

IN THE SUPREME COURT OF OHIO

CHARLES D. ABOOD, JUDGE,	:	Supreme Court Case No. 2006-1913
Appellant,	:	On Appeal from the Lucas County Court of Appeals, Sixth Appellate
-vs-	:	District:
A.J. BORKOWSKI, JR.,	:	Court of Appeals Case No. L-05-1425 Trial Court Case No. CI0200504894 (Lucas County)
Appellee.	:	

**APPELLEE A.J. BORKOWSKI, JR. S. Ct. Prac. R. IX, Section 8 ADDITIONAL
AUTHORITIES FOR ORAL ARGUMENT TO BE HELD ON OCTOBER 9, 2007**

George D. Jonson (0027124)
Linda L. Woeber (0039112)
Kimberly Vanover Riley (0068187)
(Counsel of Record)
MONTGOMERY, RENNIE & JONSON
36 East Seventh Street, Suite 2100
Cincinnati, Ohio 45202
Telephone: (513) 241-4722
Fax: (513) 241-8775
gionson@mrj.cc, lwoeber@mrj.cc,
kriley@mrj.cc e-mail

A.J. Borkowski, Jr.
P.O. Box 703
Fayette, Ohio 43521
Telephone: (419) 237-7017
aborkowskijr@yahoo.com e-mail

Pro-se Plaintiff, Appellee-Relator

Counsel for Defendant, Appellant-Respondent
the Honorable Judge Charles D. Abood

FILED
SEP 28 2007
CLERK OF COURT
SUPREME COURT OF OHIO

ADDITIONAL AUTHORITIES

Appellee A.J. Borkowski, Jr., hereby presents the attached additional authority for oral argument to be held on October 9, 2007, which was not cited in his briefs pursuant to S. Ct. Prac. R. IX, Section 8. The Appellees additional authority are listed on (page 3).

Respectfully submitted,

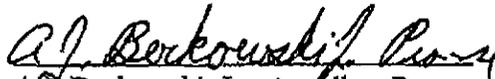
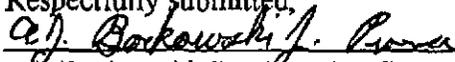

A.J. Borkowski, Jr., Appellee, Pro-se
PO. Box 703
Fayette, Ohio 43521
Tel: 419.237.7017

TABLE OF ADDITIONAL AUTHORITIES

<u>Cases</u>	<u>Pages</u>
State of Ohio ex rel. Levert K. Griffin v, Geri M. Smith, Clerk, U.S. District Court, and Augustin F. O'Neil, Ohio Supreme Court Case No: 2006-2079.....	1-6
IMFC Professional, Etc., Latin Am. Home Health, 676 F. 2d. 152,158 (5 th Cir. 1982)not attached	
Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F. 3d 305, 312 (5 th Cir. 2002)	Not Attached
Reasoner v. City of Columbus, 10 th Dist. No. 02AP-831, 2003-Ohio-670, at ¶ 15	7-12
Pulliam v. Allen (1984), 466 U.S. 522, 541-42.	Not Attached
Leaman v. Johnson, 794 F. 2d 1148; 1986 U.S. App. LEXIS 26969, (6 th Cir. 1986)	13-16
Shaw v. MRO Software, Inc., 2006 U.S. District LEXIS 69550 and 78456 (Ed. Mich. Oct. 27, 2006).	17-25
100 East Broad Corporation v. J.P. Morgan Case & Co., Southern District of Ohio docket No. 2:04-cv-1215.....	Not Attached

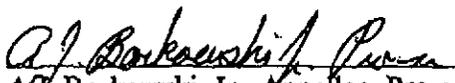
ADDITIONAL CONSTITUTIONAL PROVISIONS; STATUTES NOT ATTACHED

9 th Amendment to the U.S. Constitution	Not Attached
14 th Amendment to the U.S. Constitution	Not Attached
Title 28 U.S.C. § 1447 (c)	Not Attached
28 U.S.C. § 1331 (a)	Not Attached
28 U.S.C. § 1443	Not Attached
O.R.C. 2921.44	Not Attached
Ohio Civil Rights Acts O.R.C. 2921.45	Not Attached

Respectfully submitted,

 A.J. Borkowski, Jr., Appellee, Pro-se
 PO. Box 703
 Fayette, Ohio 43521
 Tel: 419.237.7017

CERTIFICATE OF SERVICE

This is to certify that on September 28, 2007 a true copy of the Appellee A.J. Borkowski, Jr. ADDITIONAL AUTHORITIES was filed by VIA FAX the Supreme Court of Ohio at Fax No. (614) 387-9539 and served, by VIA FAX Mail, upon George D. Jonson, Esq., Linda L. Woeber, Esq., Kimberly Vanover Riley, Esq., (Counsel of Record), MONTGOMERY, RENNIE & JONSON, 36 East Seventh Street, Suite 2100, Cincinnati, Ohio 45202, Counsel for Appellant-Respondent the Honorable Charles D. Abood. (Judge) at Fax No.(513) 768-5221.


 A.J. Borkowski, Jr., Appellee, Pro-se

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. LEVERT K. GRIFFIN,

Relator,

v.

GERI M. SMITH, CLERK, U.S. DISTRICT COURT, and AUGUSTIN F. O'NEIL,

Respondents.

Case No. 2006-2079

Original Action in Mandamus

NOTICE OF FILING A NOTICE OF REMOVAL IN FEDERAL COURT

Pursuant to 28 U.S.C. §§ 1442 and 1446, Geri M. Smith, Clerk, United States District Court, has filed a Notice of Removal in the United States District Court for the Southern District of Ohio, Eastern Division. A copy of the Notice of Removal is attached. Accordingly, removal is effected under 28 U.S.C. § 1446(d) and this Court is to proceed no further unless and until the case is remanded.¹

Respectfully submitted,

GREGORY G. LOCKHART
United States Attorney



John J. Stark (0076231)
Assistant United States Attorney
303 Marconi Boulevard, Suite 200
Columbus, Ohio 43215
Telephone: (614) 469-5715
Fax: (614) 469-5240
Email: john.stark@usdoj.gov

FILED
DEC 06 2006
MARCIA J WIENGEL, CLERK
SUPREME COURT OF OHIO

¹ Section 1446(d) states that "[p]romptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded."

P. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
JAMES BONINI
CLERK

2006 DEC -6 1 A 9 18

U.S. DISTRICT COURT
SOUTHERN DISTRICT OHIO
C2 06 1022

STATE OF OHIO ex rel. LEVERT K.
GRIFFIN,

Case No.

C2 06 1022

Relator,

JUDGE MARBLEY

v.

MAGISTRATE JUDGE ABEL

GERI M. SMITH, CLERK, U.S.
DISTRICT COURT, and AUGUSTIN
F. O'NEIL, BSQ.

Respondents.

NOTICE OF REMOVAL

1. Pursuant to 28 U.S.C. §§ 1442 and 1446, Geri M. Smith, Clerk, U.S. District Court for the Northern District of Ohio ("Clerk") is removing to this Court a civil action originally filed in the Ohio Supreme Court by Relator Levert K. Griffin, pro se.

2. The Clerk received a copy of the summons and complaint on November 15, 2006. The process and pleadings served upon the Clerk are attached at Exhibit 1.

3. Griffin petitions the Ohio Supreme Court for a writ of mandamus to compel the Clerk of the U.S. District Court, Northern District of Ohio, to serve a summons and complaint in the case of Griffin v. O'Neil, Case No. C5-05-2532. Complaint pp. 2-4. The Hon. Peter C. Economus, U.S. District Judge for the Northern District of Ohio, dismissed that action sua sponte pursuant to 28 U.S.C. § 1915(e). Judgment was entered December 8, 2005. See Case No. C5-05-2532 (Memorandum Opinion and Order, Doc. 8, and Judgment Entry, Doc. 9).

4. This action is removable pursuant to 28 U.S.C. 1442(a)(1).¹ Geri M. Smith is

¹ Section 1442(a)(1) states in part as follows:

The Supreme Court of Ohio

CASE ANNOUNCEMENTS AND ADMINISTRATIVE ACTIONS

December 11, 2006

[Cite as *12/11/2006 Case Announcements*, 2006-Ohio-6473.]

MOTION AND PROCEDURAL RULINGS

2005-0331. Whitaker v. M.T. Automotive, Inc.

Summit App. No. 21836, 2004-Ohio-7166. This cause came on for further consideration of appellant's motion to strike appellee's motion for reconsideration, or, in the alternative, to establish a new deadline for filing a response. Upon consideration thereof,

It is ordered by the court that appellant may file a memorandum opposing the motion for reconsideration within seven days of the date of this entry.

2006-1531. Goyings v. Rickels.

Paulding App. No. 11-06-03. This cause came on for further consideration of appellant's application for leave to file a motion for reconsideration. Upon consideration thereof,

It is ordered by the court that the application for leave is denied.

2006-2079. State ex rel. Griffin v. Smith.

In Mandamus. This cause originated in this court on the filing of a complaint for a writ of mandamus. On December 6, 2006, respondent Geri M. Smith filed a notice of filing of removal in the United States District court for the Southern District of Ohio, Eastern Division. Upon consideration thereof,

It is ordered by the court that this cause is stayed pending the federal court's determination. The parties shall notify this court upon the conclusion of the federal court proceedings.

MISCELLANEOUS DISMISSALS

2006-2133. State v. Rogers.

In Procedendo. This cause originated in this court on the filing of a complaint for a writ of procedendo. Upon consideration of relator's application for dismissal,

It is ordered by the court that the application for dismissal is granted. Accordingly, this cause is dismissed.

MEDIATION REFERRALS

The following case has been referred to mediation pursuant to S.Ct.Prac.R. XIV(6):

2006-2206. State ex rel. Kelley v. Indus. Comm.
Franklin App. No. 05AP-1161, 2006-Ohio-5514.

ADMINISTRATIVE ACTIONS

- 1. Amendments to Gov.Bar R. VI have been adopted. Proposed amendments to Gov.Bar R. V and VI have been published for comment.

P. 4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

State of Ohio ex rel. Levert K. Griffin,	:	
	:	
Plaintiff,	:	Case No. 2:06-cv-1022
	:	
v.	:	Judge Marbley
	:	
Geri M. Smith, Clerk, U.S. District Court, and Augustin F. O'Neil, Esq,	:	Magistrate Judge Abel
	:	
Defendants.	:	

Order

Plaintiff brings this petition for a writ of mandamus, initially filed in the Ohio Supreme Court and removed to this Court pursuant to 28 U.S.C §1442 and §1446. This matter is before the Court on Magistrate Judge Abel's March 5, 2007 Report and Recommendation that Defendant Geri M. Smith's December 13, 2006 motion to dismiss (doc.5) and her January 30, 2007 renewed motion to dismiss (doc. 11) be granted. No objections have been filed to the Report and Recommendation.

Upon *de novo* review as required by 28 U.S.C. § 636(b)(1)(B), the Court ADOPTS the Report and Recommendation. Plaintiff sought a writ of mandamus from the Supreme Court of Ohio against Defendant Smith in her official capacity as the Clerk of Courts for the Northern District of Ohio. As the Magistrate Judge held, a state court does not have jurisdiction to issue a writ of mandamus to a federal officer. *M'Clung v. Silliman*, 19 U.S. 598, 603 (1821); *Ex parte Shockley*, 17 F.2d 133, 137 (N.D. Ohio). Since the Supreme Court was without jurisdiction, this Court also lacks jurisdiction to hear this case. Accordingly, Defendant Geri M. Smith's

- December 13, 2006 motion to dismiss (doc.5) and her January 30, 2007 renewed motion to

P 5

dismiss (doc. 11) are GRANTED. Defendant Geri M. Smith is DISMISSED from this lawsuit.

s/Algenon L. Marbley
Algenon M. Marbley
United States District Judge

[Cite as *Reasoner v. Columbus* , 2003-Ohio-670.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Walter C. Reasoner,	:	
	:	
Plaintiff-Appellant,	:	No. 02AP-831
	:	
v.	:	(ACCELERATED CALENDAR)
	:	
City of Columbus, and	:	
Bruce Jenkins, Judge,	:	
Franklin County Municipal Court,	:	
	:	
Defendants-Appellees.	:	

O P I N I O N

Rendered on February 13, 2003

Walter C. Reasoner, pro se. ✓

Richard C. Pfeiffer, Jr., City Attorney, and *Glenn B. Redick*,
for appellees, City of Columbus and Judge Bruce Jenkins.

APPEAL from the Franklin County Court of Common Pleas.

KLATT, J.

{¶1} Appellant, Walter C. Reasoner, appeals from the Franklin County Court of
Common Pleas' dismissal of his complaint against appellees, city of Columbus and Judge
Bruce Jenkins. For the following reasons, we affirm.

No. 02AP-831

2

{¶2} On February 5, 2002, appellant filed suit against appellees alleging that Judge Bruce Jenkins violated appellant's due process and equal protection rights under the United States and Ohio Constitutions by dismissing appellant's underlying case when appellant refused to obtain an attorney. Appellant sued the city of Columbus only in its capacity as Judge Jenkins' employer.

{¶3} After appellees filed a Civ.R. 12(B)(6) motion to dismiss, but before the trial court ruled upon the motion, appellant filed an amended complaint. The amended complaint elaborated upon appellant's initial claim, but did not add any new claims or parties. In response to the amended complaint, appellees filed another Civ.R. 12(B)(6) motion, arguing that Judge Jenkins was immune from liability for his alleged actions.

{¶4} On June 14, 2002, the trial court issued a decision granting appellees' Civ.R. 12(B)(6) motion to dismiss the amended complaint. The trial court concluded that, based upon the allegations contained in the amended complaint, appellant could not state a claim upon which relief could be granted because the affirmative defense of judicial immunity prevented recovery. Appellant then appealed to this court.

{¶5} On appeal, appellant assigns the following errors:

{¶6} "First Assignment of Error

{¶7} "The trial court erred in showing flagrant disregard of Procedure Rules, and Appellant's rights in the dismissal of his action.

{¶8} "Second Assignment of Error

{¶9} "The trial court erred in granting Appellees Civ.R. 12(B)(6) motion to dismiss Appellant's Action."

P. 8

{¶10} In order for a court to dismiss a complaint for failure to state a claim upon which relief may be granted, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 418, 2002-Ohio-2480, ¶5. When deciding a motion to dismiss pursuant to a Civ.R. 12(B)(6) motion, a court may not consider any evidentiary materials other than averments in the complaint. *McGlone v. Grimshaw* (1993), 86 Ohio App.3d 279, 285. In construing the complaint, a court must presume that all factual allegations asserted in the complaint are true and make all reasonable inferences in favor of the plaintiff. *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144. A court, however, is not required to presume the truth of conclusions unsupported by factual allegations. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 193.

{¶11} By his first assignment of error, appellant argues that the trial court erred by granting appellees' Civ.R. 12(B)(6) motion on the basis of the affirmative defense of judicial immunity. Appellant asserts that, pursuant to Civ.R. 8(C), a defendant must assert the affirmative defense of judicial immunity in an answer, not in a Civ.R. 12(B)(6) motion.

{¶12} Generally, affirmative defenses, such as judicial immunity, cannot be raised in a Civ.R. 12(B)(6) motion because they normally cannot be proved without reliance upon evidentiary materials outside the complaint. However, this general rule is not applicable when "the existence of the affirmative defense is obvious from the face of the complaint." *Mankins v. Paxton* (2001), 142 Ohio App.3d 1, 9. See, also, *Denlinger v. Columbus* (Dec. 7, 2000), Franklin App. No. 00AP-315 ("an affirmative defense may be the basis of a motion to dismiss where it is apparent from the face of the complaint that

No. 02AP-831

4

the defense is available"); *Spence v. Liberty Twp. Trustees* (1996), 109 Ohio App.3d 357, 362 ("[a]n affirmative defense may thus be raised in a Civ.R. 12(B) motion, but only if *** it is clear on the face of the complaint that the affirmative defense is available"); *White v. Goldsberry* (Dec. 4, 1992), Athens App. No. CA-1525 ("[w]hile immunity is an affirmative defense, where the complaint itself bears conclusive evidence that the action is barred by the defense, a Civ.R. 12(B)(6) dismissal is proper").

{¶13} In the case at bar, our review of the record reveals that appellees' Civ.R. 12(B)(6) motion was based and decided solely upon the averments contained within appellant's complaint. Although appellant asserts that the trial court considered "unsworn allegations," neither the record nor the decision includes reference to such outside evidence. Consequently, because we conclude that appellees' Civ.R. 12(B)(6) motion was a proper vehicle for the assertion of the affirmative defense of judicial immunity, we overrule appellant's first assignment of error.

{¶14} By his second assignment of error, appellant argues that the affirmative defense of judicial immunity does not preclude his claim. We disagree.

{¶15} A judge is immune from civil liability for actions taken within the judge's official capacity, even if those actions were in error, in excess of authority or malicious. *Kelly v. Whiting* (1985), 17 Ohio St.3d 91, 93. A judge will only be subject to liability if: (1) the judge acted in a "clear absence of all jurisdiction"; or (2) the action at issue was not judicial in nature, i.e., an action not normally performed by a judge. *Forsyth v. Supreme Court of Ohio* (Aug. 25, 1998), Franklin App. No. 98AP-59; *Twine v. Probate Court* (June 28, 1990), Franklin App. No. 89AP-1170. ✓

P 10

No. 02AP-831

5

{¶16} In the case at bar, Judge Jenkins cannot be held liable for ordering appellant to obtain an attorney or for dismissing appellant's case unless either of the two exceptions to the judicial immunity doctrine apply. Despite appellant's arguments to the contrary, the averments in his complaint establish that neither exception exists in this case. First, it is apparent from the face of the complaint that Judge Jenkins had subject matter jurisdiction over the case underlying appellant's instant complaint. Second, by issuing the order in question and dismissing appellant's case, Judge Jenkins was performing actions within the ambit of his official, judicial functions.

{¶17} Appellant, however, argues that the trial court erred in granting the motion to dismiss because his amended complaint included allegations that Judge Jenkins exceeded his jurisdiction by ordering appellant to obtain an attorney and by dismissing appellant's case. (See Amended Complaint, at ¶¶6, 8, 9.) Although appellant may be correct in his assessment of the unlawfulness of Judge Jenkins' actions, if a "judge has the requisite jurisdiction over the controversy, he is immune from liability even though his acts are voidable as taken in excess of jurisdiction." *Hopkins v. INA Underwriters Ins. Co.* (1988), 44 Ohio App.3d 186, 187-188. Thus, because Judge Jenkins had subject matter jurisdiction over appellant's underlying case, the judge could not be liable for *any* action taken in his judicial capacity, even those taken in excess of the judge's jurisdiction. Accordingly, we conclude that the trial court properly granted appellees' motion to dismiss, and we overrule appellant's second assignment of error.

{¶18} For the foregoing reasons, we overrule appellant's assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

P 11

No. 02AP-831

6

PETREE, P.J., and BROWN, J., concur.

P 12

1 of 1 DOCUMENT

MARY KATE LEAMAN, Plaintiff-Appellant, v. MINNIE FELLS JOHNSON, et al.,
 Defendants-Appellees

No. 85-3471

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

794 F.2d 1148; 1986 U.S. App. LEXIS 26969; 40 Empl. Prac. Dec. (CCH) P36,320

Argued February 25, 1986
 July 10, 1986, Decided and Filed; PETITION FOR REHEARING EN BANC
 GRANTED September 3, 1986

PRIOR HISTORY: [*1] ON APPEAL from the United States District Court for the Southern District of Ohio.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employee sought review of the order of the United States District Court for the Southern District of Ohio, which dismissed her claim on a jurisdictional ground arising from a state created waiver or election of remedies.

OVERVIEW: The employee filed an action against defendant supervisors under 42 U.S.C.S. § 1983, claiming that her superiors discharged her because of her vocal concern about the treatment of a mentally retarded client. She alleged that her discharge over such matter of policy and expression of opinion constituted a first amendment free speech violation and a violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C.S. § 794. The district court dismissed her claim on a jurisdictional ground arising from a state created waiver or election of remedies. The court reversed the judgment of the district court. The court held that the state statute could not create a waiver rule that would oust a federal court of federal question jurisdiction. The waiver issue arose because the employee also sued the state in an Ohio state court for compensation. After the Ohio court dismissed her action as a valid personnel decision without ruling on her constitutional claims, the district court dismissed her action on the basis of the waiver provision of an Ohio statute, Ohio Rev. Code Ann. § 2743.02(A). A federally created right should be heard in federal court even if the state had closed its doors.

OUTCOME: The court reversed the judgment of the district court dismissing the claim on jurisdictional grounds. The court held that a state statute could not be interpreted so as to oust a federal court of federal question jurisdiction. A federally created right should be heard in federal court even if the state had closed its doors. Otherwise, a state would be able to obstruct and frustrate the obligation and the remedy created by federal law.

CORE TERMS: cause of action, waive, state statute, diversity, immunity, waiver rule, state officer, sovereign immunity, entertain, federal law, state officials, voluntary waiver, civil action, failure to state a claim, intelligent, personnel, federally, election, omission, withdraw, supplied, bargain, servant's, depth, doors, quid, quo

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Governments > Courts > Courts of Claims
Governments > Courts > Creation & Organization

[HN1] The Ohio Act creating Court of Claims actions provides, in part, that filing a civil action in the Court of Claims results in a complete waiver of any cause of action, based on the same act or omission against any state officer or employee. Ohio Rev. Code Ann. § 2743.02(A).

Constitutional Law > The Judiciary > Case or Controversy > General Overview
Constitutional Law > The Judiciary > Jurisdiction > General Overview
Governments > Courts > Creation & Organization

P 13

[HN2] Acts of Congress enacted under Article III, such as 42 U.S.C.S. § 1983 and 28 U.S.C.S. § 1343, define the jurisdiction of the federal courts, and ordinarily the state may not withdraw or limit that jurisdiction by the adoption of waiver or election of remedies rule. A state cannot bar removal of cases to federal court as a condition of permitting a foreign corporation to do business in the state, or defeat federal jurisdiction by confining jurisdiction of an issue to a specialized state court. It may be true in a diversity case that after Erie that the doors of the federal courts are closed if the state would not entertain the claim, but a federally created right should be heard in federal court even if the state has closed its doors to the parties. The reason for this rule is that otherwise a state would be able to obstruct and frustrate the obligation and the remedy created by federal law.

COUNSEL: Marc D. Mexibov (Argued) 36 E. Fourth Street, Suite 174 Cincinnati, OH 45202 for Appellant

Deborah A. Peperni Asst. Attorney General 30 E. Broad Street Floor 26, Columbus, OH 43215 and Tim Mangan (argued)

OPINION BY: MERRITT

OPINION

Before: LIVELY, Chief Judge; MERRITT and NELSON, Circuit Judges.

MERRITT, Circuit Judge, delivered the opinion of the court, in which LIVELY, Chief Judge, joined. NELSON, Circuit Judge, (pp. 4-8) delivered a separate dissenting opinion.

OPINION

MERRITT, Circuit Judge.

In a suit for injunctive relief and damages under 42 U.S.C. § 1983, plaintiff, a former probationary employee of the Ohio Department of Mental Retardation, claims that her superiors discharged her because of her vocal concern and disagreement expressed to court personnel and others about the treatment of a particular mentally retarded client. She sues supervisory employees of the Department. She alleges that her discharge over such matters of policy and expression of opinion constitutes a first amendment free speech violation and a violation of § 504 of the Rehabilitation [*2] Act of 1973, 29 U.S.C. § 794 (prohibiting "discrimination" against the handicapped in any program receiving federal assistance). We have no occasion to discuss the merits of her claim or any immunity defense because the District Court dismissed her claim on a jurisdictional ground arising from a state created waiver or election of remedies.

The waiver issue arises because the plaintiff also sued the state in the Ohio Court of Claims for compensation. After the Court of Claims dismissed her action as a valid personnel decision without ruling on her constitutional claims (apparently reserving her federal claims for decision in federal court), the District Court below dismissed the action against the individuals on the ground that her state action constitutes "a knowing, intelligent and voluntary waiver" of her federal action. This waiver ruling is based on [HN1] the Ohio Act creating Court of Claims actions which provides, in pertinent part, that "filing a civil action in the Court of Claims results in a complete waiver of any cause of action, based on the same act or omission . . . against any state officer or employee . . ." Ohio Revised Code § 2743.02(A).

There [*3] is no *res judicata* issue here. The reason for dismissal of plaintiff's action is based on a state waiver rule. The ruling undermines jurisdiction of a federal cause of action under § 1983 against state officials who allegedly injure a citizen in violation of federal constitutional or statutory right. The state statute in question should be construed only to waive state created but not federally created claims against state officials. Neither the state courts nor the Court of Claims have construed the statute to limit federal actions. The Court of Claims acknowledged in its opinion that the plaintiff's first amendment issues would be "determined" in federal court. No suggestion is made that a waiver rule would apply there.

[HN2] Acts of congress enacted under Article III, such as 42 U.S.C. § 1983 and 28 U.S.C. § 1343, define the jurisdiction of the federal courts, and ordinarily the state may not withdraw or limit that jurisdiction by the adoption of waiver or election of remedies rule. A state cannot bar removal of cases to federal court as a condition of permitting a foreign corporation to do business in the state, *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 22 L. Ed. 365 (1874), [*4] or defeat federal jurisdiction by confining jurisdiction of an issue to a specialized state court, *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 19 L. Ed. 260 (1869). It may be true in a diversity case that after *Erie* that the doors of the federal courts are closed if the state would not entertain the claim, see *Angel v. Bullington*, 330 U.S. 183, 91 L. Ed. 832, 67 S. Ct. 657 (1947), but a federally created right should be heard in federal court even if the state has closed its doors to the parties, *id.* at 192. The reason for this rule is that otherwise a state would be able to obstruct and frustrate the obligation and the remedy created by federal law. See also *Rosa v. Cantrell*, 705 F.2d 1208 (10th Cir. 1982) (state statute conditioning workman's compensation on waiver of other claims does not affect §-1983 action). Therefore, we decline to interpret the state statute in question here to apply a waiver rule that would oust a

P. 14

federal court of federal question jurisdiction.

The judgment of the District Court is therefore reversed and the case remanded for further proceedings.

DISSENT BY: NELSON

DISSENT

DAVID A. NELSON, [*5] Circuit Judge, dissenting. An act of the Ohio legislature says that the filing of a civil action against the State of Ohio in the Ohio Court of Claims results in a complete waiver of "any" cognate cause of action the plaintiff has against any individual state officer or employee. O.R.C. § 2743.02(A)(1). If this statute meant what it seems to say, the court suggests, it would be unconstitutional; therefore, the court concludes, that is not what it means. Because I do not believe the statute would be unconstitutional if construed to mean what it says, I respectfully dissent.

But for the possible constitutional problem, the statutory language would not seem ambiguous. It provides for the "complete waiver of any cause of action, based on the same act or omission, which the filing party has against any state officer or employee." Judges of the United States District Courts for both the Northern and Southern Districts of Ohio have read these words as covering any cause of action created by federal law, as well as state law. (In addition to the trial court's order in the instant case, see *Ferrari v. Woodside Receiving Hospital*, 624 F. Supp. 899, 902 (N.D. Ohio 1985): "if [*6] the language in § 2743.02(A) of the Ohio Revised Code is to be given effect, this court must find that the plaintiff voluntarily waived a federal cause of action in favor of an action against the State of Ohio." (Emphasis supplied.)) Absent any constitutional problem, I would find the district courts' reading of the statute unexceptionable: "any cause of action" does not, to me, mean "any cause of action arising under the law of any state or political subdivision thereof or any foreign country but not under the law of the United States." ¹ And if the statute means what the district courts have said it means, the Ohio court of Claims is bound by it, of course, just as the federal courts are, if the statute is constitutional.

¹ I am strengthened in my conclusion by this court's recent decision in *United States v. Wilson*, 793 F.2d 754 (6th Cir. 1986), holding that even under the strict construction accorded criminal statutes, the words, "any court," as used in 18 U.S.C. § 922(h)(1), are "patently unambiguous" and do not exclude foreign courts.

[*7] I do not view the Ohio statute as withdrawing or limiting the jurisdiction of the federal courts to entertain actions under 42 U.S.C. § 1983, anymore than it withdraws or limits the jurisdiction of state courts to entertain such actions. The dismissal of plaintiff's federal lawsuit was not based on lack of jurisdiction; according to the District Court's order, it was based on plaintiff's failure to state a claim against the defendant officials.

If the defendant officials had pleaded and proved an accord and satisfaction--if they had shown that plaintiff had given them a written release of all claims in exchange for a monetary consideration--the defendants would surely have been entitled to a dismissal in any court, state or federal, in which plaintiff might have brought her action; but I would not have supposed that recognition of such a defense could be said to impinge improperly upon the court's jurisdiction. This is a situation not where the court has no jurisdiction, but where the plaintiff has no case.

In *Home Insurance Company of New York v. Morse*, 87 U.S. (20 Wall.) 445, 22 L. Ed. 365 (1874), the Supreme Court held that an insurance [*8] company could not be required, as a condition of doing business in the state of Wisconsin, to agree in advance that actions brought against it in Wisconsin's courts would never be removed to the federal courts on diversity grounds. The reasoning of the Supreme Court shows, I think, why *Home Insurance* is not controlling here:

"In a civil case [a person] may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge [without a jury.] So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." 87 U.S. at 451. (Emphasis supplied.)

This does not suggest to me that if a cause of action had arisen in favor of Home Insurance Company against the State of Wisconsin and its Commissioner of Insurance, Home Insurance Company could not have chosen to waive its right to [*9] sue the Commissioner in exchange for the State's agreement to waive its immunity from suit. Yet that is just the kind of choice offered to the plaintiff in the case at bar and voluntarily accepted by her.

P. 15

Ohio has made a standing offer for such a mutual waiver in O.R.C. § 2743.02. The statute in effect tells the citizen who has a grievance against the State of Ohio and one of its officials that he is perfectly free to sue either the State or the individual official, but if he wants the State to waive its sovereign immunity, he must waive his claim against the official. The plaintiff in the case at bar chose to do that, giving up her claim against the official in exchange for an opportunity to take her chances on an action against the State in the Ohio Court of Claims--an action the State was not required to let her bring, and in which the prospects for full recovery on any judgment would have been excellent had she prevailed. Not having fared as well as she had hoped to in the Court of Claims, plaintiff now seeks to repudiate her bargain and return to square one. I agree with the district court that she has no constitutional right to do so.

As the district court said:

"By filing [*10] in the Ohio Court of Claim [sic], Plaintiff has made a knowing, intelligent, and voluntary waiver of her right to bring claims against officers and employees of the state. In exchange for that waiver Plaintiff received a solvent Defendant. There being no statutory or constitutional impediment to such an arrangement, this Court will hold Plaintiff to her *quid pro quo* and dismiss the individual Defendants for failure to state a claim against them."

The *quid pro quo* to which the district court refers is by no means illusory, of course. The plaintiff could not have sued the State of Ohio in federal court because "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art III," *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984), and the Ohio Court of Claims Act does not constitute a waiver by the State of its immunity "with respect to actions pending in federal or other state courts." *Ohio Inns, Inc. v. Nye*, 542 F.2d 673, 681 (6th Cir. 1976). Ohio was under no constitutional duty to offer anyone the opportunity to take a shot at it in the Court of Claims, [*11] and it was not unfair for the State to tell plaintiff "we will agree to let you sue the master in the Claims Court if you will agree to surrender your claim against the servant." That is not an unconstitutional condition, in my judgment, where the master has a constitutional immunity from suit. And it does not seem a bad bargain, as the district court suggested, when one considers the depth of the master's pocket in comparison to the depth of the servant's.

Payne v. Hook, 74 U.S. (7 Wall.) 425, 19 L. Ed. 260 (1869), held only that the administrator of an estate was subject to suit in a federal court on diversity grounds notwithstanding that in the state court system exclusive jurisdiction over such disputes lay with a local probate court. I see no inconsistency between the holding of the Supreme Court there and the holding of the district court here.

Holmberg v. Armbrrecht, 327 U.S. 392, 90 L. Ed. 743, 66 S. Ct. 582 (1946), an opinion by Mr. Justice Frankfurter, held that a suit in equity brought in federal court under the Federal Farm Loan Act was not controlled by a state statute of limitations that would have been a bar if the suit had been based [*12] on diversity of citizenship. Frankfurter distinguished *Holmberg* in his subsequent opinion in *Angel v. Bullington*, 330 U.S. 183, 192, 91 L. Ed. 832, 67 S. Ct. 657 (1947), a diversity action where the outcome was determined by a prior state court proceeding in which it had been held that a state statute deprived the state courts of jurisdiction. Neither case seems to me to suggest that the district court reached an erroneous result in the case at bar.

Rosa v. Cantrell, 705 F.2d 1208 (10th Cir. 1982), *cert. denied*, 464 U.S. 821, 78 L. Ed. 2d 94, 104 S. Ct. 85 (1983), which plaintiff's brief says is "most directly on point," did not involve a statute giving plaintiff the option of procuring a waiver of the state's sovereign immunity at the cost of waiving any right to recover from the state's employees. The public body involved in that case was a city that had no sovereign immunity. The city had paid workers' compensation benefits under a statute providing that the rights and remedies established by the act "are in lieu of all other rights and remedies . . ." § 27-12-103(a), Wyoming Statutes. The exclusivity feature of the statute [*13] was held not to bar a § 1983 claim because such a bar would conflict with the remedy provided by Congress. The district court saw no such conflict here, nor do I.

P 16

2 of 2 DOCUMENTS

RICHARD SHAW, Plaintiff, v. MRO SOFTWARE, INC., Defendant.

Case No. 04-75062

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2006 U.S. Dist. LEXIS 69550

**September 27, 2006, Decided
September 27, 2006, Filed**

SUBSEQUENT HISTORY: Summary judgment granted by Shaw v. MRO Software, Inc., 2006 U.S. Dist. LEXIS 78456 (E.D. Mich., Oct. 27, 2006)

CORE TERMS: counterclaim, separation agreement, amend, liquidated damages, discovery, breach of contract, prejudiced, breached, agreement provides, citation omitted, deposition, terminated, compulsory, withstand, supposed, futility', pleader, futile, freely

COUNSEL: [*1] For Richard Shaw, Plaintiff: Anthony R. Paesano, Eric A. Parzianello, John A. Hubbard, Beals Hubbard, (Farmington Hills), Farmington Hills, MI.

For MRO Software, Incorporated, Defendant: Christopher S. Olson, Rachel E. Wisley, Kickham, Hanley, (Royal Oak), Royal Oak, MI; John A. Hubbard (Farmington Hills), Beals Hubbard, Farmington Mills, MI.

JUDGES: Sean F. Cox, United States District Judge.

OPINION BY: Sean F. Cox

OPINION

ORDER

This matter is before the Court on Defendant's Motion to amend answer to add counterclaim. For the following reasons, the Court **GRANTS** Defendant's Motion.

I. BACKGROUND

This action arises out of Defendant's alleged failure to pay sales commissions to Plaintiff consistent with Plaintiff's separation agreement.

Plaintiff worked for Defendant as a senior sales consultant from November 15, 1998 to September 30, 2004. Defendant is a provider of strategic asset management and software solutions. On July 21, 2004, the parties entered into a separation agreement which governed Plaintiff's employment until his termination on September 30, 2004.

Plaintiff claims he was not paid the commissions contemplated by the agreement. On December 28, 2004, Plaintiff [*2] filed a Complaint alleging: (1) breach of contract based on a sale to Delphi; (2) breach of contract based on a sale to General Motors; (3) violation of the Michigan Sales Representative Act; (4) anticipatory breach; and, (5) fraud. Defendant filed an Answer on February 8, 2005.

On July 13, 2006, Defendant filed a Motion to amend Answer to add counterclaim.

II. STANDARD OF REVIEW

P 17

"When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice so requires, the pleader may by leave of court set up the counterclaim by amendment." Fed.R.Civ.P. 13(f). "The clause in Rule 13(f) permitting amendments 'when justice requires' is especially flexible and enables the court to exercise its discretion and permit amendment whenever it seems desirable to do so." *Budd Company v. Travelers Indemnity Company*, 820 F.2d 787, 791 (6th Cir. 1987).

III. ANALYSIS

"In exercising its discretion under Rule 13(f), the district court must balance the equities, including whether the non-moving party will be prejudiced, whether additional discovery will be required, and whether the court's [*3] docket will be strained." *Budd Company*, 820 F.2d at 792 (citation omitted). Courts are hesitant to deny amendment, even at late stages of the proceedings, when "the interest in resolving all related issues militates in favor of such a result and no prejudice is demonstrated." *Id.*

In this case, Plaintiff was aware of Defendant's contention that Plaintiff breached the separation agreement. At Plaintiff's deposition on February 17, 2006, defense counsel questioned Plaintiff on when he returned company property and whether he printed emails from his company computer. [Motion, Exhibit B]. Further, counsel inquired into Plaintiff's understanding of the separation agreement and Plaintiff responded that he understood he was supposed to give back company property on the day he was terminated. *Id.* Moreover, Defendant explicitly made the argument that Plaintiff breached the separation agreement, and thus forfeited his commissions, in its Motion for summary judgment filed approximately two months before the Motion to amend. [Doc. 25].

Plaintiff argues he would be prejudiced by the amendment because it would require further discovery and prolong trial. However, Plaintiff [*4] fails to identify any lengthy discovery that would be necessary, and trial has already been adjourned to a later date. Plaintiff also argues an amendment would be futile. In the context of amendments to complaints, although FRCP 15(a) declares that leave to amend shall be freely given when justice so requires, when amendment is futile, leave should be denied. *Foman v. Davits*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). "Futility means that the complaint, as amended, would fail to state a claim upon which relief could be granted." *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996). "In reviewing for 'futility' the district court applies the same standard of legal sufficiency as applies to a Rule 12(b)(6) motion." *Id.* See also *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1348 (6th Cir. 1993) and *Bauer v. RBX Industries, Inc.*, 368 F.3d 569, 585 (6th Cir. 2004). The same standard should apply to amendments to add counterclaims.

"Dismissal pursuant to a Rule 12(b)(6) motion is proper only if it is clear that no relief could be granted under any set of [*5] facts that could be proved consistent with the allegations." *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998)(citation omitted). The court must construe the complaint in a light most favorable to the plaintiff, and accept all of his factual allegations as true. *Id.* When an allegation is capable of more than one inference, it must be construed in the plaintiff's favor. *Id.*

The separation agreement provides that it is governed by Massachusetts law. Under Massachusetts law, the elements of breach of contract are: (1) a valid and binding agreement; (2) breach of that agreement; and (3) damages from the breach. *Coll v. PB Diagnostic Systems, Inc.*, 50 F.3d 1115, 1122 (1st Cir. 1995). Defendant claims Plaintiff admitted he breached the separation agreement during his deposition by testifying that he was aware he was supposed to return company property the day he was terminated, but failed to do so. The separation agreement provides that breach of the requirement to return company property is material.

Defendant's claim for breach of contract is sufficient to withstand a motion to dismiss. Although Plaintiff contends Defendant did not establish [*6] damages related to the breach, Defendant asserts the forfeiture of commissions is a liquidated damages clause. Under Massachusetts law, "a liquidated damages provision will be enforced when, at the time the agreement was made, potential damages were difficult to determine and the clause was a reasonable forecast of damages expected to occur in the event of a breach... [c]onversely, liquidated damages will not be enforced if the sum is grossly disproportionate to a reasonable estimate of actual damages made at the time of contract formation." *Tal Financial Corporation v. CSC Consulting, Inc.*, 446 Mass. 422, 431, 844 N.E.2d 1085 (2006). "Determining the validity of a liquidated damages clause is usually a fact-specific exercise." *Honey Dew Associates, Inc. v. M&K Food Corporation*, 241 F.3d 23, 28 (1st Cir. 2001). Given that Plaintiff was in a sales position involving lucrative contracts, the liquidated damages clause is not per se unreasonable.

In addition, Defendant argues its claim is compulsory because it arises out of the same contract Plaintiff is suing under. See Fed.R.Civ.P. 13(a). Leave to amend should be freely granted [*7] where a party seeks to add a compulsory counterclaim. *Budd Company*, 820 F.2d at 792 n.3 (6th Cir. 1987).

P 18

A balancing of the equities weighs in favor of Defendant. Plaintiff would not be prejudiced by the addition of a claim for breach of the separation agreement. Plaintiff had an indication that Defendant may pursue an action for breach based on the failure to timely return company property. And, there is time to complete further discovery without delaying trial. Additionally, the discovery Plaintiff identifies is minimal, most could be handled with an Interrogatory. The claim Defendant seeks to add arises out of the same transaction and would withstand a motion to dismiss.

Accordingly, the Court grants Defendant's Motion to add a counterclaim.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's Motion to amend Answer to add counterclaim.

IT IS SO ORDERED.

s/ Sean F. Cox

United States District Judge

Dated: September 27, 2006

P 19

1 of 2 DOCUMENTS

RICHARD SHAW, Plaintiff, v. MRO SOFTWARE, INC., Defendant.

Case No. 04-75062

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2006 U.S. Dist. LEXIS 78456

October 27, 2006, Decided
October 27, 2006, Filed

PRIOR HISTORY: Shaw v. MRO Software, Inc., 2006 U.S. Dist. LEXIS 69550 (E.D. Mich., Sept. 27, 2006)

CORE TERMS: purchase order, separation agreement, summary judgment, software, unjust enrichment, sales representative, license agreement, good faith, covenant, bad faith, fair dealing, termination, subject matter, terminated, ambiguous, shipment, consultant's, breached, reasonable attorney fees, failed to recognize, prevailing party, express contract, covering, drafter, parties agree, breach of contract, anticipatory breach, counterclaim, undisputed, senior

COUNSEL: [*1] For Richard Shaw, Plaintiff: Anthony R. Paesano, LEAD ATTORNEY, Eric A. Parzianello, LEAD ATTORNEY, John A. Hubbard, LEAD ATTORNEY, Beals Hubbard, Farmington Hills, MI.

For Richard Shaw, Counter Defendant: Anthony R. Paesano, LEAD ATTORNEY, Beals Hubbard, Farmington Hills, MI.

For MRO Software, Incorporated, Defendant: Christopher S. Olson, Rachel E. Wisley, Kickham, Hanley, Royal Oak, MI. John A. Hubbard, LEAD ATTORNEY, Beals Hubbard, Farmington Hills, MI.

JUDGES: Hon. Sean F. Cox, United States District Judge.

OPINION BY: Sean F. Cox

OPINION

OPINION AND ORDER

This matter is before the Court on Defendant's Motion for summary judgment. Both parties have fully briefed the issues and a hearing was held on October 19, 2006. For the following reasons, the Court GRANTS Defendant's Motion for summary judgment¹ on Plaintiff's claims of breach, unjust enrichment, and under the Michigan Sales Representative Act.

¹ Although Defendant styles its Motion as one for "summary judgment" it is properly considered as one for "partial summary judgment" because Defendant did not seek summary judgment on all of Plaintiff's claims. Accordingly, notwithstanding this Order, Plaintiff's claims for anticipatory breach and fraud remain.

[*2] I. BACKGROUND

This action arises out of Defendant's failure to pay sales commissions to Plaintiff on two software sales.

Plaintiff, Richard Shaw, is a software sales representative. He was employed by Defendant, MRO Software, Inc., in 1998. In

P 20

July 2004, Defendant terminated Plaintiff's employment. None of Plaintiff's claims arise from his termination. Defendant presented Plaintiff with a "Separation Agreement" that allowed Plaintiff to continue working and earning commissions for three months. Plaintiff signed the agreement and his employment was extended until September 30, 2004.

Under the separation agreement, Plaintiff was paid commissions according to the Senior Sales Consultant Incentive Plan ("compensation plan"). The compensation plan provided that "100% of all software sales recognized revenue generated solely by the Senior Sales Consultant in his/her territory" would be counted towards the senior sales consultant's quota. The quota is used to determine commission payments. Both the separation agreement and the compensation plan are governed by Massachusetts law.

Both parties agree that the compensation plan is to be interpreted consistently with the US Generally Accepted Accounting Principles ("GAAP"), and the US Generally Accepted Auditing Standards ("GAAS").

In this action, Plaintiff contends he was not paid for two software sales transactions. Defendant argues Plaintiff was not paid because Defendant did not possess the purchase order by September 30, 2004. Hence, the transaction was not considered "recognized revenue." Plaintiff challenges whether Defendant had to be in possession of the purchase order in order to credit Plaintiff with the sale.

The first transaction at issue is with Delphi Corporation ("Delphi"). It is undisputed that Delphi dated a purchase order for nearly \$ 600,000, September 30, 2004. However, Defendant was not in possession of the purchase order until October 1, 2004.

The other transaction at issue is with General Motors ("GM"). GM agreed to a purchase totaling over \$ 3 million. A purchase order was issued for \$ 1.1 million, and Plaintiff was paid the commission. However, purchase orders were not issued for the outstanding amount until December 2004 and March 2005. Plaintiff was not paid commissions on those purchase orders.

It is undisputed that Defendant possessed a signed license agreement for the GM and Delphi [*4] sales prior to September 30, 2004. At the hearing, the parties conceded that shipment also occurred prior to September 30, 2004.

On December 28, 2004, Plaintiff filed a Complaint alleging: (1) breach of contract based on the sale to Delphi; (2) breach of contract based on the sale to General Motors; (3) violation of the Michigan Sales Representative Act; (4) anticipatory breach; and, (5) fraud.

Defendant filed a Motion for summary judgment on May 8, 2006. Defendant also amended its answer to add a counterclaim for Plaintiff's alleged breach of the separation agreement. Because the claim was not added until after the instant Motion was fully briefed, it is not properly considered as part of this Motion.

II. STANDARD OF REVIEW

Under Fed. R. Civ. P 56(c), summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir. 1995). A fact is "material" and precludes [*5] a grant of summary judgment if "proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principles of law to the rights and obligations of the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984). The court must view the evidence in the light most favorable to the nonmoving party and it must also draw all reasonable inferences in the nonmoving party's favor. *Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995).

III. ANALYSIS

A. The Release Provision

The parties dispute whether Plaintiff's claims are barred under the release provision of the separation agreement. The provision reads, in pertinent part:

5. Waiver and Release. In consideration of the continuation of his employment and all associated benefits through the Termination Date as set forth in Section 1 of this Agreement, to which Mr. Shaw acknowledges he would not otherwise be entitled, Mr. Shaw hereby releases and forever discharges to the full extent permitted by law, MRO Software, [*6] Inc...from any and all claims...of any kind...which the undersigned employee ever had, now has, or may have, from the beginning of this world to the date of this Release...

P. 21

The separation agreement, containing the Release, was signed on July 21, 2004. Plaintiff's claims did not arise until the Defendant failed to pay commissions on the GM and Delphi sales, that allegedly should have been recognized revenue by September 30, 2004.

The release provision does not bar Plaintiff's claims.

B. Breach of the Separation Agreement

1. Did Defendant literally breach the separation agreement?

The parties agree that Plaintiff was governed by the separation agreement, which required commissions to be paid in accordance with the compensation plan. It is undisputed that the compensation plan incorporates by reference GAAP and GAAS.

Plaintiff contends Defendant breached the separation agreement because it failed to recognize the revenue consistent with GAAP. Specifically, GAAP contains Statement of Position 97-02 ("SOP 97-02"). According to Plaintiff, the compensation plan only requires that the four criteria of SOP 97-02 be met in order to recognize revenue. SOP 97-02 states: [*7]

If the arrangement does not require significant production, modification, or customization of software, revenue should be recognized when all of the following criteria are met.

- . Persuasive evidence of an arrangement exists.
- . Delivery has occurred.
- . The vendor's fee is fixed or determinable.
- . Collectibility is probable.

The compensation plan states that "100% of all software sales recognized revenue" will be credited toward the sales consultant's quota. The compensation plan states that "recognition of software license revenue requires a signed license agreement, purchase order and shipment to the end user and meet all audit requirements." [Motion, Exhibit C, p.2154]. The language from the compensation plan is clear and unambiguous in that a purchase order is required, in addition to a signed license agreement and shipment, in order for the revenue to be recognized by Defendant.

Nonetheless, Plaintiff asserts that the compensation plan is inconsistent because it requires revenue recognition to be done consistently with GAAP and GAAS, and specifically SOP 97-02. Plaintiff asserts that SOP 97-02 does not require a purchase order where there is [*8] a signed license agreement; while the terms of the compensation plan require a purchase order even where there is a signed license agreement before revenue will be recognized.

Because the contract in Plaintiff's view is inconsistent, i.e. ambiguous, Plaintiff concludes that it must be construed in his favor because Defendant is the drafter of the contract. Plaintiff argues that if the contract is construed in his favor, the revenue from the GM and Delphi sales should have been recognized without the purchase order, and Defendant breached the contract when it failed to recognize the revenue.

Although the Court does not so hold, assuming *arguendo*, that Plaintiff is correct and the contract is ambiguous because the criteria to recognize revenue is inconsistent, Plaintiff still does not establish a breach of contract.

The First Circuit, applying Massachusetts law, held that while "courts sometimes construe uncertain contract language against the drafter...the canon has little to do with actual intentions and should only be used, as a last resort, if other aids to construction leave the case in equipoise." *National Tax Institute, Inc. v. Topnotch At Stowe Resort and Spa*, 388 F.3d 15, 18 (1st Cir. 2004). [*9] See also *Hubert v. Melrose-Wakefield Hospital Association*, 40 Mass.App. 172, 177, 661 N.E.2d 1347 (Mass.App. 1996)("The rule of construction that contract ambiguities must be resolved against the drafter must give way to the primary and inflexible rule that contracts, are to be construed so as to ascertain the true intention of the parties.").

"To enable us to understand the subject matter of the agreement, to the extent it is doubtful or ambiguous, we resort to the conduct of the parties to determine the meaning that they themselves put upon any doubtful or ambiguous terms." *Lembo v. Waters*, 1 Mass.App. 227, 233, 294 N.E.2d 566 (Mass.App. 1973). See also *Massachusetts Municipal Wholesale Electric*

P 22

Company v. Town of Danvers, 411 Mass. 39, 59, 577 N.E.2d 283 (1991) ("The conduct of the parties after the signing of the agreements is also indicative of their intent."). Plaintiff's deposition testimony leaves little doubt that he understood the terms of the compensation plan to require a purchase order in addition to a licensing agreement before revenue would be recognized.

Q. Look at the second sentence, please, of section 3A, which says, recognition of software license revenue [*10] requires a signed license agreement, purchase order, and shipment to the end user and meet all audit requirements. Do you see that?

A. Yes.

Q. Did you have any understanding of what that meant?

A. Yes.

Q. What was your understanding of what that meant?

A. I would be paid a commission based on signed license agreements, shipping of software, and purchase orders.

[Motion, Exhibit B, p.26].

Q. Were there any promises other than those made in this agreement, Exhibit 4, with respect to how you would be paid commissions at MRO? Put it another way, did anybody verbally say we promise you something that's not in this agreement?

A. No.

[Motion, Exhibit B, p.37].

Q. Okay. Do you recall that you need a purchase order in order to recognize revenue within the quarter in which revenue is to be recognized?

Q. Do you recall that being discussed?

A. Yes.

Q. During 2004?

A. Yes.

[Motion, Exhibit B, p.63].

Q. And did you understand that, if the client or customer didn't issue the purchase order before the quarter ended, you don't have a deal for revenue recognition purposes within that quarter?

A. Yes.

[Motion, Exhibit B, p.75].

Moreover, it is clear that [*11] Plaintiff also understood that Defendant must possess the purchase order before it would recognize revenue.

Q. Okay. Their guidelines were that MRO should have the purchase order hard copy in its possession?

A. That's what was defined to me by Bill Bowen.

Q. So, your understanding was at the time that a purchase order - a valid purchase order before the end of the quarter meant to MRO in our possession?

A. That was MRO's guideline.

P. 23

[Motion, Exhibit B, p.90].

Further, Plaintiff offered to drive from his home in Howell, Michigan, to Kokomo, Indiana, to pick up a hard copy of the Delphi purchase order on September 30, 2004, to ensure receipt by Defendant. [Motion, Exhibit B, pp.87-89].

The intent of the parties with respect to the compensation plan is clear. As both parties understood the terms, a purchase order was required to be in Defendant's possession, even where it already possessed a signed license agreement, before revenue would be recognized. Plaintiff's conduct and testimony is consistent with this interpretation. Additionally, there are no allegations, much less evidence, that Defendant ever recognized revenue without possession of a purchase order.

Accordingly, [*12] Defendant is entitled to summary judgment on Plaintiff's claims for breach of the separation agreement for failure to recognize the revenue from the GM and Delphi sales.

2. Did Defendant Commit a Bad Faith Breach of the Separation Agreement? Even if Defendant did not literally breach the terms of the separation agreement, Plaintiff

claims Defendant breached the covenant of good faith and fair dealing. The parties agree that the separation agreement implied a covenant of good faith and fair dealing. [Motion, p.15; Response, p.8]. Plaintiff argues Defendant breached the covenant of good faith, *i.e.* acted in bad faith, because it had the discretion to recognize the revenue from the GM and Delphi sales without a purchase order and chose not to in order to prevent Plaintiff from obtaining commissions. Defendant denies that it had discretion to recognize the revenue without a purchase order, relying on its policies

Again, assuming without deciding that Plaintiff is correct and Defendant did have discretion to recognize the revenue from the GM and Delphi sales without a purchase order, Defendant is nonetheless entitled to summary judgment.

"Every contract in Massachusetts [*13] is subject, to some extent, to an implied covenant of good faith and fair dealing." *Ayash v. Dana-Farber Cancer Institute*, 443 Mass. 367, 385, 822 N.E.2d 667 (2005). "The implied covenant of good faith and fair dealing provides that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Anthony's Pier Four, Inc. v. HBC Associates*, 411 Mass. 451, 471, 583 N.E.2d 806 (1991). "The covenant may not be invoked to create rights and duties not otherwise provided for in the existing contractual relationship." *Ayash*, 443 Mass. at 385.

Plaintiff failed to present evidence to support an inference that Defendant acted with bad faith when it failed to recognize the revenue. Assuming Defendant had discretion, failure to exercise discretion in Plaintiff's favor, without more, does not equate to bad faith. "There is no general duty on the part of an employer to act nicely." *Id.* at 385.

In *Gram v. Liberty Mutual Ins. Company*, 384 Mass. 659, 429 N.E.2d 21 (1981), the Court held that an employer's obligation of good faith and fair dealing does not equate with good [*14] cause. *Id.* at 668. In that case, the plaintiff challenged the motive behind his termination. The Court held that "certainly good cause to discharge an employee would tend to negate the existence of bad faith in the decision to discharge an employee...but termination in the absence of good cause does not establish bad faith..." *Id.* The Court found the plaintiff did not present evidence of bad faith; it noted that the plaintiff did not present evidence that the matter of the plaintiff's commission was considered in the decision to terminate him.

In *Nadherny v. Roseland Property Company*, 390 F.3d 44 (1st Cir. 2004), the court found that pursuant to Massachusetts law, the plaintiff's evidence on his good faith breach claim was insufficient. In *Nadherny*, the plaintiff's employment with a real estate developer was terminated allegedly because he had performance problems. The plaintiff brought a claim for breach of the covenant of good faith, asserting that the defendant terminated him to deprive him of his participation interest in the defendant's projects. However, the plaintiff offered no evidence that he did not have performance problems. Rather, [*15] the plaintiff relied on the fact that he was not informed that he would be terminated if his performance did not improve; and that a memo stated he had exceptional site preparation skills and good selection of personnel to support his claim of bad faith.

Here, assuming Defendant *could have* recognized revenue without a purchase order, Plaintiff does not present any evidence that Defendant's decision not to recognize the revenue was *motivated* by a desire to prevent Plaintiff from obtaining commissions. There is no evidence that whether Plaintiff would receive commissions factored in to the decision on whether to recognize the revenue by September 30, 2004. Further, Plaintiff does not present any evidence that Defendant did not generally adhere to its policy of requiring a purchase order before recognizing revenue. Plaintiff does not identify any instance where revenue was recognized when the purchase order was not received. The only evidence offered by Plaintiff is that Defendant could have recognized the revenue, and that by not doing so, Plaintiff was not paid commissions. In order to succeed on his claim, Plaintiff is required to put forth some evidence of bad faith, because [*16] he did not, Defendant is

P 24

entitled to summary judgment. See *Nadherny, supra; Equipment & Systems For Industry, Inc. v. Northmeadows Construction Company, Inc.*, 59 Mass.App. 931, 932, 798 N.E.2d 571 (Mass.App. 2003); and *Christensen v. Kingston School Committee*, 360 F. Supp. 2d 212, 226-227 (D.Mass. 2005).

C. Michigan Sales Representative Act

Plaintiff alleges violation of the Michigan Sales Representative Act ("MSRA") pursuant to MCL § 600.2961. Under the MSRA, an employer is liable if it fails to pay "commissions that are due at the time of termination of a contract between a sales representative and principal" within a specified amount of time. MCL § 600.2961(4). "The terms of the contract between the principal and sales representative shall determine when a commission becomes due." MCL § 600.2961(2).

Defendant argues that by the terms of the separation agreement and compensation plan, no commissions were due to Plaintiff. Plaintiff fails to establish a genuine issue of fact that any commissions were due. Accordingly, Defendant is entitled to summary [*17] judgment on this claim.

Defendant also argues it is entitled to reasonable attorney fees and costs. The MSRA provides that "the court shall award the prevailing party reasonable attorney fees and court costs." MCL § 600.2961(6). A prevailing party is defined as "a party who wins on all the allegations of the complaint or on all of the responses to the complaint." MCL § 600.2961(1)(c).

The statute states that the court "shall" award attorney fees, the court does not have discretion. Accordingly, because it is the prevailing party on Plaintiff's MSRA claim, Defendant is entitled to *reasonable* attorney fees and court costs.

D. Unjust Enrichment

Defendant claims it is entitled to summary judgment on Plaintiff's unjust enrichment claim because there is an express contract covering the same subject matter. Plaintiff argues that it is arguing unjust enrichment as an alternative theory of recovery in the event the separation agreement is void. However, neither party asserts that the separation agreement is void.

"In order to sustain a claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit [*18] by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corporation v. City of Detroit*, 256 Mich. App. 463, 478, 666 N.W.2d 271 (Mich.App. 2003)(citation omitted). "If this is established, the law will imply a contract in order to prevent unjust enrichment." *Id.* "However, a contract will be implied only if there is no express contract covering the same subject matter." *Id.*

Here, Plaintiff asserts a theory of unjust enrichment to recover the commissions from the GM and Delphi sales. There is an express contract, *i.e.*, the separation agreement, which incorporates the compensation plan, covering the same subject matter. Accordingly, Defendant is entitled to summary judgment on this claim.

E. Remaining Claims

In his Complaint, Plaintiff asserts claims for anticipatory breach and fraud. Defendant did not seek summary judgment on these claims. Thus, the claims remain.

Additionally, Defendant amended its Answer to add a counterclaim on September 28, 2006. The counterclaim was not considered as part of this Motion, and that claim also remains.

V. CONCLUSION

For the foregoing [*19] reasons, the Court GRANTS Defendant's Motion for summary judgment with respect to Plaintiff's claims for breach, unjust enrichment, and the Michigan Sales Representative Act.

IT IS SO ORDERED.

S/Sean F. Cox

Sean F. Cox

United States District Judge

Dated: October 27, 2006

P 25