

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

RONALD D. FREEMAN,)
15280 Kelly Road)
Grandview, Missouri 65030)

Plaintiff,)

vs.)

KRIS KOBACH, in his official)
capacity as Chairman of the)
Republic Party of Kansas)
2025 SW Gage Blvd.)
Topeka, KS 66604)

Defendant.)

Case No. 07C867

MEMORANDUM OPINION AND ENTRY OF JUDGMENT

NATURE OF THE CASE/FINDINGS OF FACT:

This action was filed by Plaintiff, Ronald D. Freeman, claiming breach of contract and a failure to pay wages and commissions due him during his tenure as the Executive Director of the Kansas Republican Party. The Defendant, Kris Kobach, is the Party's current chairman and is sued in his official capacity as such.

He was also the individual who relieved Mr. Freeman of his duties as executive director when Mr. Kobach became chairman and replaced him with its current executive director, Christian Morgan.

Mr. Freeman became executive director effective May 1, 2006, under a contract negotiated between him and Tim Shallenburger, the then chairman of the Kansas Republican Party. That agreement is reproduced here following:

"Agreement

This is the agreement between Ron Freeman and the Kansas Republican Party (Party), represented by Tim Shallenberger, State Chairman.

Mr. Freeman agrees to serve as the Executive Director of the Party, commencing May 1, 2006. The Kansas Republican Party agrees to compensate Mr. Freeman as follows:

- \$5500.00 per month base salary, payable in \$2750.00 increments, the 15th and the last day of the month.
- 5% per \$100,000.00 above \$300,000.00
- 5% for Eagle donors

The Party, also, agrees to supply:

- A vehicle or mileage reimbursement

for use of personable vehicle,
including turnpike fees or K-Tag.

- A cell phone with a service agreement.

This agreement can be terminated by either party, with a 30 days notice."

Here, the parties admit Mr. Freeman was paid his monthly base salary through February 15, 2007, and Mr. Freeman, as executive director, paid himself an additional \$15,000, sometime after November 2006 when funds were available, that had accrued under the "5% per \$100,000 above \$300,000" proviso of his compensation agreement. Mr. Freeman claims he is owed an additional \$9,4767.19 under that provision and is owed \$12,015.00 under the "5% for Eagle donors" proviso of his agreement. Mr. Freeman based all his calculations only on 2006 end of year figures and makes no claims for 2007 under these two provisos of his agreement.

The position of the Kansas Republican Party, through Mr. Kobach, is that, at best, Mr. Freeman was owed a total above his base salary of only \$1,005.14,

being a balance due under the latter two compensation *provisos* after applying the credit for the \$15,000 previously paid.

Mr. Morgan testified that commissions for money raised, including a commission bonus for Eagle donors, which was identified as the donor moniker used for donors meeting a \$15,000 annual contribution threshold, was based on "money in the door." Accordingly, Mr. Morgan based his calculations for the amount due Mr. Freeman from only May 1, 2006, forward and further excluded revenues or contributions, which he identified as made for specific projects by the donor (Republican House Campaign Committee for Republican Congressional candidate mailings), were reimbursements for specific party activities (White House 2006 visit/victory celebration event), or were certain interfund transfers (Federal election reconciliations and State Republican Party Accounts).

Beyond the commissions identified above, Mr. Freeman also claims he is due back salary in the amount of \$5,500 because Mr. Kobach, acting as chairman,

failed to provide him with a 30 day notice before relieving him of his duties as executive director and bringing on Mr. Morgan in that capacity.

Mr. Freeman was told by Mr. Kobach in a meeting occurring on or about February 6-10, 2007, that he was not being kept on. At that time, Mr. Kobach offered Mr. Freeman the opportunity to remain as finance director at a \$2,500 base salary or \$30,000 annually plus commissions, but Mr. Freeman declined the offer. Mr. Freeman testified Mr. Kobach had already told Mr. Freeman that he would not be comfortable with Mr. Freeman in the office and that Mr. Freeman "ought to move on." Mr. Kobach testified he had intended upon his election as chairman to bring on Mr. Morgan as executive director, which Mr. Kobach thinks was widely known; however, he asserted there was no hurry in doing so. Mr. Morgan took over in mid-February 2007. Mr. Freeman performed no services for the Kansas Republican Party after February 15, 2007. Mr. Freeman claims the non-payment of his salary was "willful" within the meaning of the Kansas Wage Payment Act, specifically

K.S.A. 44-315(b), and seeks the penalty there authorized.

An affidavit of Tim Shellenburger was admitted into evidence by agreement. It is unremarkable except as it states Mr. Freeman was to receive commissions based on "total contributions" during the "fiscal year." His "Eagle donors" commissions, likewise for the same period, were based on "all contributions."

(Defendant's Exhibit 2.)

Here, the Court finds neither party substantively rebutted the version of each party as to the events occurring concerning Mr. Freeman's replacement. Mr. Freeman confronts Mr. Morgan's testimony concerning the manner in which the commissions were determined by him as inconsistent with his understanding and inconsistent with the terms of his compensation agreement.

CONCLUSIONS OF FACT AND LAW:

Here, in regard to the questions of Mr. Freeman's commissions due, if any, including for Eagle donor contributions, the Court finds the contract between Mr. Freeman and the Party controls. If any ambiguity

existed in regard to what the base period was upon which those compensation formulas were to be calculated, or the extent, or scope, of inclusion for the contributions upon which calculation was to be made, the affidavit of Tim Shallenburger prevents any reduction, or lessening effect, to be given to the clearly unrestricted terms used in the employment agreement itself. The evidence was the "fiscal year" for the Party was co-existent with a calendar year.

While Mr. Morgan testified that the commissions were intended to be "money in the pocket" arrangements, that is, based on the individual production and effort of Mr. Freeman, hence, prospective from a calculation standpoint, both the contract and Mr. Shallenburger's affidavit undermine such a construction. The words "total contributions" and the fixing of the compensation accrual period as the "fiscal year" provide the succinct parameters to apply the 5% formulae.

Further, even without Mr. Shallenburger's affidavit, the contract itself, by providing the

commission beginning threshold for general contributions at \$300,000, is self-enforcing. Further, since "Eagle donors" are demarcated by a *cumulative* threshold of \$15,000, the fact that periodic contributions building to this status began in 2006 before Mr. Freeman began his tenure cannot obscure the fact that the threshold was only reached after he was in the position. There is evidence two individual donors reached the threshold of \$15,000 prior to Mr. Freeman's tenure. (See Defendant's Exhibit, 3 at 1/28/06: Todd Tiahrt and 3/27/06: Mark Heitz.) Otherwise, a plain and common sense reading of the parties' agreement supports Mr. Freeman's view of the proper baselines from which to ascertain his commissions. Each formula was clearly separate, notwithstanding the overlapping of contributions. However, the Court would agree that if the threshold status to be an "Eagle donor" was reached before May 1, 2006, as the two donors noted had, then the combined \$30,000 of their donations to May 1, 2006, in reaching this threshold should be excluded from the "Eagle

donor" commission calculation.

The only question remaining then is whether some other of the Kansas Republican Party revenues and receipts during 2006 should be excluded from the commission calculations under the "5% per \$100,000 above \$300,000 proviso." Mr. Morgan asserts some funds received by the Party during the course of 2006 were earmarked and funneled through the Republican state political party apparatus on behalf of another political entity - the Republican House Campaign Committee (RHCC) - for a special purpose mailing and should not be seen as "contributions." Similarly, Mr. Morgan claims that special funds were paid by the national Republican party on behalf of the White House for, or as reimbursement for, a Presidential visit and/or a 2006 victory party and should be excluded.

Again, the contract is not so limited or sophisticated. Further, the Defendant Party has failed to establish that it has revenues other than from what people donate to it. As such, all revenues must be considered donated or "contributed." The Party's

former political finance director prepared the receipts and expenditure report for 2006 admitted as Plaintiff's Exhibit 1. Salient is that Mr. Freeman's claim for commissions is based on a column category only designated as sourced from "contributions." Thus, the Party's accounting method supports Mr. Freeman's view that earmarked or special project reimbursements are, nevertheless, contributions. Again, nothing in the contract would exclude such receipts from the base to be used for calculation. Finally on this issue, a review of the disbursements made does nothing to dispel the fact that whatever was done and accounted for was done for the benefit of the Party as a whole, all originating from the same pot of contributions.

Mr. Morgan's assertions above - which he advanced by Defendant's Exhibit 3, which he produced - that certain items booked as contributions were, in fact, merely transfers between accounts (Defendant's Exhibit 3 at 3/29/06, at 4/13/06) or administrative adjustments (Defendant's Exhibit 3 at 5/11/06, 6/26/07, 7/14/06, 8/14/06, and 10/10/06) does not effectively rebut the

fact that while these may be accounting adjustments, nevertheless, they are adjustments to revenues received, the source of which is, again, all from contributions. There is no evidence such adjustments arose because of revenues received in another accounting year.

It is to be noted from Plaintiff's Exhibit 1 that expenditures in 2006 totaled \$793,242.83. Receipts were \$789,343.97. The year ending surplus for 2005 was \$4,318.99. Thus, total revenues available in 2006 were \$793,662.96, leaving only a \$420.13 surplus for both years combined. This squares with Plaintiff's Exhibit 1, which shows a surplus in 2005 of \$4,318.99 and a deficit in 2006 of (\$3,898.86). Thus, while carry over revenues may have been spent, they were never credited against the 2006 revenues from which Mr. Freeman's commissions were calculated. Thus, neither Mr. Morgan's argument nor his Exhibit 3 is persuasive to rebut the 2006 accounting shown in Plaintiff's Exhibit 1.

Accordingly, Mr. Freeman's commission basis of

\$789,343.97 less \$300,000, or \$489,343.97, is sound from the Defendant's own previous accountings as shown in Plaintiff's Exhibit 1. Thus, less his prior receipt of \$15,000, a balance of \$9,467.19 is due Mr. Freeman under the "5% per \$100,000 above \$300,000" portion of his compensation agreement.

Mr. Freeman had the power to pay this amount to himself from funds available; however, as the 2006 budget reconciliation demonstrates, funds were substantially exhausted by year's end. Thus, the payment to himself of less than was due imports no waiver or estoppel. He lost that power on February 15, 2007. Accordingly, 10% interest pursuant to K.S.A. 16-201, or discretionarily by K.S.A. 44-323, should fairly be awarded given the availability of the funds as shown by Defendant's Exhibit 3, from March 15, 2007, which date would have provided a reasonable opportunity for review. Otherwise, Mr. Freeman makes no claim the non-payment was "willful."

In regard to the "Eagle donor" claim by Mr. Freeman, the Court believes the "fiscal year" and

"total contributions" based on the Shallenburger affidavit controls. As noted, two persons had met the \$15,000 threshold by May 1, 2006. Though such contributions were not specifically excluded by the contract, nevertheless, the *thresholds* were reached by May 1, 2006, without contribution or effort of Mr. Freeman and should be excluded from a common sense view of the agreement. Accordingly, for the reasons expressed, the Court would accept the 2006 accounting figure of \$240,300 from Plaintiff's Exhibit 1, less \$30,000, or \$210,300. Thus, under the "5% for Eagle donors," commission bonus portion of Mr. Freeman's compensation agreement, he is owed \$10,515.00. Similarly, as with the other commissions owed Mr. Freeman, all figures were available for 2006 and funds were available at the time of his release. A reasonable period for inquiry should be accorded. The Court finds 10% interest should be paid on this sum from and after March 15, 2007.

The final issues relate to the question of whether Mr. Freeman is entitled to his base salary for thirty

days for want of the 30 day notice before he was removed from his position as was specified by his contract. The Court is satisfied he is so entitled.

"In a case involving wrongful discharge from employment the proper measure of damages is the amount the salary for the period would have been less the amount plaintiff earned, or which with reasonable diligence he could have earned, had he applied the same ability and devotion in a comparable job. (*Haskell v. Stryker*, 135 Kan. 611, 614, 11 P.2d 700 [1932]; *Rench v. Hayes Equipment Mfg. Co.*, 134 Kan. 865, 8 P.2d 346 [1932]; *Griffin v. Oklahoma Natural Gas Corp.*, 132 Kan. 843, 297 Pac. 662 [1931].)"

Lines v. City, 223 Kan. 772, 781 (1978).

The proffer of a different position or the requirement he be situated at state Republican party headquarters takes principles of mitigation too far. Mr. Freeman occupied a unique position for which he was entitled to be compensated by his contract. Mr. Kobach had elected to replace him or, at the very best, demote him, and, in fact, Mr. Morgan assumed the position formerly held by Mr. Freeman on February 15, 2007. While it is probably true that Mr. Kobach expressed his decision to replace Mr. Freeman before he knew the

terms of Mr. Freeman's contract, it is equally clear it was a choice Mr. Kobach intended to stick with even after he had knowledge of the contract. It was not an option for Mr. Freeman to continue as executive director once Mr. Morgan was on board. Having repudiated Mr. Freeman's employment with the Party in the position for which he was employed, ignoring the thirty day notice in doing so, and thus preventing Mr. Freeman's continuance in the job by inserting Mr. Morgan, the breach occurred, which immediately entitled Mr. Freeman to damages. *Briney v. Toews*, 150 Kan. 489, 495 (1939); *Ely v. Jones*, 110 Kan. 9, 11-12 (1921).

Equally clear is the fact Mr. Freeman probably knew by no later than Friday, February 9, 2007, that Mr. Kobach's position was firm and Mr. Freeman, of course, knew of his own thoughts to decline further employment. Written notice was not required by the agreement. Accordingly, oral notice to Mr. Freeman was sufficient, effective the most likely day it can be established as certainly given by, which would be by February 9, 2007. Here, Mr. Freeman agrees he was paid through February

15, 2007. Accordingly, Mr. Freeman is owed his salary for thirty days from February 9, 2007, pursuant to the thirty day notice requirement of the base salary portion of his agreement or through March 11, 2007, (30 days) less any payment that was made for the 6 days from February 9 through February 15, 2007. This unpaid 24 days prorated to his salary of \$66,000 per year, or \$180.82191 per day, equals \$4,339.90 for which judgment would be entered for Mr. Freeman.

The remaining question is whether the non-payment of salary here claimed was "willful" within the meaning of K.S.A. 44-315(b). As stated in *Weinzirl v. Wells Group, Inc.*, 234 Kan. 1016, 1023 (1984), in reference to the leading case of *Holder v. Kansas Steel Built, Inc.*, 224 Kan. 406, 411 (1978):

"In *Holder v. Kansas Steel Built, Inc.*, 224 Kan. 406, 411, 582 P.2d 244 (1978), we stated under K.S.A. 44-135(b) [sic] '[a] willful act is one indicating a design, purpose, or intent on the part of a person to do wrong or to cause an injury to another.' There was evidence in *Holder* that the employer intentionally made large deductions from gross profit figures to reduce the employee's commission, a willful act designed by the employer to wrong the employee."

By the *Holder* standard, coupled with long standing standard rules of construction as to when a breach occurs (*Briney v. Toews, supra*) and, again, the longstanding line of cases in regard to the measure of compensation for breach of an employment contract not at will as noted in *Lines v. City, supra*, unquestionably, the Defendant, through Mr. Kobach, took a knowing course of conduct in not paying Mr. Freeman. While perhaps such a course might be justified, at least for a period of time to reconcile accountings in regard to *commission* payments and confirm them with the former chairman, Mr. Shallenburger, if doubt there was, nothing presented justifies the withholding of the payment of Mr. Freeman's salary. Mr. Freeman's salary due could have been paid without prejudice to resolving any question Mr. Kobach may have held concerning commissions due, if any, to Mr. Freeman. See, K.S.A. 44-316.

Further, the offer of half-price continued employment in a different position under an employer

who suggested he "ought to go" could not reasonably be expected by Mr. Kobach to be a mitigation that could defeat Mr. Freeman's salary entitlement nor would it be reasonable to expect Mr. Freeman could obtain *comparable* employment in the short remaining time period of thirty days that would have been needed for effective notice of termination of the contract to pass without liability. Thus, withholding the salary portion of Mr. Freeman's compensation must be considered grossly arbitrary, hence "willful", within the meaning of K.S.A. 44-315(b). Given the time delay, the penalty would equal the wages due or \$4,339.90 and should be, and is, assessed. No interest would be due under this salary claim as the penalty fairly supplants interest.

Accordingly, based on the above findings and for all the expressed reasons, judgment is entered for Mr. Freeman on all his breach of contract/wage payment claims.

ENTRY OF JUDGMENT

Judgment is entered for the Plaintiff, Ronald D.

Freeman, and against the Defendant, Kris Kobach in his official capacity as the Chairman of the Kansas Republican Party, in the amount of \$9,467.19 with 10% interest from March 15, 2007; in the additional amount of \$10,515.00 with 10% interest from March 15, 2007; and in the additional amount of \$8,679.80. Costs are taxed to the Defendant. Attorneys fees are not awarded. The Defendant's counterclaim is dismissed as abandoned and for want of evidence.

This entry of judgment shall be final when filed with the Clerk of this Court and no further journal entry is required.

IT IS SO ORDERED, this ____ day of August, 2008.

Franklin R. Theis
Judge of the District Court
Division Seven

cc: Swanson Midgley, LLC
c/o John J. Miller
Henson, Clark, Hutton, Mudrick & Gragson, LLP
c/o Phil Gragson