

FILED
COURT OF CLAIMS
OF OHIO

2010 JUN 30 PM 3: 28

IN THE COURT OF CLAIMS OF OHIO

ORIGINAL

Eugene Wrinn, Jr.,

Plaintiff,

v.

Ohio State Highway Patrol,

Defendant.

) Case No. 2006-05934

)

) Judge Alan C. Travis

)

) **NOTICE OF EXHIBITS TO BE FILED**

) **WITH PLAINTIFF'S MOTION FOR**

) **RECONSIDERATION**

)

) Cary Rodman Cooper (0013062)

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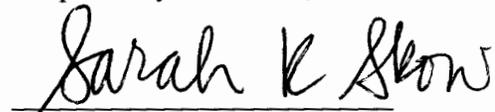
)

) *Counsel for Plaintiff*

On June 28, 2010 plaintiff's counsel mailed a Motion for Reconsideration to the Court for filing. The exhibits that were to be filed with that Motion for Reconsideration were inadvertently omitted from the filing. I attach Exhibits 1-3 that should have been filed with that Motion, and respectfully request that the Clerk attach Exhibits 1-3 to plaintiff Eugene Wrinn, Jr.'s Motion for Reconsideration.

Dated: June 29th, 2010

Respectfully submitted,



Cary R. Cooper

Sarah K. Skow

Counsel for Plaintiff

ON COMPL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 29th day of June, 2010 by ordinary U.S. mail, postage prepaid, upon: **James P. Dinsmore, Eric A. Walker**, Assistant Attorneys General, Court of Claims Defense Section, 150 East Gay St., 18th Floor, Columbus, Ohio 43215-3130; **Anthony Geiger**, Law Director, CITY OF LIMA, 209 N. Main St., 6th Floor, Lima, Ohio 45901; upon **Todd M. Raskin** and **Carl E. Cormany**, MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A., 100 Franklin's Row, 34305 Solon Road, Cleveland, Ohio 44139; upon **Michael S. Loughry**, MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A., 250 Civic Center Drive, Suite 400, Columbus, Ohio 43215; and upon **Jane M. Lynch** and **Jared A. Wagner**, GREEN & GREEN, LAWYERS, 800 Performance Place, 109 North Main Street, Dayton, Ohio 45402-1290.



Sarah K. Skow
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

EUGENE WRINN, JR.,	:	
	:	CASE NO. 3:06CV2188
Plaintiff,	:	
	:	JUDGE KATZ
v.	:	
	:	
DAREN JOHNSON, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**MOTION BY THE OHIO STATE HIGHWAY PATROL TO DISMISS THIS ACTION
AGAINST DEFENDANTS JOHNSON, MANLEY AND KOVERMAN**

Interested Party, the Ohio State Highway Patrol (OSHP), through counsel, moves this Court to dismiss this action against Defendants Daren Johnson, G. K. Manley, and K. J. Koverman.¹ The attached memorandum supports this Motion.

Respectfully submitted,

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Trial Attorney for Interested Party OSHP

¹ Under the Ohio Revised Code § 109.361, the Ohio Attorney General may appear in any civil action in order to protect the interest of the State of Ohio, including its agencies, even though no request for representation has been made by the officer or employee. Such appearance does not waive personal service and any defenses available at law. Although Defendants Johnson, Manley, and Koverman are being sued in their individual capacities, this suit concerns Defendants' actions or inactions performed in the course of their duties for OSHP, a division of the Ohio Department of Public Safety. Accordingly, Defendants may be entitled to qualified immunity. This constitutes the State's interest.

MEMORANDUM

I. STATEMENT OF FACTS

Plaintiff Eugene Wrinn, Jr., ("Wrinn") brings the instant action in this Court under 42 U.S.C. § 1983. *See* (Doc. No. 1, Complaint). In his Complaint, Wrinn names as Defendants Daren Johnson, G. K. Manley, and K. J. Koverman of the Ohio State Highway Patrol (OSHP), along with other law enforcement officers. However, on September 13, 2006, Wrinn filed a complaint in the Ohio Court of Claims concerning this same incident and naming OSHP, Daren Johnson, and G. K. Manley, as defendants. *Compare* (doc. no. 1 at ¶¶ 25-40, 42, 46, 49-55) and Complaint, *Wrinn v. State of Ohio*, Ohio Court of Claims, Case. No. 2006-05934, ¶¶ 7-35, copy attached as EXHIBIT A.

In this Section 1983 lawsuit and the lawsuit filed in the Ohio Court of Claims, Wrinn alleges that on September 16, 2005, at approximately 2:00 a.m., he was driving on Interstate Highway 75 when he crashed head-on into a truck. *Compare* (doc. no. 1, at ¶ 25) and Ex. A at ¶ 7. In both complaints, Wrinn alleges that following the crash, OSHP Sergeant Daren Johnson arrived at the scene and used excessive force on Wrinn who attempted to walk away from the vehicle. *Compare* (doc. no. 1, at ¶ 25) and Ex. A at ¶ 7. Wrinn also alleges that Sergeant Johnson used his taser on Wrinn. *Compare* (doc. no. 1, at ¶ 38) and Ex. A at ¶ 20. In addition, both complaints allege that OSHP Trooper G. K. Manley arrived after Sergeant Johnson and together they used excessive force in trying to handcuff Wrinn. *Compare* (doc. no. 1, at ¶ 40) and Ex. A at ¶¶ 22-25. Wrinn does not include OSHP Lieutenant K. J. Koverman in his Court of Claims case, but names Lt. Koverman, as a defendant in this Section 1983 action due to his supervisory position. *See* (Doc. No. 1 at ¶ 85).

In the instant lawsuit, Wrinn asserts that Sgt. Johnson, Trooper Manley, and Lt.

Koverman's actions or inactions violated his rights under the United States Constitution, and Ohio tort law. (Doc. No. 1, Complaint at 9-15). Nonetheless, the Court should dismiss this case in its entirety for the following reasons: 1) Wrinn is specifically barred from filing this Section 1983 action under O.R.C. § 2743.02(A); and 2) the Complaint fails to state a Section 1983 claim against Defendant Koverman for which relief can be granted. Moreover, absent Wrinn's federal claims, the Court should not exercise pendent jurisdiction over Wrinn's state claims.

II. LAW AND ARGUMENT

A. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) attacks the legal sufficiency of the complaint. *Roth Steel Products v. Sharon Steel Co.*, 705 F. 2d 134, 155 (6th Cir. 1983). When determining the sufficiency of a complaint in light of a motion to dismiss, the court must be guided by the principle that "a complaint should not be dismissed * * * unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Windsor v. The Tennessean*, 719 F. 2d 155, 158 (6th Cir. 1983). Although the court must liberally construe the complaint in favor of the plaintiff opposing the motion to dismiss, it must not accept conclusions of law or unwarranted inferences of fact cast in the form of factual allegations. *Kugler v. Helfant*, 421 U.S. 117, 125-126 n.5 (1976); *Blackburn v. Fisk University*, 443 F.2d 121, 124 (6th Cir. 1971).

A court should grant a motion to dismiss for failure to state a claim if the complaint is without any merit because of the type made, or if insufficient facts are pled to make a valid claim, or if on the face of a complaint there is an insurmountable bar to relief indicating that the plaintiff does not have a claim. *See generally, Rauch v. Day & Night Manufacturing*, 576 F.2d

1376, 1369 (6th Cir. 1975); *Brennan v. Rhodes*, 423 F. 2d 706 (6th Cir. 1970). In its decision to dismiss the Complaint, the Court may consider matter outside the pleading if the Court treats the Fed.R.Civ.P. 12(b) motion as one for summary judgment under Fed.R.Civ.P. 56. See Fed.R.Civ.P. 12(b).

B. OHIO REVISED CODE § 2743.02(A) BARS WRINN FROM BRINGING THIS SECTION 1983 ACTION BECAUSE HE FILED THIS SAME ACTION IN THE OHIO COURT OF CLAIMS.

Ohio Revised Code § 2743.02(A) (the Court of Claims Act) states, in pertinent part,

Except in the case of a civil action filed by the state, 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, which the filing party has against any officer or employee * * * The waiver shall be void if the court [of claims] determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

The Sixth Circuit has interpreted the Court of Claims Act as establishing a *quid pro quo*, in which the state consents to be sued in exchange for a plaintiff's waiver of claims against the state's employees. *Leaman v. Ohio Dept. of Mental Retardation*, 825 F.2d 946 (6th Cir. 1987) (*en banc*), *cert. denied*, 487 U.S. 1204. *Leaman* has been followed in cases involving Ohio's Court of Claims Act, *Haynes v. Marshall*, 887 F.2d 700 (6th Cir. 1989), and has been applied to similar statutes in other states. *White v. Gerbitz*, 860 F.2d 661 (6th Cir. 1988) (Tennessee), *cert. denied*, 489 U.S. 1028 (1989). Simply stated, a plaintiff may sue the state under § 1983 in the Court of Common Pleas or Federal Court instead of the Court of Claims, but if he chooses the later, he is bound by his decision. *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir. 1995).

The plain language of the statute is clear and straightforward; it is the filing of an action in the Ohio Court of Claims that results in a waiver of any cause of action based upon the same acts or omissions. This waiver is presumed to be knowing, intelligent, and voluntary if the

plaintiff is represented by competent counsel when he filed his action in the Court of Claims. *See Kajfasz v. Haviland*, 55 Fed. Appx. 719, 721 (6th Cir. 2003). By its express terms, O.R.C. § 2743.02(A)(1) makes no provision for “undoing” the waiver that results from filing an action, aside from a finding by the Ohio Court of Claims that the employee in question actions were *ultra vires*, malicious, or outside the scope of his or her employment. Only then, is the waiver void and the lawsuit in federal court may be reinstated.

Here, Wrinn filed this Section 1983 lawsuit. *See* (Doc. No. 1, Complaint). Wrinn cannot dispute that he, **through counsel**, filed a complaint in the Ohio Court of Claims on September 13, 2006. *See* EXHIBIT A. Likewise, Wrinn cannot dispute that both lawsuits hold the same defendants liable, arise out of the same act or omission, and are based on identical legal principles. Specifically in both lawsuits, Wrinn alleges that on September 16, 2005, at approximately 2:00 a.m., he was driving on Interstate Highway 75 when he crashed head-on into a truck. *Compare* (doc. no. 1, at ¶ 25) and Ex. A at ¶ 7. In both complaints, Wrinn alleges that following the crash, OSHP Sergeant Daren Johnson arrived at the scene and used excessive force on Wrinn who attempted to walk away from the vehicle. *Compare* (doc. no. 1, at ¶ 25) and Ex. A at ¶ 7. Wrinn also alleges that Sergeant Johnson used his taser on Wrinn. *Compare* (doc. no. 1, at ¶ 38) and Ex. A at ¶ 20. In addition, both complaints allege that OSHP trooper G. K. Manley arrived after Sergeant Johnson and together they used excessive force in trying to handcuff Wrinn. *Compare* (doc. no. 1, at ¶ 40) and Ex. A at ¶¶ 22-25. In fact, Wrinn’s allegations in paragraphs 25-40, 42, 46, and 49-50 of his Complaint (doc. no. 1) are identical to the allegations in paragraphs 7-23, 25, and 29-35 of his complaint in the Ohio Court of Claims. *See* Exhibit A.

Wrinn had a choice of fora. The *quid pro quo* received by Wrinn was not illusory, and the bargain he accepted was not unfair when one considers the depth of the sovereign’s pockets in

comparison to the depth of the servants'. He could attempt to recover from the State by filing in the Court of Claims, or he could attempt to recover from the State employees by filing in federal court. Having chosen the former over the later, Wrinn cannot now sidestep the very Act whose benefit he attempted to reap. In other words, Wrinn waived this and any future federal civil actions once he filed his Court of Claims' complaint. As such, Defendants Johnson, Manley, and Koverman are entitled to judgment as a matter of law.

C. DEFENDANT KOVERMAN SHOULD BE DISMISSED BECAUSE WRINN FAILS TO ALLEGE ANY PERSONAL INVOLVEMENT SUBJECTING HIM TO LIABILITY UNDER 42 U.S.C. § 1983, NOR IS HE LIABLE IN HIS SUPERVISORY CAPACITY.

A § 1983 claim must be supported by evidence of personal involvement on the part of each defendant. *Searcy v. City of Dayton*, 38 F.3d 282 (6th Cir. 1994); *O'Banion v. Bowman*, 824 F. Supp. 743 (S.D. Ohio 1993); *Hardin v. Straub*, 954 F.2d 1193 (6th Cir. 1992). Therefore, a 42 U.S.C. § 1983 claim must be dismissed when there is no evidence to support the personal involvement of each defendant. In his Complaint, Wrinn fails to allege any personal involvement on the part of Lt. Koverman that would subject him to liability under Section 1983. *See* (Doc. No. 1, Complaint at Sixth Cause of Action). Therefore, Lt. Koverman should be dismissed.

Moreover, Lt. Koverman's position as an OSHP supervisor does not make him liable for Wrinn's claims. The law is clear that, in actions brought pursuant to 42 U.S.C. § 1983 and in direct actions brought under the Constitution, the liability of supervisory personnel and government entities must be based on more than merely the right to control. *Jones v. City of Memphis*, 586 F.2d 622 (6th Cir. 1978). A supervisor can be liable for an employee's violation of the plaintiff's constitutional rights if the supervisor "either encouraged the specific incident of misconduct or in some other way directly participated in it." *Hays v. Jefferson County*, 668 F.2d

869, 874 (6th Cir.), cert. denied, 459 U.S. 833, 103 S. Ct. 75, 74 L. Ed. 2d 73 (1982); *Tucker, et al. v. Rose, et al.*, 955 F. Supp. 810 (S.D. Ohio 1997); *Hicks v. Frey*, 992 F.2d 1450 (6th Cir. 1993). Here, Wrinn fails to allege any fact to show that Lt. Koverman encouraged, let alone participated in any alleged mistreatment towards Wrinn. Therefore, Lt. Koverman is entitled to dismissal of this action.

D. THE COURT SHOULD DISMISS WRINN'S STATE CLAIMS AGAINST DEFENDANTS BECAUSE HIS FEDERAL CLAIMS ARE SUBJECTED TO DISMISSAL.

“Generally, ‘if the federal claims are dismissed before trial, ... the state claims should be dismissed as well.’” *Taylor v. First of Am. Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)) (other citation omitted). However, a trial court’s decision to retain a pendent state law claim remains a matter of discretion. See *Baer v. R & F Coal Co.*, 782 F.2d 600, 603 (6th Cir. 1986).

When deciding whether to resolve a pendent state claim on the merits, a trial court must balance the interests surrounding its adjudication. See *Aschinger v. Columbus Showcase Co.*, 934 F.2d 1402, 1412 (6th Cir.1991). In particular, “[a] district court should consider the interests of judicial economy and the avoidance of multiplicity of litigation and balance those interests against needlessly deciding state law issues.” *Id.* Considering these factors, the Sixth Circuit in *Taylor v. First of Am. Bank-Wayne*, affirmed the district court’s retention of supplemental jurisdiction over the plaintiff’s state claims in the interests of judicial economy and fairness. 973 F.2d at 1288. Specifically, the court held that the case had been on the district court’s docket for almost two years, the parties had completed discovery and compiled a voluminous record, and a motion for summary judgment was pending. *Id.*

However, the compelling circumstances presented in *Taylor* are absent in this case. Unlike *Taylor*, discovery has not commenced, and no motion for summary judgment has been filed. Consequently, there has been no waste of judicial resources and any delay resulting from dismissal is *de minimus*. Thus, it is consistent with the interests of judicial economy to dismiss Wrinn's state claims. Moreover, Wrinn is currently pursuing the identical claims raised in this case against the same defendants in the Ohio Court of Claims. Therefore, the dismissal of this action shall avoid multiplicity of litigation, which may subject Defendants to inconsistent judgments for the same event. Accordingly, the Court should dismiss Wrinn's state claims.

III. CONCLUSION

Wherefore, Interested Party, the Ohio State Highway Patrol (OSHP) requests that the Court issue an order to dismiss Defendants Johnson, Manley, and Koverman; certify, pursuant to 42 U.S.C. 1915(a)(3) that an appeal from this decision cannot be taken in good faith; assess costs to Plaintiff; and order any other relief deemed necessary and just by this Court.

Respectfully submitted,

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Attorney General

/s/ Philip A. King
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Trial Attorney for Interested Party the Ohio
State Highway Patrol

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2006, the foregoing *Motion By The Ohio State Highway Patrol To Dismiss This Action Against Defendants Johnson, Manley And Koverman* was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I also certify that a copy of the foregoing was sent to following defendants, via regular mail this same day.

City of Lima
Curt Hile, Lima Police Department
John Dunham, Jr., Lima Police Department
Officer Douglass, Lima Police Department
Bev Leary, Lima Police Department
C. Stevenson, Lima Police Department
A. Cortes, Lima Police Department
J. G. Garlock, Lima Police Department
Allen County, Ohio
Robert Tomasi, Allen County Sheriff's Office
T. Myers, Allen County Sheriff's Office
Daniel W. Beck, Allen County Sheriff's Office

/s/ Philip A. King
PHILIP A. KING
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

EUGENE WRINN, JR.,

Plaintiff,

Case No. 3: 06 CV 2188

-vs-

MEMORANDUM OPINION

DAREN JOHNSON, etc., et al.,

Defendant.

KATZ, J.

This matter is before the Court on the defendants' motions to dismiss (Doc. 2, 14, 22), the plaintiff's responses (Doc. 13, 17, 24) and the defendants' replies (Doc. 16, 18). This Court has jurisdiction pursuant to 18 U.S.C. § 1331.

I. Background

Plaintiff Eugene Wrinn, Jr. brings this lawsuit under 42 U.S.C. § 1983 against Defendants Daren Johnson, G. K. Manley and K. J. Koverman of the Ohio State Highway Patrol, in addition to other law enforcement officers. Interested party, Ohio State Highway Patrol, moves the Court to dismiss this case because (1) Plaintiff is specifically barred from filing this § 1983 under Ohio Rev. Ann. § 2743.02(A) and (2) pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiff fails to state a § 1983 claim against Defendant Koverman for which relief can be granted.

On September 11, 2006, Plaintiff filed the case before this Court. On September 13, 2006, Plaintiff filed a complaint in the Ohio Court of Claims regarding the same incident from which this lawsuit arises. That lawsuit named OSHP, Daren Johnson and G.K. Manley as defendants. In both lawsuits, Plaintiff alleges that on September 16, 2005, he was driving on Interstate Highway

75 when his car crashed head-on into a truck. Following the accident, Plaintiff alleges that Defendants Johnson and Manley used excessive force on him, causing injuries. Defendant Koverman is named because of his supervisory position over Defendants Johnson and Manley. Plaintiff alleges that the actions of Johnson, Manley and Koverman violated his rights under the U.S. Constitution and Ohio tort law.

II. Standard of Review

No complaint shall be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45, (1957); *see also Pfennig v. Household Credit Servs.*, 295 F.3d 522, 525-26 (6th Cir.2002) (citing *Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559, 561 (6th Cir.1998)). When deciding a motion brought pursuant to Fed.R.Civ.P. 12(b)(6), the inquiry is essentially limited to the content of the complaint, although matters of public record, orders, items appearing in the record, and attached exhibits also may be taken into account. *Yanacos v. Lake County*, 953 F.Supp. 187, 191 (N.D. Ohio 1996). The Court's task is to determine not whether the complaining party will prevail on its claims, but whether it is entitled to offer evidence in support of those claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The Court must accept all the allegations stated in the complaint as true, *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 (1984), while viewing the complaint in the light most favorable to the plaintiff. *Scheuer*, 416 U.S. at 236. A court, however, is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

III. Discussion

The Court is faced with a choice between following Sixth Circuit precedent and dismissing this case, or adhering to the statute as interpreted by the Ohio Supreme Court and allowing the case to continue in this Court.

The Ohio Court of Claims Act (“O.C.C.A.”), Ohio Rev. Code § 2743.02(A) provides the following:

Except in the case of a civil action filed by the state, 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, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

The Sixth Circuit has held, en banc, and reiterated more than once, that a claim cannot be brought in federal court if it is also brought in the Ohio Court of Claims. *Leaman v. Ohio Dep't of Mental Retardation*, 825 F.2d 946 (6th Cir.1987) (en banc) (“Where a claimant elects to sue the state in the Court of Claims, in other words, the state's employees are given an affirmative defense which the federal court has both the jurisdiction and the duty to recognize.”); *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir.1995); *Portis v. State of Ohio*, 141 F.3d 632, 633-34 (6th Cir.1998) (applying *Leaman*).

The Ohio Supreme Court has ruled that the O.C.C.A. only applies to state law claims and does not apply to bar federal claims that arise from the same set of facts as a claim brought in the Ohio Court of Claims. *Conley v. Shearer*, 64 Ohio St.3d 284, 292-93 (Ohio 1992). “Those sections, however, do not apply to claims brought under federal law. R.C. 9.86 expressly limits its

coverage to ‘any civil action that arises under the law of this state * * *.’” *Id.* “Moreover, the United States Supreme Court has concluded that ‘[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law,’ ‘even though the federal cause of action [was] being asserted in the state courts.’” *Id.* (citing *Howlett v. Rose*, 496 U.S. 356, 376 (1990)). “Similarly, federal courts in Ohio have concluded that R.C. 9.86 and 2743.02(F) do not apply to Section 1983 claims even when such claims are pursued in state court.” *Id.*

As recently as 1998, the Sixth Circuit has held that “where a federal court plaintiff files a related action in the Court of Claims, she has waived her right to sue the state officials for monetary damages in federal court.” *Turker* at 459. The Circuit also acknowledged that, “[a]lthough this portion of *Leaman* produced six dissenters, and has been the target of much scholarly criticism, [footnote omitted] it remains the law of this circuit.” *Id.* at 457. “The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.”¹ *Id.* at 457-58.

However, the Court also noted that there may be other language in the statute that could affect how a case fares in federal court, side-stepping the issue of waiver. Basically, the Circuit noted that if the Court of Claims finds that the state employees acted “outside the scope of their employment, or with a malicious purpose, in bad faith or in a wanton or reckless manner,” then the waiver would not apply and the case could proceed in federal court.

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Indeed, it was a dissenter of the en banc *Leaman* decision who authored the panel’s opinion in *Turker*. This demonstrates the impact and authority of an en banc decision.

We must make one addendum to the above discussion. Ohio has created a limited exception to the rule that state employees may not be sued in their official capacities. As set forth in § 2743.02(A)(1), Ohio state employees can be sued for damages in their official capacities if their actions were "manifestly outside the scope of [their] office or employment or [they] acted with malicious purpose, in bad faith, or in a wanton and reckless manner." The determination of whether a state employee's actions were ultra vires or malicious is to be made exclusively by the Ohio Court of Claims. *See* Ohio Rev.Code § 2743.02(F); *Thomson*, 65 F.3d at 1318 n. 3; *Haynes v. Marshall*, 887 F.2d 700, 704 (6th Cir.1989).

The district court noted that at the time it was considering the motion to dismiss, the Ohio Court of Claims had not yet determined whether the defendants' alleged actions were taken outside the scope of their employment, or with a malicious purpose, in bad faith or in a wanton or reckless manner. Should the Ohio Court of Claims so find, then the district court (as it held) must reinstate *Turker's* claims as if no waiver had ever occurred.

Id. at 458.

This Court is faced with a clear contradiction of interpretation between two courts the precedents of which it is bound to respect.² It is well established that the highest court of a state is

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The Court is aware of another Circuit opinion that has interpreted the O.C.C.A. language at issue. In *Tweed v. Wilkinson*, a three-judge panel of the Circuit wrote that "[*Leaman* implied] that a waiver occurs only if the plaintiff has pursued an Ohio Court of Claims case to the point of a judgment on the merits." 1998 U.S. App. LEXIS 8535 at *4 (6th Cir. 1998) (citing *Leaman*, 825 F.2d at 955). *Tweed* was decided on April 29, 1998, mere months before *Turker* was decided on October 5, 1998. *Turker* is the more recent opinion of the two.

Further, the Court notes that the portion of *Leaman* which the *Tweed* court cited appears to have been made in the course of drawing an analogy between the O.C.C.A. and the Federal Tort Claims Act and other laws that create a waiver of claims against the *federal* government in exchange for some other remedy.

If that provision of federal law [the Federal Tort Claims Act] does not sully the skirts of justice with the detritus of the marketplace, neither does the waiver provision of the Ohio Court of Claims Act. . . . [O]ne who does not pursue his remedies against the federal government is not required to give up any claim he may have against the federal government's servants; but one who pursues his statutory remedies against the United States to the point of judgment

(continued...)

the ultimate authority on the construction of statutes of that state. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). The Supreme Court of Ohio has interpreted the O.C.C.A. language at issue here as being inapplicable to federal causes of action. In other words, a plaintiff may file and maintain causes of action arising from the same facts in both the Ohio Court of Claims and this Court. *Conley*, supra. However, the Sixth Circuit, both before and after the Ohio Supreme Court's ruling in *Conley* in 1992, has interpreted the O.C.C.A. language as requiring a complete waiver of all claims, including federal claims, upon the filing of a similar complaint in the Ohio Court of Claims. See *Leaman*, supra (1987) (en banc) and *Turker*, supra (1998). The *Turker* court, in citing *Conley*, considered itself "precluded from departing from *Leaman* and *Thomson's* holdings. That can only be done by an en banc [Sixth Circuit]. Of course, such a course of action remains open to both *Turker* and the defendants." *Turker*, 157 F.3d at 460.

It appears incongruous to this Court that such disparate interpretations could persist between the Ohio Supreme Court and the U.S. Court of Appeals for the Sixth Circuit, given the traditional deference of federal courts to the construction of state statutes by the highest state court. The court that has issued the more recent decision, and the one to which the decisions of this Court are subject to appeal, is the federal appeals court. As the *Tucker* court noted, only that

²(...continued)

-- even an adverse judgment or a judgment for only a small part of the amount claimed -- bars himself from any recovery against federal employees.

Leaman, 825 F.2d at 955.

Finally, the Court notes again the language in *Turker* with regard to adhering to *Leaman*: "[*Leaman*] remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Turker*, 157 F.3d at 457-58.

court, sitting en banc, can overturn its decision in *Leaman* and align itself with the Ohio Supreme Court on this issue. This Court is therefore bound to follow *Tucker* in spite of the divergence of interpretations.³

Finally, the Court notes that, should the Ohio Court of Claims find liability against the defendants in that case, and further determine that the defendants acted “outside the scope of their employment, or with a malicious purpose, in bad faith or in a wanton or reckless manner,” then this Court would appear to be bound to grant reinstatement of the underlying matter before it. Ohio Rev. Code § 2743.02(A); *Turker*, 157 F.3d at 458.

Conclusion

For the reasons described herein, the defendants’ motions to dismiss (Doc. 2, 14, 22) are hereby granted.

IT IS SO ORDERED.

s/ David A. Katz
DAVID A. KATZ
U. S. DISTRICT JUDGE

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The Court, however, also notes that this issue might be appropriate for the parties to at least consider resolving via appeal to the U.S. Court of Appeals for the Sixth Circuit and encourages the parties to do so. If the Circuit chooses to overrule *Leaman* and its progeny, then this case will take on a different light. If the Circuit confirms its prior opinions, then this decision will remain in force with regard to that issue. This Court will follow the Circuit’s precedent and not speculate on the potentiality of such a situation, except the foregoing.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

EUGENE WRINN, JR.,

Plaintiff,

Case No. 3: 06 CV 2188

-vs-

JUDGMENT ENTRY

DAREN JOHNSON, etc., et al.,

Defendant.

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendants' motions to dismiss (Doc. 2, 14, 22) are granted.

S/ David A. Katz
DAVID A. KATZ
U. S. DISTRICT JUDGE



LEXSEE 157 F3D 453

MELDA TURKER, Plaintiff-Appellant, v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, et al., Defendants-Appellees.

No. 96-3873

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

157 F.3d 453; 1998 U.S. App. LEXIS 24596; 1998 FED App. 0305P (6th Cir.); 74 Empl. Prac. Dec. (CCH) P45,691

May 1, 1998, Submitted
October 5, 1998, Decided
October 5, 1998, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 94-02693. Patricia A. Gaughan, District Judge.

DISPOSITION: AFFIRMED the district court in as much as it dismissed Turker's claims for monetary damages. REVERSED the district court's dismissal of Turker's request for reinstatement and REMANDED for proceedings in accordance with this opinion.

COUNSEL: ON BRIEF: Melda Turker, Moreland Hills, Ohio, pro se.

Robert L. Griffin, James G. Petrie, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellees.

JUDGES: Before: JONES, MOORE, and COLE, Circuit Judges.

OPINION BY: NATHANIEL R. JONES

OPINION

[***2] [*454] **OPINION**

NATHANIEL R. JONES, Circuit Judge. Pro se plaintiff-appellant Melda Turker appeals the district court's dismissal of her civil rights lawsuit seeking equitable and monetary relief against various state officials on the grounds that the district court misread our decisions in *Leaman v. Ohio Dep't of Mental Retardation*

and *Development Disabilities*, 825 F.2d 946 (6th Cir. 1987) (en banc) and *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir. 1995), cert. denied, 517 U.S. 1105, [*455] 134 L. Ed. 2d 473, 116 S. Ct. 1321 (1996). [**2] Because neither *Leaman* nor *Thomson* bars Turker's quest for equitable relief in federal court, we hold that the district court erred in dismissing Turker's entire lawsuit.

I.

From 1976 until 1992, Turker was employed by defendant Ohio Department of Corrections ("ODRC"). She worked as a state jail inspector since 1980.

In 1991, several mayors of cities in Cuyahoga County complained to Ohio Lieutenant Governor Michael DeWine (who oversaw the ODRC) about "intense" scrutiny the jails in their cities were receiving from Turker in her effort to have the jails comply with state standards as reflected in the Ohio Administrative Code. Turker also discovered in December 1991 that Defendant-Appellee Jill Goldhart, Deputy Director [***3] of ODRC's Division of Parole and Community Services, was engaged in consulting work in violation of ODRC policy and state law. Turker reported this information to the Lieutenant Governor's office, which subsequently disciplined Goldhart.

On February 6, 1992, shortly after Turker gave an interview to the *Cleveland Plain Dealer* regarding the failure of several jails to conform to state standards, Defendant-Appellee Michael Lee, Bureau Chief [***3] of the Bureau of Adult Detention and Turker's supervisor, ordered her to relax her scrutiny of the jails in Cuyahoga County and terminate her ongoing investigations. Lee

followed up this oral directive with a written one to the same effect on February 11, 1992.

Beginning in March 1992, the ODRC changed its travel reimbursement policy retroactive to January 3, 1992. Turker discussed these changes with an on-site supervisor who told her to continue following the old policy with the understanding that someone would contact her if it posed a problem. As a result, Turker continued submitting reimbursement reports under the old policy that were incorrect under the new policy. Nevertheless, her supervisor continued to approve those reports without ever alerting her to the inaccuracies. Not only did the supervisor fail to alert Turker to the inaccuracies in her reimbursement forms, but Lee, Goldhart, and others began covert surveillance of Turker's travel mileage and parking receipts. This surveillance lasted from April 1992 to September 1992. Those defendants (Lee, Goldhart, and others) then presented the information to the proper authorities at the ODRC who eventually terminated Turker [**4] on December 30, 1992 based upon the inaccuracies in her reimbursement reports.

After causing Turker's termination, those same defendants then presented the information to the Cuyahoga County Prosecutor who obtained a seventeen-count indictment against Turker. Following further investigation, the prosecutor moved to *nolle prosequi* the charges, which was recorded on August 31, 1994. Nevertheless, while the [***4] charges were still pending against Turker, on May 3, 1993, Defendant-Appellee James Buccieri, ODRC's Regional Director of the Adult Parole Authority, published to several employees within the ODRC the fact that Turker had been charged with theft.

On December 29, 1994, Turker, then represented by counsel, filed a complaint in the United States District Court for the Northern District of Ohio, listing the ODRC, Goldhart, Lee, Buccieri, John Does I and II, and an unnamed Bureau Chief with the ODRC as defendants. All of the defendants are either agents or instrumentalities of the State of Ohio. In her complaint, Turker alleged violations of her civil rights pursuant to 42 U.S.C. § 1983, her constitutional rights under the *First* and *Fourteenth Amendments*, [**5] and state law torts of malicious prosecution, abuse of process, wrongful discharge, and intentional infliction of emotional distress. The only specific relief Turker sought in the complaint was monetary damages.

On January 20, 1995, defendants filed a motion to dismiss and a motion to stay discovery. On February 16, 1995, the district court agreed to stay discovery in the case pending resolution of the motion to dismiss. On March 10, 1995, Turker filed an amended complaint in the district court, and, for the first time, specifically re-

quested reinstatement to her position at ODRC and declaratory relief. J.A. at 82 (Amended Complaint).

[*456] On March 14, 1995, Turker filed a complaint against the defendants in the Ohio Court of Claims. It appears that sometime in August 1995, Turker voluntarily dismissed the state action. However, she refiled it on January 16, 1996. The second state complaint was virtually identical to the action pending in the district court.

As a result of the refiled state complaint, the defendants filed a second motion to dismiss in the district court on February 6, 1996. In that motion, the defendants argued that [***5] by filing an action against [**6] them in the Court of Claims, Turker waived her claims against the defendants in the federal action, and therefore, the federal case should be dismissed. The district court agreed and dismissed the federal action as to all defendants.

Turker then filed a timely appeal in this court, but voluntarily dismissed it on February 13, 1997. Henceforth proceeding *pro se*, Turker subsequently moved this court for reinstatement of the appeal, contending that her attorney dismissed her appeal without her approval. On April 25, 1997, this court granted Turker's motion to reinstate her appeal.

II.

Whether the district court correctly dismissed the suit pursuant to *Fed. R. Civ. P. 12(b)(6)* is a question of law subject to *de novo* review. *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996), *cert. denied*, 520 U.S. 1251, 138 L. Ed. 2d 175, 117 S. Ct. 2409 (1997). The court must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove any set of facts in support of her claim that would entitle her to relief. *Id.*

In her federal lawsuit, Turker [**7] asserted claims for equitable and monetary relief against the ODRC and its employees in both their official and individual capacities. Our task is to determine whether the district court was correct in granting the defendants' motion to dismiss on the basis that Turker had waived her federal action by filing her complaint in the Ohio Court of Claims.

In 1975, the Ohio General Assembly enacted the Ohio Court of Claims Act, *Ohio Rev. Code. § 2743.01-.72* ("O.C.C.A."), which governs Ohio's waiver of sovereign immunity and consent to be sued in the Ohio Court of Claims. The provision most pertinent to this appeal reads: [***6]

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The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) of this section. To the extent that the state has previously consented to be sued, [**8] this chapter has no applicability.

Except in the case of a civil action filed by the state, 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, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

Ohio Rev. Code. § 2743.02(A)(1).

The district court's disposal of Turker's claims for monetary damages was proper. It is well-established that a plaintiff cannot sue a state agency or any of its employees in their official capacities for monetary damages. See, e.g., *Thiokol Corp. v. Dep't of Treasury, State of Mich., Revenue Div.*, 987 F.2d 376, 381 (6th Cir. 1993) (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100-01, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) and *Hans v. Louisiana*, 134 U.S. 1, 10, 33 L. Ed. 842, 10 S. Ct. 504 (1890)), [***9] cert. denied, 117 S. Ct. 2448 (1997). It is equally [*457] well-established that a federal court cannot entertain a lawsuit against state officials for violations of state law unless the state has waived [***7] its immunity under the *Eleventh Amendment*.¹ See, e.g., *Freeman v. Michigan, Dep't of State*, 808 F.2d 1174, 1179-80 (6th Cir. 1987) (citing *Pennhurst*, 465 U.S. at 106). Ohio has not waived that immunity. See *Haynes v. Marshall*, 887 F.2d 700, 705 (6th Cir. 1989).

1 The *Eleventh Amendment* provides:§

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

A plaintiff however, may sue state officials for monetary damages in their individual capacities under § 1983 without running afoul of the *Eleventh Amendment*. [**10] See *Hafer v. Melo*, 502 U.S. 21, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991). To this end, the district court held that, based on this court's decision in *Leaman v. Ohio Dep't of Mental Retardation*, 825 F.2d 946 (6th Cir. 1987) (en banc), Turker had waived any claim of monetary damages against the defendants by filing her action in the Ohio Court of Claims.

In *Leaman*, a former employee of the Ohio Department of Mental Retardation ("ODMR") initially brought a federal cause of action against the ODMR and certain of its officials for unconstitutionally terminating her employment. She subsequently brought a substantially similar cause of action against the ODMR in the Ohio Court of Claims. The defendants moved for dismissal, arguing that under § 2743.02, the plaintiff waived her claims against the state officials by filing an action in the Ohio Court of Claims. The district court agreed and dismissed the action.

The plaintiff appealed, asserting that her filing of the court of claims suit should have had no adverse impact on her *federal* cause of action since the Ohio waiver statute limited [***8] any waiver to claims arising under [**11] state law. An en banc panel of this court interpreted the O.C.C.A. as creating a *quid pro quo* in which the state agreed to forego its sovereign immunity in exchange for the plaintiff's waiver of claims against the state's employees. *Leaman*, 825 F.2d at 954. The *Leaman* court concluded that the O.C.C.A. mandated that once the plaintiff elected to go after the sovereign state's "deep pockets" in the Court of Claims, the plaintiff waived not only state causes of action against state employees, but federal claims as well. *Id.* at 953-54.

Although this portion of *Leaman* produced six dissenters, and has been the target of much scholarly criticism,² it remains the law of this circuit. See, e.g., *Portis v. State of Ohio*, 141 F.3d 632, 633-34 (6th Cir. 1998) (applying *Leaman*). Most pertinent to Turker's case is that *Leaman* was followed in *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir. 1995), cert. denied, 517 U.S. 1105, 134 L. Ed. 2d 473, 116 S. Ct. 1321 (1996), a case that bears many similarities to the case *sub judice*. In *Thomson*, the plaintiff sued several defendants connected [**12] with the University of Cincinnati College of Medicine for damages and equitable relief under § 1983

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in federal court. He subsequently filed a complaint against several of the same defendants in the Ohio Court of Claims asserting violations of state law. This court, citing *Leaman*, ruled that the plaintiff had waived any claim of damages against the state officials by virtue of his filing the action in the Court of Claims. 65 F.3d at 1318-20.

2 See SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 9:72 (4th ed. 1997); Richard B. Saphire and Susan W. Brenner, *The Effect of the Ohio Court of Claims Act on Civil Rights Actions in State and Federal Courts*, 22 U. TOL. L. REV. 167, 197-213 (1991); Steven H. Steinglass, *Section 1983 and the Reorganization of the Sixth Circuit: Closing the Doors to the Federal Courthouse*, 20 U. TOL. L. REV. 497, 571-78 (1989).

Much like Turker contends now, the plaintiff in *Thomson* [**13] argued that the *Leaman* court erroneously and unduly [***9] interpreted the O.C.C.A. as pertaining to federal causes of action. However, the *Thomson* court rejected this argument, noting that a "panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent [*458] decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Id.* at 1320 (quoting *Salmi v. Secretary of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)). Because we are bound to follow both *Leaman* and *Thomson*, we agree with the district court's finding that Turker waived any monetary claims against the defendants in federal court when she filed her action in the Court of Claims. Thus, we conclude that the district court was correct when it dismissed Turker's monetary damages claims against the ODRC and its employees.

We must make one addendum to the above discussion. Ohio has created a limited exception to the rule that state employees may not be sued in their official capacities. As set forth in § 2743.02(A)(1), [**14] Ohio state employees can be sued for damages in their official capacities if their actions were "manifestly outside the scope of [their] office or employment or [they] acted with malicious purpose, in bad faith, or in a wanton and reckless manner." The determination of whether a state employee's actions were *ultra vires* or malicious is to be made exclusively by the Ohio Court of Claims. See *Ohio Rev. Code § 2743.02(F)*; *Thomson*, 65 F.3d at 1318 n.3; *Haynes v. Marshall*, 887 F.2d 700, 704 (6th Cir. 1989).

The district court noted that at the time it was considering the motion to dismiss, the Ohio Court of Claims had not yet determined whether the defendants' alleged

actions were taken outside the scope of their employment, or with a malicious purpose, in bad faith or in a wanton or reckless manner. Should the Ohio Court of Claims so find, then the district court (as it held) must reinstate Turker's claims as if [***10] no waiver had ever occurred. See *White v. Gerbitz*, 860 F.2d 661, 665 (6th Cir. 1988).³

3 The district court indicated that Turker would only be permitted to pursue her state claims in the event that she obtain a favorable ruling from the Court of Claims. Although *Gerbitz* interpreted Tennessee's counterpart to the O.C.C.A., the statutes were substantively identical and nothing in *Gerbitz* precluded reinstatement of the federal claims as well as pendent state claims in Turker's circumstances. See *Gerbitz*, 860 F.2d at 665 ("the plaintiff may present an order within sixty (60) days of the state action reinstating his *claims* to the federal district court's docket") (emphasis added). Defendants concede the point in their brief that Turker should be allowed to reinstate her federal claims along with her state claims should the Ohio Claims Court determine that the defendants' acts were outside the scope of their employment. Def. Br. at 23-24.

[**15] In an alternative argument, Turker asserts that any purported waiver should be voided because her attorney did not fully explain to her the consequences of filing the Court of Claims action (i.e., that by doing such, she could not seek monetary redress in federal court). Thus, Turker contends, her relinquishment of her rights was not "knowing, intelligent, and voluntary." Turker Br. at 14-15.

It is always unfortunate when attorneys fail to fully apprise their clients of the tactical decisions to be made in lawsuits. While we are sympathetic to Turker's predicament, we cannot afford her relief. The plaintiff in *Leaman* made a substantially identical argument that her attorney did not convey to her the nature of the *quid pro quo* of the O.C.C.A. before filing an action in the Court of Claims. This court rejected the *Leaman* plaintiff's argument that she had not made a "knowing, intelligent, and voluntary waiver of her right to bring claims against officers and employees of the state." *Leaman*, 825 F.2d at 956. We elaborated on the point as follows:

Ms. Leaman's counsel must be deemed to have known that the price of suing the state in the Court of [**16] Claims would be the surrender of Ms. Leaman's punitive [***11] damages claims against her superiors in the Department of Mental Retardation, unless the Court of

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Claims could be persuaded that those individuals acted outside the scope of their employment or maliciously. It was not the duty of any court to explore the adequacy of communication between client and counsel before permitting the complaint in the Court of Claims suit to be accepted for filing. And where a claimant represented by competent counsel has elected to accept Ohio's statutory offer to subject itself to suit in the Court of Claims in exchange for a waiver of claims against individual state officials, nothing in the [*459] Constitution entitles the claimant to repudiate the waiver if she or he loses the suit in the Court of Claims and does not even appeal the decision.

Id. at 956-57 (footnote omitted). Since Turker does not allege that her counsel was incompetent, (Turker Br. at 15), we, like the *Leaman* panel, must presume that counsel understood the meaning of the O.C.C.A. Indeed, since counsel in this case had the benefit of the *Leaman* and *Thomson* decisions, the presumption [**17] that counsel appreciated the consequences of filing the Court of Claims action is all the greater. Accordingly, "it [is] not incumbent upon the court to make sure that [Turker's] lawyer had adequately explained the effect of her action." *Id.* at 956.

III.

Dismissal of the monetary claims leaves only Turker's prayer for reinstatement to her position at ODRC. The district court did not directly address the reinstatement request in its opinion. Instead, it appears that the district court assumed that under *Leaman*, the reinstatement claim had been waived as well by Turker's filing in the Ohio Court of Claims.

Our decisions in *Leaman* and *Thomson* compel reversal. In dicta, the *Leaman* court reminded plaintiffs that

the Ohio statute gives claimants an option not otherwise available to them, and any claimant who does [***12] not like the statutory option is perfectly free to reject it and prosecute a § 1983 action against the state's officials just as if the [O.C.C.A.] had never been passed. Such an action may be maintained either in federal court or in an Ohio court of common pleas, without any necessity of filing an action in [**18] the Court of Claims.

It is settled under Ohio law, moreover, that the [O.C.C.A.] would not prevent such a claimant from seeking declaratory or injunctive relief against the Department of Mental Retardation itself, again without any necessity of suing in the Court of Claims.

Leaman, 825 F.2d at 953 (emphasis added). The *Thomson* court, under similar circumstances as those presented by the case at bar, adopted the *Leaman* dicta as its holding. In addition to monetary damages (which had been waived under *Leaman*) against his state university employer, the *Thomson* plaintiff also sought reinstatement to his position as a researcher. *Thomson* held that when a federal court plaintiff files a related action in the Ohio Court of Claims, then the *Leaman* decision only requires the federal court to dismiss the plaintiff's damages claims and not the plaintiff's claims for prospective equitable relief. *Thomson*, 65 F.3d at 1320-21.

Together *Leaman* and *Thomson* provide that where a federal court plaintiff files a related action in the Court of Claims, she has waived her right to sue the state officials for monetary [**19] damages in federal court, but she has not waived her claims for prospective equitable relief. The *Thomson* court offered several justifications for the rule. First, *Thomson* noted that with regard to equitable relief, there was no *quid pro quo* because under *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908) and *Edelman v. Jordan*, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974), a state has no Eleventh Amendment immunity to "bargain" against prospective equitable claims. *Thomson*, 65 F.3d at 1320-21. Second, prospective equitable relief, such as injunctions or reinstatement, has only an incidental or ancillary effect on a state's treasury. *Id.* at 1320-21. Finally, the *Thomson* court reasoned that it would have been unduly harsh to hold that a [***13] plaintiff waives prospective equitable claims when she files an action in the Court of Claims, since the Court of Claims was without power to grant any relief other than money damages. *Id.* at 1321. Of course, reinstatement to a job position clearly falls within the purview of prospective equitable relief. See [**20] *Hall v. Medical College of Ohio*, 742 F.2d 299, 310 (6th Cir. 1984) (reinstatement qualifies as a form of equitable relief); accord *Coakley v. Welch*, 877 F.2d 304, 306-07 (4th Cir. 1989) (same).

Applying *Leaman* and *Thomson* to Turker's situation, it is clear that by filing a related action in the Ohio Court of Claims against the same ODRC officials she was suing in federal court, Turker waived her claims for monetary damages against those [*460] officials under *Leaman*. Nevertheless, under *Thomson*, she could

maintain her action against those officials on her reinstatement claim because it is a form of prospective equitable relief. Thus, we must reverse the district court's order to the effect that it dismissed Turker's claims for reinstatement.

The defendants expend much energy attacking *Thomson* for permitting equitable remedies after a plaintiff has filed an action in the Court of Claims. According to defendants, *Thomson* violates the spirit, if not the letter, of the O.C.C.A., which states that "filing a civil action in the court of claims results in a complete waiver of any cause of action[.]" *Ohio Rev. Code § 2743.02(A)(1)* [**21] (emphasis added).⁴ However, as already discussed, absent a contrary decision from the United [***14] States Supreme Court, only an en banc panel of this court may overrule a previous decision of this court. Thus, as we are bound by *Leaman's* holding that the O.C.C.A. precludes a federal action for monetary damages after a claimant has sought redress in the Court of Claims, we are also bound by *Thomson's* holding that federal claims grounded on equitable relief are permissible under the O.C.C.A.

⁴ Defendants also sharply criticize *Thomson's* characterization of the Court of Claims as being without jurisdiction to afford equitable relief, a rationale upon which *Thomson* based its decision to allow equitable claims in federal court. See *Thomson*, 65 F.3d at 1321. Defendants point out that the O.C.C.A. empowers the Court of Claims

with "full equity powers in all actions within its jurisdiction." *Ohio Rev. Code § 2743.03(A)(1)*. A recent unpublished Ohio appellate court decision rendered similar complaints against this portion of *Thomson*. See *Staton v. Henry*, 1998 Ohio App. LEXIS 1762, at *13 n.2, No. CA97-10-184 (Ohio App. 12 Dist. Apr. 27, 1998).

[**22] Being so bound, assuming that we were to share the dissenting view of our colleague Judge Merritt in *Thomson*⁵ that the Ohio Supreme Court's decision in *Conley v. Shearer*, 64 Ohio St. 3d 284, 595 N.E.2d 862 (Ohio 1992), renders *Leaman* wrongly decided, we are precluded from departing from *Leaman* and *Thomson's* holdings. That can only be done by an en banc court. Of course, such a course of action remains open to both Turker and the defendants.

⁵ See *Thomson*, 65 F.3d at 1321-22 (Merritt, C.J., dissenting) (arguing that *Conley* makes clear that the O.C.C.A. has no bearing on federal actions).

IV.

For the reasons stated herein, we AFFIRM the district court in as much as it dismissed Turker's claims for monetary damages. We REVERSE the district court's dismissal of Turker's request for reinstatement and REMAND for proceedings in accordance with this opinion.

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June 29, 2010

Miles C. Durfey, Clerk
COURT OF CLAIMS OF OHIO
The Ohio Judicial Center
65 S. Front Street, 3rd Floor
Columbus, Ohio 43215

RE: *Eugene Wrinn, Jr. v. Ohio State Highway Patrol*
Court of Claims of Ohio Case No. 2006-05934

FILED
COURT OF CLAIMS
OF OHIO
2010 JUN 30 PM 3:28

Dear Mr. Durfey:

I enclose an original and three copies of a Notice of Exhibits to Be Filed with Plaintiff's Motion for Reconsideration in the above-referenced matter. Please file the Notice with the Court and return at least one, file-stamped copy to our office in the enclosed, self-addressed, stamped envelope. Thank you for your assistance in this matter.

Sincerely,

Sarah Skow

Sarah K. Skow

(clk)

VDS
06/30/10

SKS/dk
Enc

cc: James P. Dinsmore, Esq. w/encl.
Anthony L. Geiger, Esq. w/encl.
Carl E. Cormany, Esq. and Todd M. Raskin, Esq. w/encl.
Jane M. Lynch, Esq. and Jared A. Wagner, Esq. w/encl.
Michael S. Loughry, Esq. w/encl.
Eugene M. Wrinn, Sr. w/encl.