to Defendant's business judgment, which this Court may not question. "[The Court's] role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second guesses employers' business judgment." Simms v. State of Oklahoma ex rel. Dep't of Mental Health and Substance Abuse Servs., 165 F.3d 1321, 1330 (10th Cir.), cert. denied 120 S. Ct. 53 (1999) (quoting Verniero v. Air Force Academy Sch. Dist. No. 20, 705 F.2d 388, 390 (10th Cir. 1983)).

in all relevant aspects. See id. Plaintiff refers in his deposition to one former white Utilities Department employee, Dale Quinn, who Plaintiff asserts left his post without permission and was not fired. Plaintiff worked with Mr. Quinn the night he left and thus claims personal knowledge of the incident. According to Plaintiff, Mr. Quinn retained his job until several weeks or months later. Plaintiff stated that Mr. Quinn was eventually fired for making personal phone calls at work and failing to answer a page. However, Plaintiff did not have personal knowledge of why Mr. Quinn was fired. Instead, he apparently learned this information from a supervisor, Vernon Brown. Thus, Plaintiff's testimony regarding the reason for Mr. Quinn's termination lacks a sufficient evidentiary foundation of personal knowledge, see Fed. R. Evid. 602, and the Court may not consider that part of the testimony in ruling on the motion for summary judgment, see Fed. R. Civ. P. 56(e). ASEC, on the other hand, asserted that Mr. Quinn was discharged for leaving his job without permission and cited this incident as its example of its policy of zero tolerance for those leaving without permission. ASEC's evidence supporting its version of Mr. Quinn's discharge is contained in its letter to the Oklahoma Human Rights Commission. See Def's Original Motion for Summary Judgment, Ex. B ("a former employee, Dale Quinn, a white male abandoned his position of a Utility Operator . . . in 1996, [and] was terminated for the same reason.").

The remainder of Plaintiff's examples of similarly situated employees do not rest on sound evidentiary foundations. For example, Plaintiff stated in his deposition that a calciner operator named Kevin Bickell left his post without permission and was only reprimanded, not fired. Plaintiff obtained this information from his girlfriend, so he did not have personal knowledge of it. Maurice Blake, in his deposition, also referred to Mr. Bickell's alleged incident

and further added that Mr. Bickell is white. However, Mr. Blake's affidavit established no foundation of personal knowledge on the part of the affiant.

Plaintiff referred in his deposition to a man named Ted Brown who allegedly left his post without permission and was not fired. Again, Plaintiff lacked personal knowledge of this incident because he only heard about it from former co-workers. Similarly, the affidavit of Ollie Brown does not indicate how the affiant has personal knowledge of the Ted Brown incident. McKinley Warren, in his affidavit, made similar allegations about Lance Boyd, but those allegations are similarly without any evidence that the affiant had personal knowledge of the incident. Mr. Warren's statements about two other workers, Jeremy Rader and Matt Shedd, also lack evidence of personal knowledge. Additionally, these workers are not, from the facts alleged, similarly situated to Plaintiff because neither showed up at the job site at all. This distinguishes them from Plaintiff, who worked for several hours before leaving.

Thus, effectively all of the evidence Plaintiff seeks to introduce regarding similarly situated non-minority employees is inadmissible under the Federal Rules of Evidence, and therefore the Court may not consider it. In sum, the record reflects only that Dale Quinn, a white male, left his position without notifying his supervisor but was not discharged until several weeks or months later and that ASEC has represented to State regulators that this discharge was attributable to Mr. Quinn's abandonment of his job. Accordingly, the record is insufficient to cause a reasonable jury to doubt the truthfulness of ASEC's proffered reason for discharge.

C

Finally, Plaintiff's witnesses discuss personal encounters with racial discrimination in their employment experiences at ASEC. A defendant's practices regarding minority

employment, especially statistical data, may be probative to help show pretext. See McDonnell Douglas, 411 U.S. at 804-05; Simms v. State of Oklahoma ex rel. Dep't of Mental Health and Substance Abuse Servs., 165 F.3d 1321, 1328 (10th Cir.), cert. denied 120 S.Ct. 53 (1999).

McKinley Warren, who is black, told of getting passed over for promotion in favor of a less qualified white person. Ollie Williams, who is black, told of having to give up his position and take a demotion in favor of Crystal Woolman, who is white. And Maurice Blake, who is black, told of being denied a promotion in favor of a less qualified white employee. Mr. Blake also explained that a racial epithet directed at him was scrawled on the bathroom wall, and ASEC took no remedial action. All of these alleged incidents, if proven true, would give rise to serious concerns about racial discrimination at ASEC. However, in the context of this lawsuit, these actions do not show the kind of probative pattern that a statistical analysis does, and there is no evidence that they are connected in any way to Plaintiff's discharge or to the person who was responsible for the discharge, David Hearn. In Simms v. State of Oklahoma, the plaintiff, a black male, sought to establish an inference of pretext in a failure to promote claim by pointing out that defendant had previously discriminated against him and settled a similar claim. See 165 F.3d at 1324-25, 1330. The Tenth Circuit upheld the trial court's grant of summary judgment for defendants, stating

Mr. Simms attempts to establish pretext by reference to his prior settlement in Simms I, suggesting that because [defendant] had settled a prior discrimination claim, its decision not to promote him . . . was based on discriminatory motives rather than the reason proffered by defendant. Such a conclusive assertion is not probative of pretext unless the prior incidences of alleged discrimination can somehow be tied to the employment actions disputed in the case at hand. Mr. Simms fails to establish such a connection, for he does not link any of the parties involved in the current employment action . . . to the employment actions that were the subject of the Simms I litigation.

Id. at 1330 (internal citations omitted). This case is similar to Simms in that Plaintiff has provided no connection between the alleged discrimination against other employees and the discrimination against Mr. White. Absent a more concrete connection, Plaintiff's proffered examples of alleged discrimination against other black employees are too attenuated to support a finding of pretext.

In sum, the Court finds that Plaintiff has not provided sufficient evidence for a rational jury to find that ASEC's stated reason for discharging him is unworthy of belief. Viewing the evidence in the light most favorable to Plaintiff, the record evidence of pretext consists of the following: (1) an admitted non-supervisor told him he could leave, in violation of company policy, (2) a similarly situated white male who also left without permission was discharged within a few months or weeks, not within a week, as Plaintiff was, and (3) other black employees at the company claim unrelated incidents of discrimination by management. This evidence does not carry Plaintiff's burden on summary judgment of showing ASEC's reason for his termination was mere pretext.

Based on the above, Defendant ASEC Manufacturing Company's Renewed Motion for Summary Judgment (Docket # 29) is hereby granted. Additionally, Defendant's Motion for Sanctions (Docket # 10) is denied.

IT IS SO ORDERED.

This 13<sup>TH</sup> day of July, 2000.

  
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Sven Erik Holmes  
United States District Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 14 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HUGH JOSEPH,  
SSN: 436-23-3224

Plaintiff,

v.

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

Defendant.

Case No. 99-CV-606-J

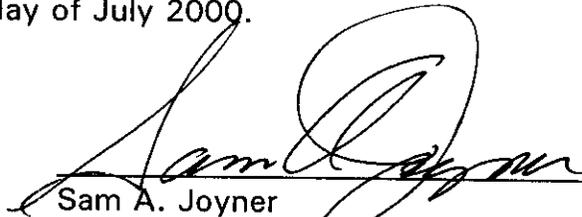
ENTERED ON DOCKET

DATE JUL 14 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 14 day of July 2000.

  
Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 14 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HUGH JOSEPH,  
SSN: 436-23-3224

Plaintiff,

v.

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

Defendant.

Case No. 99-CV-606-J

ENTERED ON DOCKET

DATE JUL 14 2000

ORDER

Now before the Court is Plaintiff's appeal of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying him Supplemental Security Income benefits under Title XVI of the Social Security Act. The Administrative Law Judge ("ALJ"), R.J. Payne, denied benefits at step five of the sequential evaluation process used by the Commissioner to evaluate disability claims.

The ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to perform a limited range of light work. Plaintiff had no past relevant work. However, given his RFC the ALJ found that Plaintiff could perform a substantial number of jobs in the national economy. On appeal, Plaintiff argues (1) that the ALJ failed to complete a PRT Form, (2) failed to consider the combined effect of Plaintiff's impairments, and (3) failed to give the appropriate weight to Plaintiff's treating physician. The Court has meticulously reviewed the entire record and for the reasons discussed below the Court rejects Plaintiff's arguments and **AFFIRMS** the Commissioner's decision.

## I. STANDARD OF REVIEW

A 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 will be found disabled

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). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.<sup>1/</sup>

The standard of review applied by this Court to the Commissioner's disability determinations is set forth in 42 U.S.C. § 405(g). According to § 405(g), "the finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a

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<sup>1/</sup> 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 the claimant to 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. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 404.1525. 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 combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at 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, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

reasonable mind will accept as adequate to support the ultimate 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.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. 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).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to 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/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

## II. DISCUSSION

### A. FIRST ALLEGED ERROR – THE ALJ FAILED TO COMPLETE THE PRT FORM

When there is evidence of a mental impairment, the Commissioner must follow the procedure set forth in 20 C.F.R. § 416.920a. This procedure requires an ALJ, who is evaluating whether an alleged mental impairment meets or equals a listing, to document his findings on a Psychiatric Review Technique Form ("PRTF"). See, e.g., Cruise v. HHS, 49 F.3d 614 (10th Cir. 1995).

There is evidence in the record that Plaintiff has a mental impairment (i.e., low IQ), and Plaintiff did allege that his mental impairment met the mental retardation listing – 112.05. The ALJ was, therefore, required to complete a PRTF, which he did. *R.* at 31-33. Plaintiff alleges, however, that the ALJ erred in his analysis of Plaintiff's mental impairment because the ALJ did not complete all portions of the PRTF.

The Commissioner's PRTF is designed to be used by the ALJ to evaluate mental impairments to determine whether they meet any of several of the listings (i.e., listings 112.02-112.09). Most listings are written with "Part A" and "Part B" criteria, both of which must be present in order for the mental impairment to be considered of sufficient severity to meet a listing. Cruise, 49 F.3d at 617. The PRTF has two sections which allow the ALJ to evaluate the "Part A" and "Part B" criteria separately. Plaintiff alleges that the ALJ erred in this case because he failed to complete the "Part B" portion of the PRTF. The government argues that the ALJ was not required to complete the second part of the PRTF because "Part B" criteria are not relevant to the mental retardation listing.

The government is correct that the mental retardation listing – listing 112.05 – does not have traditional "Part B" criteria. However, the Commissioner's PRTF states as follows:

**"B" Criteria of the Listings**

The following Functional Limitations (which apply to paragraph B of listings 12.02-12.04 and 12.06-12.08 and paragraph D of 12.05) exist as a result of the individual's mental disorder(s).

*R.* at 32. As indicated, the second portion of the PRTF is not used with the mental retardation listing, except when evaluating impairments under paragraph D of that listing. Paragraph D of the mental retardation listing provides as follows:

The required severity for this disorder is met when [the claimant 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, Listing 112.05(D). This is the section of the listing on which Plaintiff relies because he alleges that he has a mental impairment and other physical impairments (i.e., hip problems and pain) which together render him disabled. The "Part B" portion of the PRTF is, therefore, relevant to Plaintiff's alleged impairments and should be used when evaluating impairments under listing 112.05(D), as the Commissioner's own PRTF recognizes.

Plaintiff has, however, provided no authority which establishes that the ALJ must complete the "Part B" portion of the PRTF if he determines that the "Part A" criteria are not established. The "Part A" criteria of listing 112.05(D) require an IQ

of between 60 and 70. The evidence of record, which is not disputed by Plaintiff, is that he has an IQ of 75. Plaintiff's mental impairment does not, therefore, meet the "Part A" criteria of listing 112.05, which the ALJ notes on the PRTF he completed. *R.* at 31-32. Nothing in Cruise or § 416.920a requires an ALJ who has found that the "Part A" criteria were not met to address and complete the "Part B" criteria on the PRTF. The Court finds no error in the ALJ's failure to complete the "Part B" portion of the PRTF attached to his decision.

**B. SECOND ALLEGED ERROR -- THE ALJ FAILED TO CONSIDER THE COMBINED EFFECTS OF PLAINTIFF'S IMPAIRMENTS**

Plaintiff alleges that the ALJ failed to consider the combined effects of his alleged impairments. Plaintiff argues that "[t]he most obvious failure in this regard is Mr. Joseph's mental impairments . . . ." Doc. No. 7, p. 3. Plaintiff begins his argument by stating that the ALJ ignored the fact that "the consultative examiner noted that Mr. Joseph lives with his mother [-] he has never lived independently . . . ." Id. However, at the time of the hearing, Mr. Joseph testified that he lived alone in an apartment, and that he prepared his own meals. *R.* at 44. Plaintiff also states in the brief that the ALJ ignored the fact that "he has difficulty making change." Doc. No. 7, p. 3. However, at the hearing, Plaintiff testified that he could make change. *R.* at 46. There is, therefore, no evidence that the ALJ "ignored" these factors.

Plaintiff also takes issue with the ALJ's conclusion that he could perform routine, simple tasks with little supervision and non-routine, detailed tasks with

additional supervision. Plaintiff argues that there is nothing in the record (i.e., not substantial evidence) to support this conclusion. However, the ALJ's conclusion, and language, is taken directly from the report of a non-examining, consultative examiner who evaluated Plaintiff's mental residual functional capacity. *R.* at 139. The ALJ's conclusion is also supported by the report of an examining, consultative examiner. See R. at 184-85. There is, therefore, evidence in the record to support the ALJ's conclusion, which the Court is not permitted to reweigh. See Clifton v. Chater, 79 F.3d 1007, 1009-10 (10th Cir. 1996).

Plaintiff also alleges that the ALJ "ignored Mr. Joseph's obesity as an impairment." A review of the record establishes that the ALJ did not "ignore" Plaintiff's weight problem. The ALJ found that Plaintiff could perform a limited range of light work. The ALJ limited the full range of light work with several restrictions that were related in part to Plaintiff's weight and the additional stress that weight put on Plaintiff's left hip. See R. at 28, finding 6. Thus, the ALJ did not "ignore" Plaintiff's weight problem.

**C. THIRD ALLEGED ERROR – THE ALJ FAILED TO GIVE APPROPRIATE WEIGHT TO AN OPINION OF PLAINTIFF'S TREATING PHYSICIAN**

A treating physician's opinion is entitled to great weight. Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). Here, Plaintiff alleges that the ALJ failed to give enough weight to a phrase written by Plaintiff's doctor on a

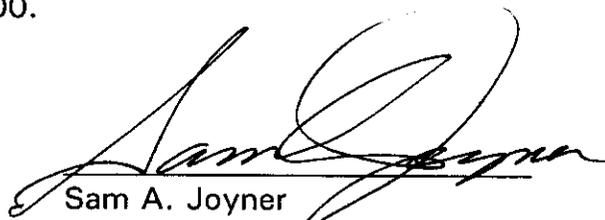
prescription. That phrase simply states: "unable to seek work." *R.* at 187. It goes without saying that this phrase is brief, conclusory and without analysis or discussion by Plaintiff's physician. The ALJ discussed the "unable to seek work" phrase in his opinion and did not totally discount it. *R.* at 25. It is within the ALJ's province to weigh the evidence and determine the amount of weight, in light of the remaining record, to give such a conclusory phrase. The Court finds no error by the ALJ with regard to his evaluation of the treating sources in this record.

### CONCLUSION

For the reasons discussed above the Commissioner's denial of benefits is hereby **AFFIRMED**.

IT IS SO ORDERED.

Dated this 14 day of July 2000.

  
Sam A. Joyner  
United States Magistrate Judge

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

**FILED**

JUL 14 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ELIZABETH JACKSON, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ERLANGER TUBULAR CORP. )  
 )  
Defendant. )

No. 99-CV-623-K

ENTERED ON DOCKET  
JUL 14 2000  
DATE

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 13 day of July, 2000.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

JADCO MANAGEMENT CO., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FEDERAL INSURANCE COMPANY, )  
 )  
Defendant. )

Case No. 99-CV-1034-H(E)

**FILED**  
JUL 13 2000  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE JUL 14 2000

**ORDER**

This matter comes before the Court on Defendant Federal Insurance Company's Motion for Summary Judgment (Docket # 12). For the reasons set forth below, the Court finds that the motion should be granted.

The facts relevant to this motion are not in dispute. This is the sixth time one of the Jadco companies, either Jadco Management Co. ("Jadco") or Jadco Purchasing Corporation, has filed suit against Defendant Federal for recovery on the same insurance policy and actions related to such recovery.<sup>1</sup> All of the prior suits were resolved in favor of Defendant. Most significantly for purposes of the instant motion, the fifth suit ("Jadco V") was removed to this Court, which granted Defendant Federal's motion for summary judgment and dismissed the action in a written order filed June 7, 1999. Notwithstanding this ruling, Plaintiff filed essentially the same action in Tulsa County District Court on November 15, 1999. Defendant again removed the action to this Court and seeks summary judgment based upon claim preclusion.

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<sup>1</sup>Plaintiff concedes that Jadco Management Co. is a successor in interest to Jadco Purchasing Corporation. In Jadco V, Plaintiff identified itself as "Jadco Management Corporation" instead of Jadco Management Company. However, Plaintiff asserted in both Jadco V and the instant case the Jadco Management entity (whether company or corporation) took over business operations from, and assumed all assets of, Jadco Purchasing. Moreover, it is undisputed that Jadco Management Co. and Jadco Management Corp. are the same entities.

## I

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). 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). 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. 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).

## II

The first issue presented by Defendant's motion is whether claim preclusion bars Plaintiff's suit and mandates summary judgment. The Court finds that claim preclusion clearly applies.

Claim preclusion, formerly referred to as res judicata, "operates to bar relitigation by the parties or their privies of issues which either were or could have been litigated in a prior action which resulted in a final judgment on the merits." Deloney v. Downey, 944 P.2d 312, 318 (Okla. 1997). "Claim preclusion requires: (1) a judgment on the merits in the earlier action; (2) identity of the parties or their privies in both suits; and (3) identity of the cause of action in both suits." Yapp v. Excel Corp., 186 F.3d 1222, 1226 (10th Cir. 1999).<sup>2</sup>

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<sup>2</sup>Tenth Circuit jurisprudence is unsettled as to whether federal or state claim preclusion rules apply to successive diversity suits. See Franden v. Westinghouse Corp., 46 F.3d 975, 977 (10th Cir.1995) (discussing conflicting decisions and noting that the Restatement of Judgments

Plaintiff's current suit is essentially identical to Jadco V, previously heard by this Court. In both suits, Plaintiff sought recovery for breach of an insurance contract and also asserted a bad faith claim against Defendant. Both Plaintiff (and its privy, Jadco Purchasing Corp.) and Defendant litigated the prior suit. Finally, the Court decided Jadco V on the merits. In Jadco V, the Court granted summary judgment for Defendant, finding Plaintiff's contract claim barred by preclusion and its bad faith claim barred by the statute of limitations. A motion for summary judgment is clearly a ruling "on the merits." See, e.g., id. at 1226-27 (noting parties agreed that summary judgment was ruling on the merits for purposes of claim preclusion); Nwosun v. General Mills Restaurants, Inc., 124 F.3d 1255, 1257 (10th Cir. 1997) (finding grant of summary judgment for failure to meet statute of limitations is judgment on the merits); 18 Charles Alan Wright, Arthur R. Miller & Edward C. Cooper, Federal Practice and Procedure: Jurisdiction § 4444 (1981). The fact that the summary judgment ruling was based on affirmative defenses, rather than the actual substance of the case itself, does not take the case outside the scope of a merits decision for claim preclusion analysis. See generally Wright, Miller & Cooper, §§ 4441, 4444. Accordingly, Plaintiff's claim is precluded by a prior adjudication, and the Court hereby grants Defendant's Motion for Summary Judgment.

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applies federal law except where the matter is distinctly substantive). Like the court in Franden, this Court finds that it need not decide this question because the result is the same applying either Oklahoma or federal law. Oklahoma's requirements for claim preclusion are:

(1) an identity of subject matter, of the parties or their privies, of the capacity of the parties and of the cause of action; (2) the court which heard the original action must have been one of competent jurisdiction; and (3) the judgment rendered must have been a judgment on the merits of the case and not upon purely technical grounds.

Carris v. John R. Thomas and Assocs., 896 P.2d 522, 527 (Okla. 1995). These requirements are effectively identical to the federal requirements, and the Court would reach the same conclusion under the Oklahoma test as it would under the federal test.

precluded by this Court's prior ruling in Jadco V. In fact, Plaintiff did not even bother to address the matter of claim preclusion in its briefs, relying instead on a wholly meritless and frivolous theory that it was simply refileing Jadco I, which it had dismissed after an unsuccessful appeal to the Oklahoma Court of Appeals. The application of claim preclusion to this case was clear, and Plaintiff knew, or was wanton and vexatious in its failure to recognize, this fact.

Bad faith litigation such as that involved here harms not only the opposing party, but also the court system itself. "Courts have the inherent power to impose . . . sanctions on . . . litigants in order to regulate their docket, promote judicial efficiency, and *deter frivolous filings*." Mullen v. Household Bank-Federal Savings Bank, 867 F.2d 586, 588 (10th Cir. 1989) (emphasis added); accord Braley v. Campbell, 832 F.2d 1504, 1510 (10th Cir. 1987) (en banc).

The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of "vindicat[ing] judicial authority without resort to more drastic sanctions . . . and mak[ing] the prevailing party whole for expenses caused by his opponents obstinacy."

Chambers, 501 U.S. at 46 (quoting Hutto v. Finney, 437 U.S. 678, 689 n. 14 (1978)). Filing repetitive and utterly frivolous lawsuits wastes judicial resources and threatens the very legitimacy of the judicial system. All litigation must come to an end, and parties must accept finality when it comes, regardless of whether they are satisfied with the outcome. "One of the main policy considerations underlying res judicata is the interest in bringing litigation to an end. 'By preventing repetitious litigation, application of res judicata avoids unnecessary expense and vexation for parties, conserves judicial resources, and encourages reliance on judicial action.'" Nwosun, 124 F.3d at 1258 (quoting May v. Parker-Abbott Transfer & Storage, Inc., 899 F.2d 1007, 1009 (10th Cir. 1990)). "[F]airness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end." Restatement (Second), Judgments § 19.

The Court expects that Plaintiff will not initiate any further litigation against Defendant with respect to the instant matter. For that reason, the Court denies Defendant's request for an injunction against Plaintiff. Of course, should Plaintiff again file such repetitive litigation in this Court, it may be subject to further and potentially more severe sanctions.

The issue of sanctions is hereby referred to Magistrate Judge Claire V. Eagan for a report and recommendation on the amount of attorney fees reasonably justified in this case.

IV

Finally, Plaintiff filed a Motion to Amend Complaint seeking leave to strike its claim of bad faith (Docket # 17). Not only has Plaintiff shown a pattern against this Defendant of dismissing claims and then later refile them, but Plaintiff also misrepresented to the Court that Defendant had failed to respond to the motion, when in fact Defendant had timely filed a response in opposition to Plaintiff's motion. Plaintiff has failed to show good cause for leave to amend, and its motion is hereby denied.

In sum, the Court hereby **grants** Defendant's Motion for Summary Judgment, **grants** Defendant's Motion for Sanctions, and **denies** Plaintiff's Motion to Amend. As stated above, the matter of the amount of sanctions is hereby referred to Magistrate Judge Eagan.

IT IS SO ORDERED.

This 13<sup>TH</sup> day of July, 2000.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

Sm

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

JUL 13 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GEORGE M. COLLIER, )

Plaintiff, )

vs. )

UNITED STATES POST OFFICE, )

Defendant. )

Case No. 00-CV-431-EA ✓

ENTERED ON DOCKET  
DATE JUL 13 2000

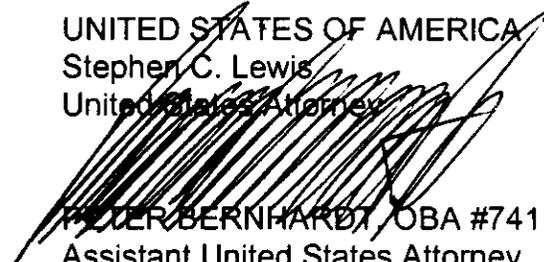
STIPULATION OF DISMISSAL

The Plaintiff, George M. Collier, pro se, and Defendant, William Henderson, Postmaster General, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, hereby stipulate to the dismissal of this action pursuant to Rule 41 (a)(1)(ii), Federal Rules of Civil Procedure.

Dated this 11 day of July, 2000.

  
\_\_\_\_\_  
GEORGE M. COLLIER, Plaintiff  
4310 South Peoria  
Tulsa, Oklahoma 74105  
(918) 742-0701

UNITED STATES OF AMERICA  
Stephen C. Lewis  
United States Attorney

  
PETER BERNHARDT, OBA #741  
Assistant United States Attorney  
333 W. 4th Street, Suite 3460  
Tulsa, Oklahoma 74103-3880  
(918) 581-7463

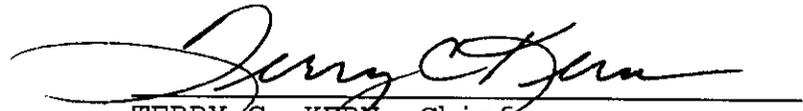
CLJ



part. Recovery of damages may not be based on speculation.

It is the Order of the Court that the motion of plaintiff to alter or amend judgment (#174) is hereby DENIED.

ORDERED this 12 day of July, 2000.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE





jm

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUL 12 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 ✓

ENTERED ON DOCKET

DATE JUL 12 2000

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

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

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

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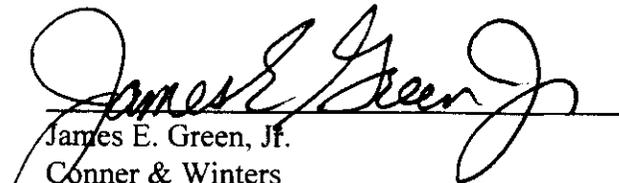
CS

4. No costs are awarded.



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

Attorney for Plaintiff  
Wiley Pearson



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

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

**FILED**

JUL 12 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

PETR ADAMIK, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
THE STANLEY WORKS, et al. )  
 )  
Defendants. )

No. 99-CV-541-K

ENTERED ON DOCKET  
DATE JUL 12 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 11<sup>th</sup> day of July, 2000.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

JASON LEE CONKLIN, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 CREEK COUNTY; et al., )  
 )  
 Defendants. )

No. 99-CV-894-H (D)

ENTERED ON DOCKET  
DATE JUL 11 2000

**FILED**

JUL 10 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

On October 20, 1999, Plaintiff, appearing *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 (Docket #1), naming as defendants Creek County and Creek County Jail. Pursuant to the Court's November 2, 1999 Order, Plaintiff was granted leave to proceed *in forma pauperis*. The Court also directed Plaintiff to file an amended complaint to cure certain deficiencies in his pleadings. Thereafter, on November 18, 1999, Petitioner filed his Amended Complaint (Docket #6), naming as defendants Creek County; Cal Smith, Jail Administrator for Creek County; Larry Fugate, Sheriff of Creek County; and Ed Willingham, Chief Criminal Detective for Creek County Sheriff's Department. Plaintiff has also filed a "motion for transfer or release for safety" (Docket #4) and a motion for appointment of counsel (Docket #5). For the reasons discussed below, the Court finds Plaintiff's amended complaint should be dismissed without prejudice for failure to state a claim upon which relief may be granted.

As a preliminary matter, the Court finds that both Plaintiff's "motion for transfer or release for safety" and his motion for appointment of counsel should be denied. The Court is without authority to enter the relief requested in the "motion for transfer or release for safety." Therefore, that motion should be denied.

As to Plaintiff's request for appointment of counsel, the Court has discretion to appoint an attorney to represent an indigent plaintiff where, under the totality of circumstances of the case, the denial of counsel would result in a fundamentally unfair proceeding. McCarthy v. Weinberg, 753 F.2d 836, 839-40 (10th Cir. 1985). The Tenth Circuit Court of Appeals has stated that "if the plaintiff has a colorable claim then the district court should consider the nature of the factual issues raised in the claim and the ability of the plaintiff to investigate the crucial facts." Rucks v. Boergermann, 57 F.3d 978, 979 (10th Cir. 1995) (quoting McCarthy, 753 F.3d at 838). After reviewing the merits of Plaintiff's case, the nature of the factual issues involved, Plaintiff's ability to investigate the crucial facts, the probable type of evidence, Plaintiff's capability to present his case, and the complexity of the legal issues, see Rucks, 57 F.3d at 979 (cited cases omitted); see also McCarthy, 753 F.2d at 838-40; Maclin v. Freake, 650 F.2d 885, 887-89 (7th Cir. 1981), the Court finds Plaintiff's motion for appointment of counsel should be denied.

## ANALYSIS

### A. Standards

Plaintiff is a prisoner as that term is defined in § 1915A(c) (i.e., a person incarcerated for violations of the criminal law). The Defendants in this case are either a governmental entity or employees of a governmental entity. The Court is, therefore, required to conduct an initial review of Plaintiff's complaint. See 28 U.S.C. § 1915A(a). During this review, the Court is required to "identify cognizable claims or dismiss the complaint, or any part of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted . . ." 28 U.S.C. § 1915A(b)(1).

Plaintiff is also proceeding *in forma pauperis*. In cases where the plaintiff is proceeding *in*

*forma pauperis*, § 1915(e) 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).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110. See also 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).<sup>1</sup>

---

<sup>1</sup>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." Conley, 355 U.S. at 45-46. The Court finds that this same standard should be applied when deciding whether to dismiss a claim *sua sponte* under either 28 U.S.C. § 1915(e)(2)(B)(ii) or § 1915A(b)(1).

**B. Plaintiff's claims**

In his amended complaint, Plaintiff alleges that his constitutional rights have been violated by Defendants as follows:

- Count I: Cruel and unusual punishment.  
I've been placed in the Hole for requesting to speak to my lawyer and requesting medical treatment.
- Count II: Wrongful herassment (sic)  
Since Creek County has found out about me trying to sue them I've been threatened with violence and bodily endangerment.
- Count III: Refusal of medical treatment  
I was very sick and requested medical care and was refused and placed in the Hole for calling my lawyer about it.

Each of these claims alleges that defendants engaged in retaliation against Plaintiff as a result of Plaintiff exercising his constitutional rights. Plaintiff also alleges he was denied medical care while incarcerated at the Creek County Jail.

The Court finds that, even if the allegations in Plaintiff's amended complaint are accepted as true, the amended complaint fails to state a claim upon which relief can be granted as to each of the named defendants. Plaintiff has named as defendants Creek County; Cal Smith, Jail Administrator for Creek County; Larry Fugate, Sheriff of Creek County; and Ed Willingham, Chief Criminal Detective for Creek County Sheriff's Department. Nowhere in his amended complaint does Plaintiff explain how these defendants acted to deprive him of his constitutional rights. Furthermore, to the extent Plaintiff's claims are against Defendants Smith, Fugate and Willingham in their individual capacities as supervisors at the Creek County Jail, it is well established that for a supervisor to be liable in a civil rights suit for the actions of others there must be an affirmative link between the supervisor and the constitutional deprivation. Meade v. Grubbs, 841 F.2d 1512, 1527. That link can take the form of personal participation, an exercise of control or discretion, or

a failure to supervise. Id. Plaintiff must show that the defendant expressly or otherwise authorized, supervised, or participated in the conduct which caused the deprivation. Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990), cert. denied, 499 U.S. 976 (1991). Absent such a link, a supervisor is not liable for the actions of his employees. Id.

In the instant case, neither Plaintiff's retaliation claims nor his denial of medical care claim states a claim for relief. Plaintiff makes no allegations suggesting that, but for defendants' retaliatory motive, the acts of which he complained would not have occurred. Nor does plaintiff allege that the named defendants were personally involved in the allegedly retaliatory conduct or the alleged denial of medical care. See Mitchell v. Maynard, 80 F.3d 1433, 1441 (10th Cir.1996) (holding that a plaintiff must allege the personal participation of the named defendants to establish liability under § 1983). Therefore, absent further amendment, Plaintiff's conclusory allegations are insufficient to state a claim for relief against Defendants in their individual capacities.

As to Plaintiff's claims against Creek County and Defendants Smith, Fugate and Willingham, in their official capacities, the Court again finds Plaintiff's amended complaint fails to state a claim upon which relief may be granted. In order to state a claim against a municipality under section 1983, a plaintiff must show that the municipality itself, through custom or policy, caused the alleged constitutional violation. Monell v. Dep't of Social Servs., 436 U.S. 658 (1978). There are two requirements for liability based on custom: (1) the custom must be attributable to the county through actual or constructive knowledge on the part of the policy-making officials; and (2) the custom must have been the cause of and the moving force behind the constitutional deprivation. *Respondeat superior* does not give rise to a § 1983 claim. Monell, 436 U.S. at 692-94; see also Jenkins v. Wood, 81 F.3d 988, 993-94 (10th Cir. 1996) (citing City of Canton v. Harris, 489 U.S. 378, 385 (1989)). Plaintiff's claims fail to demonstrate either of these elements. Because Plaintiff

does not allege that the retaliation or denial of medical care was the result of any policy or custom of the county, he has failed to state a claim for relief against defendants in their official capacities.

**CONCLUSION**

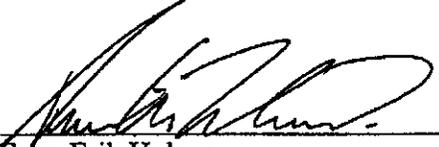
Plaintiff's conclusory allegations fail to state a claim upon which relief may be granted. Therefore, Plaintiff's amended complaint should be dismissed without prejudice to the filing of a second amended complaint. The Court will reopen this action should Plaintiff file a second amended complaint within twenty (20) days of the entry of this Order.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. Plaintiff's "motion for transfer or release for safety" (Docket #4) is **denied**.
2. Plaintiff's motion for appointment of counsel (Docket #5) is **denied**.
3. Plaintiff's amended complaint (Docket #6) is **dismissed without prejudice** to the filing of a second amended complaint.
4. The Court will reopen this action should Plaintiff file a second amended complaint within twenty (20) days of the entry of this Order.

IT IS SO ORDERED.

This 7<sup>th</sup> day of July, 2000.

  
Sven Erik Holmes  
United States District Judge

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

JO BOB HILLE and MARY ANN  
HILLE,

Plaintiffs,

vs.

J. FREDERIC STORASKA, et al.

Defendants.

ENTERED ON DOCKET  
DATE **JUL 11 2000**

No. 98-CV-369-K

**FILED**

JUL 10 2000

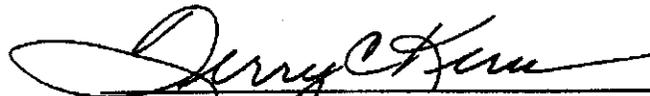
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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. Pursuant to the parties' agreement, the Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary, in no event later than November 1, 2001.

ORDERED this 10 day of July, 2000.



TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

SHATILYA BARNES, Individually and as )  
Mother and Next Friend of GERALD )  
BARNES, a minor; ANDREA )  
RUTHERFORD, Individually and as )  
Mother and Next Friend of DENISE )  
RUTHERFORD, a minor; KAYSONDRA )  
WILSON, Individually and as Mother and )  
Next Friend of JORDAN WILSON, a )  
minor; and DAPHINE SUDDARTH, )  
Individually and as Mother and Next )  
Friend of RONISHA SUDDARTH, a )  
minor, )

Plaintiffs, )

v. )

HEAD START, INC.; INDEPENDENT )  
SCHOOL DISTRICT NO. 1 OF TULSA )  
COUNTY, OKLAHOMA; COMMUNITY )  
ACTION PROJECT OF TULSA )  
COUNTY, OKLAHOMA; TULSA CITY- )  
COUNTY HEALTH DEPARTMENT; KD )  
ENTERPRISES, INC.; STATE OF )  
OKLAHOMA ex rel. THE BOARD OF )  
REGENTS OF THE UNIVERSITY OF )  
OKLAHOMA d/b/a UNIVERSITY OF )  
OKLAHOMA HEALTH SCIENCE )  
CENTER IN TULSA; DOE )  
GOVERNMENT AGENTS 1 through 4; )  
ROSEMARY LIGUORI, ARNP PhD )  
CPNP; SHARON WESTBROOK; SUSAN )  
WALKER, LPN; GUS DOE, OUFHPS; )  
JOHN DOES 1 through 10; and JANE )  
DOES 1 through 10, )

Defendants. )

ENTERED ON DOCKET  
DATE JUL 11 2000

**F I L E D**

JUL 10 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99-CV-733-K(J) ✓

ORDER

9M

Before the Court is Defendant State of Oklahoma *ex rel.* the Board of Regents of the University of Oklahoma d/b/a University of Oklahoma Health Science Center in Tulsa's (the "University's") motion to dismiss Plaintiffs' claims against it for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). The University argues that it is not a person subject to suit under 42 U.S.C. §§ 1983, 1985, and 1986; it is immune under Oklahoma's Governmental Tort Claims Act ("GTCA"), Okla. Stat. tit. 51, §§ 151-200, because Plaintiffs' allegations necessarily require a finding that its employee acted outside the scope of her employment; and it is not subject to suit under the Oklahoma Constitution.

#### History of Case

Plaintiffs' allegations stem from the physical examinations of minor children in the Head Start Program at Wiley Post Elementary School in Tulsa, Oklahoma. Plaintiffs consist of these children ("Minor Plaintiffs") and their parents ("Parent Plaintiffs"). Plaintiffs allege that the children were stripped of their clothing and subjected to a physical examination, including a survey of their genitalia and the taking of a blood sample, without informed written parental consent. Plaintiffs have sued the various entities involved in the Head Start Program at Wiley Post Elementary School, as well as the individuals allegedly involved in the examinations. Plaintiffs bring suit under 42 U.S.C. § 1983 alleging unreasonable search and seizure, lack of substantive due process, and interference with parental liberty rights. Plaintiffs also allege a conspiracy to deprive them of equal protection of the laws under 42 U.S.C. §§ 1985 and 1986. Finally Plaintiffs assert various state common-law and

constitutional claims, including unreasonable search and seizure and interference with parental liberty rights in violation of the Oklahoma Constitution and various common-law torts. Plaintiffs seek compensatory and punitive damages, as well as injunctive relief and attorney fees. Specifically, Plaintiffs allege that the University's employees performed the examinations at issue.

**"Person" Under 42 U.S.C. §§ 1983, 1985, and 1986**

The University is not a person subject to suit under 42 U.S.C. §§ 1983, 1985, and 1986. Section 1983 provides,

Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

(emphasis added). Sections 1985 and 1986 similarly use the term "person." See 42 U.S.C. §§ 1985(3) ("If two or more persons . . .") and 1986 ("Every person who . . ."). Neither a state nor a governmental entity that is an arm of the state for Eleventh Amendment purposes is a "person" subject to suit under section 1983. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989); *Harris v. Champion*, 51 F.3d 901, 905 (10th Cir. 1995). The Tenth Circuit has found that the University is an arm of the state, see *Hensel v. Office of the Chief Admin. Hearing Officer*, 38 F.3d 505, 508 (10th Cir. 1994), and the University, therefore, is not a "person" as that term is used in 42 U.S.C. § 1983 or in sections 1985 and 1986, see, e.g., *Vaizburd v. United States*, 90 F. Supp. 2d 210, 216 n.10 (E.D.N.Y. 2000) (dismissing the plaintiff's sections 1983 and 1985 claims against the state as only "persons"

can be liable); *Penaranda v. Cato*, 740 F. Supp. 1578, 1583 (S.D. Ga. 1990) (finding state agency is not a "person" under sections 1983 and 1985).

### Sovereign Immunity

Furthermore, this Court has no jurisdiction over Plaintiffs' claims against the University, as it has sovereign immunity from this suit in federal court. Sovereign immunity implicates a district court's subject matter jurisdiction. *See Martin v. Kansas*, 190 F.3d 1120, 1126 (10th Cir. 1999). As noted above, the University is an arm of the State of Oklahoma for sovereign immunity purposes. The University, therefore, has sovereign immunity from suits for monetary or injunctive relief unless the State has waived that immunity or Congress has abrogated it. *See Ellis v. University of Kan. Med. Ctr.*, 163 F.3d 1186, 1195 (10th Cir. 1999). Congress has not abrogated state sovereign immunity in 42 U.S.C. §§ 1983, 1985, and 1986, *see id.* at 1196, and Oklahoma has not waived its sovereign immunity in federal court to Plaintiffs' federal or state law claims. It is long settled that a state can waive sovereign immunity in its own courts without doing so in federal court, *see Smith v. Reeves*, 178 U.S. 436, 441-42, 445 (1900), and a state will have waived its immunity in federal court "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction,'" *Edelman v. Jordan*, 415 U.S. 651, 673 (citation omitted) (alterations in original). Oklahoma has not waived its sovereign immunity in federal court, and the GTCA cannot be read as so doing. *See Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.2d 584, 589 (10th Cir. 1994) (citing

Okla. Stat. tit. 51, § 152.1(B)). While the GTCA waives state sovereign immunity to certain tort claims in state court, it expressly refuses to waive Oklahoma's rights under the Eleventh Amendment. *See* Okla. Stat. tit. 51, § 152.1(B). Therefore, Plaintiffs claims against the University must be dismissed for lack of subject matter jurisdiction.

**Conclusion**

The University is not subject to suit under 42 U.S.C. §§ 1983, 1985, and 1986, because it is not a "person" as that term is used by those sections. Furthermore, the Court lacks subject matter jurisdiction over Plaintiffs' claims against the University, as Oklahoma has not waived, and the United States has not abrogated, the State's sovereign immunity to suit in federal court.

IT IS THEREFORE ORDERED that the Motion to Dismiss of Defendant University of Oklahoma (# 91) is GRANTED. Plaintiffs' claims against State of Oklahoma *ex rel.* the Board of Regents of the University of Oklahoma d/b/a University of Oklahoma Health Science Center in Tulsa are DISMISSED.

ORDERED THIS 7 DAY OF JULY, 2000.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

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

HAROLD GREEN, JANELLE  
GREEN, husband and wife,  
JAYNIE GREEN and SUZANNE  
GREEN,

Plaintiffs,

vs.

STATE FARM MUTUAL  
AUTOMOBILE INSURANCE  
COMPANY,

Defendant.

**FILED**

JUL 11 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 00 CV 0184BU(M)

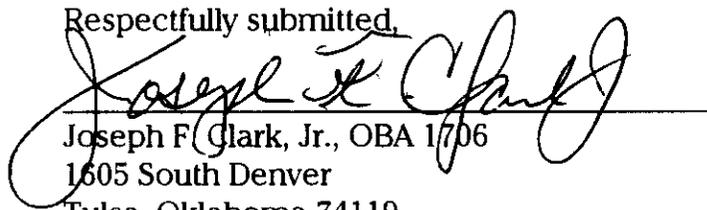
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DATE JUL 11 2000

STIPULATION OF PARTIAL DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs, Jaynie Green and Suzanne Green, only, and the Defendant, State Farm Mutual Automobile Insurance Company, and advise the Court that a partial settlement has been reached in the above-styled matter and hereby stipulate to the Dismissal With Prejudice of the Defendant by the above-named Plaintiffs, only, with each party to bear their own costs and attorneys' fees. This Dismissal does not include Harold Green or Janelle Green, whose claims are still pending.

Respectfully submitted,



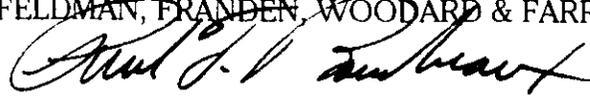
Joseph F. Clark, Jr., OBA 1706  
1605 South Denver  
Tulsa, Oklahoma 74119  
Tel: 918/583-1124

ATTORNEY FOR PLAINTIFFS,  
JAYNIE GREEN and SUZANNE GREEN

18

o/b

FELDMAN, FRANDEN, WOODARD & FARRIS



---

Paul T. Boudreaux, OBA # 990

525 South Main - Suite 1000

Tulsa, Oklahoma 74103-4514

Tel: 918/ 583-7129

Fax: 918/ 764-3005

ATTORNEY FOR DEFENDANT,  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY

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

**FILED**

JUL 10 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JEFF NIMMO, )  
)  
Plaintiff, )  
vs. ) Case No. 99-CV-758-BU(E)  
)  
AMERICAN FOUNDRY GROUP, INC., )  
)  
Defendant. )

ENTERED ON DOCKET  
DATE JUL 11 2000

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 10<sup>th</sup> day of July, 2000.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**

JUL 11 2000

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

PAMELA SMITH, an individual, )  
)  
Plaintiff, )  
)  
v. )  
)  
STATE OF OKLAHOMA, ex rel., )  
DEPARTMENT OF PUBLIC SAFETY; )  
DON COCHRAN, in both his individual )  
and official capacity; and ED SPENCER, )  
in both his individual and official capacity. )  
)  
Defendants. )

Case No.: OOCV0035C(J)

ENTERED ON DOCKET  
DATE JUL 11 2000

**PARTIAL DISMISSAL WITHOUT PREJUDICE**

COMES NOW the Plaintiff, Pamela Smith, by counsel Bridger-Riley & Associates, P.C., and does dismisses WITHOUT PREJUDICE all claims against the Defendant, State of Oklahoma, ex. rel. Department of Public Safety in the above-styled matter. The Plaintiff, however, continues to assert and allege all remaining claims against the individually-named Defendants, Don Cochran and Ed Spencer.

RESPECTFULLY SUBMITTED,

  
\_\_\_\_\_  
Tony Mareshie, OBA#18180  
N. Kay Bridger-Riley, OBA # 1121  
*Bridger-Riley & Associates, P.C.*  
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Tulsa, Oklahoma 74136  
(918) 494-6699 (Telephone)  
(918) 494-8825 (Telefax)

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**CERTIFICATE OF MAILING**

I hereby certify that on the 11<sup>th</sup> day of July, 2000 I did mail a complete, true and exact copy of the foregoing, with prepaid postage affixed thereon, to:

Mr. Charles Babb, Esq.  
Assistant Attorney General  
4545 North Lincoln Blvd, Suite 260  
Oklahoma City, OK 73105  
**Counsel for Defendant Department of Public Safety**



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Tony Mareshie, OBA#18180