

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

JIM SISNEY, an individual,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 09-CV-253-TCK-PJC
)	
INDEPENDENT SCHOOL DISTRICT)	
NO. 3 OF TULSA COUNTY, a Political)	
Subdivision; and the BROKEN ARROW)	
SCHOOL BOARD,)	
)	
Defendants.)	

**DEFENDANT’S RESPONSE IN OPPOSITION
TO PLAINTIFF’S APPLICATION FOR
ORDER OF DISMISSAL WITHOUT PREJUDICE**

The Defendant, Independent School District No. 3 of Tulsa County, Oklahoma a/k/a Broken Arrow Public Schools (the “District”), respectfully submits this response in opposition to the Plaintiff’s Application for Order of Dismissal Without Prejudice to Refiling [Dkt. No. 16]. The Plaintiff, Jim Sisney, asks this Court to dismiss the instant action without prejudice pursuant to Rule 41(a)(2), FED. R. CIV. P.¹ Because Rule

¹ The Plaintiff has chosen to ask this Court to dismiss this action pursuant to Rule 41(a)(2), rather than filing a notice of dismissal pursuant to Rule 41(a)(1)(i), notwithstanding that the District has neither answered nor filed a motion for summary judgment. The District assumes the Plaintiff has proceeded in this manner because a plaintiff’s dismissal by notice pursuant to Rule 41(a)(1)(i) does not deprive the district court of jurisdiction to decide collateral matters, such as sanctions, costs, and attorney’s fees. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396-98 (1990). By asking the Court to order the dismissal of this case without prejudice pursuant to Rule 41(a)(2), rather than filing a notice of dismissal under Rule 41(a)(1)(i), it appears the Plaintiff is attempting to foreclose the District from seeking a post-dismissal award of attorney’s fees and costs. Regardless of the Plaintiff’s reason for proceeding under Rule 41(a)(2), the law is clear that the Court may impose conditions on a dismissal under Rule 41(a)(2).

41(a)(2) authorizes a court to impose “terms that the court considers proper” before dismissing a case upon the plaintiff’s request, the District requests that the Court order dismissal of this case only upon the imposition of one of the following conditions:

- i. That the dismissal be with prejudice as to the Plaintiff’s federal law claims; or
- ii. That the Plaintiff be required to pay the costs and attorney’s fees incurred by the District in defending this matter prior to any dismissal without prejudice.

The Plaintiff invoked this Court’s jurisdiction by filing his Complaint herein on April 30, 2009 [Dkt. No. 1]. The Plaintiff advanced claims under 42 U.S.C. § 1983, as he alleged that his dismissal from his previous employment as Superintendent of the District caused him to be deprived of property and liberty without due process of law. The Plaintiff also asserted a state law claim for breach of contract. The District moved to dismiss all of the Plaintiff’s claims for failure to state a claim upon which relief can be granted [Dkt. No. 8], pointing out that the Plaintiff was advised of his right to a due process hearing and voluntarily elected not to request such a hearing [Dkt. No. 9]. The Plaintiff filed a response in opposition to this motion [Dkt. No.10], and the District filed a reply [Dkt. No. 12].

On October 5, 2009, Plaintiff’s counsel advised the District’s counsel via electronic mail that Plaintiff intended to file an application to dismiss the instant case without prejudice and asked if the District objected. Exhibit 1, attached. In response, counsel for the District asked for an explanation and reminded counsel for the Plaintiff of the District’s pending motion to dismiss. Counsel for the District also asked if Plaintiff

would agree to pay any of the costs and attorney's fees the District had incurred in defending this matter. Exhibit 2, attached. Counsel for the Plaintiff replied that the Plaintiff now believes his claims "can be addressed to his satisfaction within his state claims." Counsel for the Plaintiff concluded by stating, "As you know, we are under no further obligation to dismiss with prejudice, agree to payment of costs or disclose our reasoning." Exhibit 3, attached. Counsel for the District responded by stating that Plaintiff's position "appears to be an attempt by [Plaintiff] to manipulate jurisdiction." Counsel for the District advised counsel for the Plaintiff that because of Plaintiff's unwillingness to address the substantial costs incurred by the District, the District objected to a dismissal without prejudice. Exhibit 4, attached.

On October 7, 2009, the Plaintiff filed his application for an order of dismissal without prejudice pursuant to Rule 41(a)(2), FED. R. CIV. P. The only explanation offered by the Plaintiff for this motion was the following statement:

4. Through discovery and case development, Counsel has determined that Plaintiff's claims and remedies are not, at this time, of a federal nature, but those that sound in the laws governed by the state courts. Accordingly, in the interests of justice, Plaintiff seeks dismissal of his federal case without prejudice.

[Dkt. No. 16, p.2].

By acknowledging that his "claims and remedies are not ... of a federal nature," the Plaintiff has effectively conceded that his claims that he was deprived of property and liberty without due process of law are without merit and that the Defendant's pending motion to dismiss should be granted as to the federal-law claims.

Moreover, the District is at a loss to understand what Plaintiff means by his reference to information gained through “discovery and case development.” The only discovery done to date in this matter was the submission of written discovery requests by the District to the Plaintiff. The Plaintiff has neither responded to such written discovery requests nor served any discovery requests on the District. No depositions have been taken in this matter. The only “case development” of which the District is aware is that Plaintiff’s counsel has now had the opportunity to review the authorities cited by the District in support of its motion to dismiss.

The Tenth Circuit has noted that Rule 41(a)(2) “is designed ‘primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.’” *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 357 (10th Cir. 1996, quoting 9 C. Wright and A. Miller, *Federal Practice and Procedure* § 2364 at 279 (2d ed. 1994). The court explained that “when considering a motion to dismiss without prejudice, ‘the important aspect is whether the opposing party will suffer prejudice in the light of the valid interests of the parties.’” *Id.* at 357, quoting *Clark v. Tansy*, 13 F.3d 1407, 1411 (10th Cir. 1993). The Tenth Circuit identified the following relevant factors a court should consider in determining whether a the opposing party will suffer prejudice if the plaintiff’s request to dismiss the case is granted: “the opposing party’s effort and expense in preparing for trial,” “excessive delay and lack of diligence on the part of the movant,” “insufficient explanation of the need for a dismissal,” and “the present stage of the litigation,” including whether a dispositive motion is pending. *Id.* at 358. The Tenth

Circuit explained that the foregoing factors are not exclusive but are simply guides for the district court to follow. *Id.*

All of the foregoing factors indicate that the District will suffer prejudice if the Plaintiff's motion to dismiss without prejudice is granted. Accordingly, all of the factors support the District's request that conditions be imposed upon such dismissal.

The District has incurred significant attorney's fees in the defense of this matter. Counsel for the District prepared a motion to dismiss all of the Plaintiff's claims, a brief in support, and a reply brief addressing the Plaintiff's response. Counsel for the District has also prepared and served written discovery requests on the Plaintiff. Finally, counsel for the Defendants has been forced to prepare and file a motion to compel the Plaintiff to disclose a computation of each category of damages identified in the Plaintiff's initial disclosures [Dkt. No. 15].

Counsel for the Plaintiff, on the other hand, has been less than diligent in prosecuting this case. Counsel for the Plaintiff has yet to make the proper initial disclosures required by Rule 26, FED. R. CIV. P. *See* District's Motion to Compel [Dkt. No. 15]. Nor has the Plaintiff served any written discovery requests on the District.

The Plaintiff has certainly not provided an adequate explanation of his decision to seek an order dismissing this case. In light of the fact that the Plaintiff has conducted no discovery and the operative facts of this case are the same today as they were when this action was filed, the explanation offered by the Plaintiff rings false. The Plaintiff's failure to explain his decision to seek dismissal of this case suggests that the Plaintiff is attempting to manipulate jurisdiction for his own benefit.

Finally, the fact that a dispositive motion has been at issue for almost three (3) months² weighs against granting the Plaintiff's motion to dismiss this case without prejudice. The Tenth Circuit expressly noted in *Phillips USA* that "a party should not be permitted to avoid an adverse decision on a dispositive motion by dismissing a claim without prejudice." *Id.* at 358, citing *Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969). The Plaintiff's failure to offer an adequate explanation for seeking dismissal of this action strongly suggests that the Plaintiff is motivated by the desire to avoid a ruling by this Court on the District's pending motion to dismiss.

Because the District has demonstrated that it will suffer prejudice if the Plaintiff's motion to dismiss without prejudice is granted, the Court should order that the Plaintiff's federal claims be dismissed with prejudice. Alternatively, the Court may make granting the Plaintiff's motion to dismiss without prejudice conditional upon the Plaintiff's payment of the District's costs and attorney's fees. In *Aerotech, Inc. v. Estes*, 110 F.3d 1523 (10th Cir. 1997), the Tenth Circuit explained that an award of attorney's fees is appropriate when a plaintiff is allowed to dismiss its case without prejudice pursuant to Rule 41(a)(2):

Today, we continue to adhere to the rule that a defendant may not recover attorneys' fees when a plaintiff dismisses an action with prejudice absent exceptional circumstances. When a plaintiff dismisses an action without prejudice, a district court may seek to reimburse the defendant for his attorneys' fees because he faces a risk that the plaintiff will refile the suit and impose duplicative expenses upon him In contrast, when a plaintiff dismisses an action with prejudice, attorneys' fees are usually not

² The District filed its reply brief in support of its motion to dismiss [Dkt. No. 12] on July 24, 2009.

a proper condition of dismissal because the defendant cannot be made to defend again.

Id. at 1528 (citation omitted).

In addition, the Court should award the District its attorney's fees and costs under the Court's inherent power to sanction a party for acting in bad faith, vexatiously, or for oppressive reasons. *Rogler v. Standard Insurance Company*, 30 Fed. Appx. 909, 914 (10th Cir. 2002), *quoting Chambers v NASCO, Inc.*, 501 U.S. 32, 55 (1991). Notwithstanding that the Plaintiff was pursuing state court claims against three members of the District's Board of Education at the time this case was filed, the Plaintiff elected to invoke this Court's jurisdiction and force the District to defend in this forum against federal-law claims. Motivated by nothing more than the apparent realization that such federal claims are – and always have been – without merit, the Plaintiff now seeks an order from this Court dismissing this case pursuant to Rule 41(a)(2). Because the Plaintiff's action in instituting this meritless litigation was in bad faith, vexatious, and for the purpose of oppressing the District, the Court should sanction the Plaintiff for engaging in such conduct by requiring him to pay the District's costs and attorney's fees.

Respectfully submitted,

s/ Kent B. Rainey

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Gary L. Richardson
Charles L. Richardson
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Attorneys for the Plaintiff

s/ Kent B. Rainey

Kent B. Rainey