

NO. A10-658

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State of Minnesota  
**In Court of Appeals**

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Arlyn A. Hamann, M.D.,

*Appellant,*

v.

Park Nicollet Clinic,

*Respondent.*

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**RESPONDENT'S BRIEF**

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## STATEMENT OF THE ISSUES

1. Did the district court err when it determined that Appellant's claims for breach of contract, promissory estoppel and unjust enrichment are barred by the statute of limitations?
  
2. Did the district court err when it determined that Appellant failed to state a claim upon which relief can be granted for unjust enrichment?

## STATEMENT OF THE CASE

Appellant Arlyn A. Hamann is employed by Respondent Park Nicollet Clinic (“Respondent”) as a physician in its Obstetrics & Gynecology Department. Appellant served a Complaint asserting breach of contract and related quasi-contract claims against Respondent.

Appellant concedes that his claims for breach of contract, promissory estoppel, and unjust enrichment are subject to a two or three-year statute of limitations. Appellant bases his claims on a single event that occurred in April of 2005. Because he did not initiate this action until October 30, 2009, Appellant’s claims are time-barred even if the three-year limitations period applies. In addition, Appellant cannot state a legally cognizable claim for unjust enrichment because no benefit was conferred upon Respondent unjustly. The district court properly dismissed Appellant’s Complaint in its entirety pursuant to Minn. R. Civ. P. 12.

## STATEMENT OF FACTS

Appellant commenced this litigation by serving his Complaint on October 30, 2009. Appellant is currently employed as a physician in the Ob-Gyn Department (“the Department”) at Park Nicollet’s St. Louis Park clinic, where he has worked since 1974. (A.A. 3.)<sup>1</sup> He alleges that in 1995, the Department adopted a Length of Service Recognition Policy (“the Policy”), which was distributed to the physicians in the Department. (A.A. 3.) In relevant part, the Policy provided that physicians who met

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<sup>1</sup> References in this brief to Appellant’s Brief shall be to “App. Br. \_\_,” Appellant’s Appendix shall be to “A.A. \_\_,” and references to Appellant’s Addendum shall be to “A. \_\_.”

certain criteria would be exempt from obstetrics night call, and would not receive a corresponding salary reduction. (A.A. 12.)

Appellant further alleges that he reached age 60 in July 2004 and that earlier that year, he spoke with the Department Chair about exercising the Policy. (A.A. 5.) During this conversation, Appellant agreed to voluntarily defer exercising the Policy until April 2005 so that the Department would not be understaffed while other physicians were out on leave. (A.A. 5.)

In his Complaint, Appellant alleges that “[i]n April 2005, when [he] informed the Department Chair that he wished to exercise the Policy and stop taking night call, he was told for the first time that the Policy no longer existed and would no longer be honored. [Appellant] was told that he had to continue to take OB night call and that his salary would be cut if he refused.” (A.A. 6.) Appellant continued to work night call for nearly three years, until February 2008. (A.A. 6.) Appellant claims that working night call during that time “left him exhausted and physically worn out and ... adversely affected his health.” (A.A. 6.) Appellant does not allege that he incurred any lost income or reduced salary between 2005 and 2008. (A.A. 1-6.)

### **ARGUMENT**

Appellant asserted the following causes of action based on the factual allegations set forth in the Complaint: 1) breach of contract; 2) promissory estoppel; and 3) unjust enrichment.<sup>2</sup> As is clear from the factual allegations, the contract and quasi-contract

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<sup>2</sup> In response to Respondent’s Rule 12 motion, Appellant voluntarily dismissed his misrepresentation and statutory claims (Counts III and V). Accordingly, only the claims for breach of contract, promissory estoppel, and unjust enrichment remain.

claims relate to Appellant's employment and arise from events that are alleged to have occurred in 2004 and 2005. Consequently, those claims are time-barred. In addition, Appellant's unjust enrichment claim is not supported by applicable law. Appellant failed to state any claim upon which relief can be granted. Minn. R. Civ. P. 12.02(e). The Court should affirm the decision of the district court.

#### **I. THE STANDARD OF REVIEW**

When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e), the question is whether the Complaint sets forth a legally sufficient claim for relief. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). A motion to dismiss for failure to state a claim will be granted if it appears to a certainty from the pleadings as a whole that no facts exist which could be introduced to support granting the relief demanded. *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 623 (Minn. 2007). This Court reviews the district court's decision de novo, and must "consider only the facts alleged in the Complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

Even if Appellant's factual allegations are taken as true, he is not entitled to relief. Based on his allegations, there are no facts that could come to light in discovery that would give rise to a viable claim for relief.

**II. THE DISTRICT COURT PROPERLY DETERMINED THAT APPELLANT'S CLAIMS ARE TIME-BARRED.**

The district court correctly concluded that Appellant's causes of action for breach of contract, promissory estoppel and unjust enrichment (Counts I, II and IV) are time-barred. Each of those claims is subject to a two-year statute of limitations. And those claims accrued no later than April 2005, if they accrued at all.

**A. The Applicable Statute of Limitations**

From the plain allegations in the Complaint, Appellant's claims for breach of contract, promissory estoppel and unjust enrichment arise out of his employment with Respondent. Therefore, the applicable statute of limitations as to each of these claims is set forth in Minn. Stat. § 541.07(5). The statute provides that actions for the recovery of wages or overtime shall be commenced within two years or, alternatively, three years if non-payment is willful. Minn. Stat. § 541.07(5). "Minnesota courts consistently hold that 'all damages arising out of the employment relationship are subject to the two-year statute of limitations set forth in Minn. Stat. § 541.07(5).'" *Stowman v. Carlson Cos., Inc.*, 430 N.W.2d 490, 493 (Minn. App. 1988) (citing *Portlance v. Golden Valley State Bank*, 405 N.W.2d 240, 243 (Minn. 1987); accord *Kulinski v. Medtronic Bio-Medicus, Inc.*, 112 F.3d 368, 371 (8th Cir. 1997); *McGoldrick v. Datatrak Int'l, Inc.*, 42 F. Supp.2d 893, 898 (D. Minn. 1999). Certainly, a claim based upon an employer's alleged breach of a unilateral contract that purportedly results in lost income is a claim arising out of the employment relationship.

The two-year statute applies regardless of whether Appellant premises his claim upon a breach of contract or an equitable theory of recovery such as promissory estoppel or unjust enrichment. *See Roderick v. Lull Engineering Co., Inc.*, 208 N.W.2d 761, 763 (Minn. 1973) (“[I]t is our opinion, based on the broad definition of wages stated in [Minn. Stat. § 541.07(5)], that claims for wages based on quantum meruit are also controlled by [Minn. Stat. § 541.07(5)].”); *Idearc Info. Servs., LLC v. Mangan*, 2007 U.S. Dist. LEXIS 85875, \* 4-7 (D. Minn. Nov. 20, 2007) (“Mangan asserts that Idearc was unjustly enriched when it did not pay him commissions he was due. Because the underlying basis for this claim is for unpaid wages and commissions, the statute of limitations applicable to wage claims applies.”) (citations omitted); *Burns v. Kraft Foods N. Am.*, 2004 U.S. Dist. LEXIS 20134 (D. Minn. Aug. 26, 2004) (“The two-year statute of limitations also applies to Appellant’s promissory estoppel claim, as this, too, is a claim ‘arising out of the employment relationship.’”). The two-year limitations period applies to each of Appellant’s contract-related claims -- breach of contract, promissory estoppel and unjust enrichment. Thus, those claims are subject to dismissal if they accrued before October 30, 2007. Moreover, although Appellant alleges a “willful” violation, the three-year statute of limitations period applicable to such claims does not save his claims here because he failed to initiate this action within three years of accrual.

#### **B. Accrual of the Purported Claims**

Appellant’s claims are unavoidably time-barred. Taking Appellant’s allegations as true, at the very latest, the claims for breach of contract, promissory estoppel and unjust enrichment arose in April 2005 when Respondent allegedly failed to follow the

Policy. That is when Appellant contends the contract was breached or the promise was broken. That is, therefore, when the contract and quasi-contract claims accrued.

“[I]t has long been settled that a cause of action for breach of contract accrues on the breach of the terms of the contract.” *Levin v. C.O.M.B. Co.*, 441 N.W.2d 801, 805 (Minn. 1989) (citing *Bachertz v. Hayes-Lucas Lumber Co.*, 201 Minn. 171, 176, 275 N.W. 694, 697 (1937)). “This is true even when actual damages resulting from the breach do not occur until some time afterwards.” *Jacobson v. Bd. of Trs.*, 627 N.W.2d 106, 110 (Minn. App. 2001).

Appellant alleges that the Policy was an enforceable contract and complains that “[Respondent] breached the contract by failing to honor the agreement and refusing to allow Dr. Hamann to be exempt from night call without salary reduction.” (A.A. 7.) By his own admission, the alleged breach occurred in 2005 based on his allegation as follows: “In April 2005, when [Appellant] informed the Department Chair that he wished to exercise the Policy and stop taking night call, he was told for the first time that the Policy no longer existed and would no longer be honored.” (A.A. 6.) Because Appellant did not initiate this action until October 2009, more than four years after the alleged breach, it is untimely.

The quasi-contract claims are similarly time-barred. Appellant alleges as the basis for his promissory estoppel claim that “[Respondent] promised [Appellant] that, if he continued to practice with [Respondent] as a physician in its Ob-Gyn Department until he was 60 years old, took OB call for at least 15 years and met other criteria, he would be exempt from night call without salary reduction.” (A.A. 7.) Thus, as pled, the alleged

promise was broken, if at all, in July 2004 when Appellant reached age 60 or, at the latest, in April 2005 when he was allegedly told for the first time that the Policy no longer existed. Regardless, the promissory estoppel claim is untimely.

Appellant asserts that Respondent has been unjustly enriched because it “knowingly received the value of [his] services, not being entitled to the full benefit of said services, under circumstances that would make it unjust to permit [Respondent]’s retention of said benefit.” (A.A. 9.) He does not allege that Respondent failed to pay him for all services rendered during the time he “continued to take OB night call” between April 2005 and February 2008. (*See* A.A. 6, 9.) Appellant’s unjust enrichment claim accrued, if at all, when Respondent allegedly began to be “unjustly enriched” in April 2005. Like his breach of contract and promissory estoppel claims, Appellant’s unjust enrichment claim is time-barred.

Moreover, Appellant’s framing of the accrual issue is off the mark. The issue is not whether “accrual of the statute of limitations” should be accelerated. Rather, the question is: when did Appellant’s claims accrue? The trial court did not conclude, nor does Respondent argue, that accrual of the statute of limitations can or should be “accelerated.” Respondent simply asserts, based on applicable Minnesota law, that Appellant’s claims accrued in April 2005, if at all.

**C. The District Court Properly Rejected Appellant’s “Ongoing Breach” Theory.**

In an effort to save his claims from dismissal, Appellant advances an “ongoing breach” theory under which the statute of limitations will *never* run on his claims as long

as he is employed by Respondent. The district court properly rejected this theory, holding that “[a]s of April 2005, [Appellant] was on notice that, even though performance was due, [Respondent] refused to perform under the Policy. At the time of this breach the limitations period began to accrue.” (A. 8.)

**1. As Alleged in the Complaint, Respondent’s Declaration in April 2005 Constituted a Breach of a Present Obligation and Not Anticipatory Repudiation.**

Appellant argues that Respondent “breached its contract with Dr. Hamann by: (1) denying him his right to be exempt from OB night call from April 2005 until February 2008, and (2) reducing his salary for not taking OB night call from February 2008 to the present.” (App. Br. 11.) Inexplicably, Appellant also asserts that “separate ongoing breaches commenced in April 2005 and continued through February of 2008....” (App. Br. 15.) Regardless of that patent inconsistency, Appellant’s argument rests entirely on his characterization of the alleged breach in April 2005 as an anticipatory repudiation of a future obligation. (A.A. 16.) His assertion in that regard, however, is unfounded.

It is well established that anticipatory repudiation occurs when one party communicates to the other his repudiation of the contract *before* the time fixed by the contract for his performance. *In re Haugen*, 278 N.W.2d 75 (Minn. 1979.) Appellant claims that when the alleged breach occurred in April 2005, he had met all of the requisite criteria under the Policy. (App. Br. 10.) Appellant argues further that once he met all requirements of the Policy, “the Policy could not be rescinded or revoked, and [Respondent] was bound to perform *at that time*.” (App. Br. 10 (emphasis added).) Thus, Respondent’s alleged refusal to abide by the Policy’s terms was not an anticipatory

repudiation but an affirmative breach of an existing obligation. In April 2005, according to Appellant's theory, Respondent had a present obligation – a duty of *immediate* performance – to abide by the terms of the Policy, i.e., Appellant had the immediate right to cease taking night call without a corresponding reduction in salary. Respondent allegedly breached its obligation once, in April 2005 when it allegedly told Appellant “that he had to continue to take OB night call and that his salary would be cut if he refused.” (A.A. 6.) Thus, if Respondent had an immediate duty of performance in April 2005 as asserted by Appellant, then Appellant was required to bring his action within two or three years after April 2005. He failed to do so and the trial court correctly decided that his claims are time-barred.

**2. Appellant's “Ongoing Breach” Theory is Not Supported by Minnesota Law.**

Not only is Appellant's “ongoing breach” theory contrary to established law, Appellant contradicts his own arguments in trying to concoct a basis for avoiding dismissal of stale claims. Appellant relies principally on the Minnesota Supreme Court's decision in *Levin* and this Court's decision in *Guercio* for his argument that although he had a right to bring a claim as of April 2005, he had no obligation to do so. (App. Br. 11-14.) But *Levin* and *Guercio* address an anticipatory repudiation of a future payment obligation, not an alleged breach of a duty of immediate performance as is the case here. See *Levin v. C.O.M.B. Co.*, 441 N.W.2d 801, 805 (Minn. 1989) and *Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379, 387 (Minn. App. 2003.)

In *Levin*, the Minnesota Supreme Court reversed the lower court decision accelerating accrual of all of an employee's claims to the date of the employer's repudiation of a commission agreement, noting that it "has long been established ... that the renunciation and repudiation of a contract by one of the parties does not set the statute of limitations in motion against the other party although it gives the latter an election to sue immediately." *Id.* at 803-04 (citation omitted). The agreement in *Levin* was similar to an installment contract, and the plaintiff alleged a series of breaches arising from repeated failures to pay commissions, each of which came due only at the close of a contract year – a predetermined future date. *Id.* at 803. The supreme court characterized the complaint as asserting separate causes of action with different accrual dates. *Id.* Appellant mischaracterizes the court's analysis in *Levin* in that the court made no mention of "continuing" breaches, and, instead, concluded that separate, discrete breaches occurred. That is quite different from the facts alleged in the present case.

Neither is *Guercio* instructive here, as it too addressed a repudiation of a future payment obligation. In *Guercio*, this Court observed in dicta that a change in the plaintiff's commission plan from 50% to 40% on certain product lines did not start the running of the limitations period.<sup>3</sup> *Guercio*, 664 N.W.2d at 387-88. Importantly, the plaintiff in *Guercio* could not claim entitlement to anything when the alleged breach occurred, i.e., the change in the commission plan. Going forward, the plaintiff would not receive a reduced commission unless and until he made a sale in the future.

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<sup>3</sup> The discussion in *Guercio* relied upon by Appellant is dicta because the Court had already decided that the contract claim failed on the merits for other reasons. *Guercio*, 664 N.W.2d at 383-84.

Appellant's reliance on *McGoldrick v. Datatrak Intern., Inc.*, 42 F.Supp.2d 893 (D. Minn. 1999) to support his "ongoing breach" theory is also misplaced. (App. Br. 14.) First, that decision provides no meaningful guidance for this case because the opinion does not adequately describe the facts at issue or legal reasoning. More importantly, based on what little facts are shared, the employee in *McGoldrick* was hired at a salary of \$50,000 per year. *McGoldrick*, 42 F.Supp.2d at 894. After nearly a year, the employee had only received \$6,115.75 of his promised salary, and he resigned. *Id.* He initiated an action seeking back pay just before the two-year limitations period expired. *Id.* Relying on *Levin*, the district court rejected the employer's argument that the wage claim accrued when he was hired. *Id.* at 898. In *McGoldrick* there was no dramatic, affirmative breach from which the claim was born because the employee never received any notice that he would not be receiving the pay he was promised.

*Levin*, *Guercio* and *McGoldrick* are distinguishable from the facts at issue in this case. In the present case, the only thing Appellant claims he was ever entitled to is the right to stop taking OB night call without a reduced salary. And that is a purported right that did not somehow change or renew just because Appellant voluntarily chose to continue taking night call and receive full pay after April 2005. In fact, the salary reduction in February 2008 was merely the manifestation of what occurred three years earlier. Appellant just chose to put it off for three years. It was certainly not some new breach.

The Court should follow the holdings of other Minnesota courts that have distinguished *Levin* on facts like those alleged in this case. See *Medtronic, Inc. v. Shope*,

135 F.Supp.2d 988, 992 (D. Minn. 2001); *Botten v. Shorma*, 440 F.3d 979, 981 (8th Cir. 2006) (relying on *Levin* and holding that a cause of action for unpaid wages arose when the terms of the employment contract were breached). In *Shope*, the court held that an action on stock certificates issued to an employee was an action for wages subject to the two or three-year limitations period set forth in Minn. Stat. § 541.07(5). *Id.* at 991. The employee in that case relied principally on *Levin* to support his argument that the limitations period did not begin to run when the employer canceled the certificates more than five years before the suit was commenced. *Id.* at 992. However, the court distinguished *Levin*, recognizing that the holding of *Levin* only applies to anticipatory repudiation of future obligations, not to breaches of present contractual obligations. The court held that the employer's cancellation of the stock certificates was not an anticipatory repudiation, but was "without a doubt, a breach of contract.... [and] precisely the kind of 'dramatic breach, which completely severed the contractual relationship' that begins the running of the statute of limitations." *Id.*, citing *Griffin v. American Motors Sales Corp.*, 618 F.Supp. 455, 460 (D. Minn. 1985). In the present case, if any breach occurred, which Respondent denies, it undoubtedly happened in April 2005 when Appellant alleges that he was told unequivocally that the policy in question was no longer in effect.

Like the cancellation of the stock certificates in *Shope*, Appellant's allegation that in April 2005 "he was told for the first time that the Policy no longer existed and would no longer be honored" and "his salary would be cut if he refused" to take night call amounts to an allegation of a dramatic breach of a present obligation that very clearly

began the running of the statute of limitations. Based on the facts alleged in the Complaint, Appellant could not have received more definite notice that the Policy was no longer in effect than he did in April 2005. Thus, by his own allegations, if any breach occurred or any promise was broken, it happened more than three years before Appellant brought suit. He knew without any doubt or ambiguity in April 2005 that the policy in question no longer existed and that he would not receive its purported benefits.

**3. Sound Policy Supports Rejection of Appellant's "Ongoing Breach" Theory.**

The courts have articulated compelling policy reasons for rejecting Appellant's "ongoing breach" theory. In essence, Appellant argues that the limitations period will never expire so long as he continues to work for Respondent. (App. Br. 9-11.) The United States Supreme Court has rejected this rationale in the employment discrimination context. *Del. State College v. Ricks*, 449 U.S. 250, 257 (U.S. 1980) ("Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.") The Supreme Court has also repeatedly observed that statutes of limitations "themselves promote important interests; 'the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'" *Id.* at 259-60, citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975).

Similarly, the Minnesota Supreme Court has recognized the important policy considerations served by enforcing limitations on a party's ability to bring an action: "[i]t

would encourage fraud, oppression, and interminable litigation, to permit a party to delay a contest until it is probable that papers may be lost, facts forgotten, or witnesses dead. A statute of limitation is based to a great extent on the proposition that if one person has a claim against another ... it would be inequitable for him to assert such claim after an unreasonable lapse of time, during which such other has been permitted to rest in the belief that no such claim existed.” *Bachertz v. Hayes-Lucas Lumber Co.*, 201 Minn. 171, 176 (Minn. 1937). If this Court adopts Appellant’s argument, he could sit on his hands and let his damages accrue while evidence is lost, memories fade, and witnesses die off. In fact, under Appellant’s theory, the applicable statute of limitations will never run -- even if he chooses to continue working for another 20 years. Appellant’s theory is not the law in Minnesota. Nor should it be. Consequently, the Court should affirm the decision of the district court that Appellant’s claims are time-barred.

**D. Appellant’s Continued Employment Constituted Acceptance of a New Contractual Term.**

Even if the Policy constituted a unilateral contract, Appellant’s claim for breach is subject to dismissal for the additional reason that his continued employment with Respondent after it announced that the Policy was no longer in effect signaled his acceptance of a new unilateral contract. If the Policy gave rise to a contractual obligation on the part of Respondent, then Respondent’s revocation in April 2005 was an offer to change the terms of the existing agreement. *See Guercio*, 664 N.W.2d at 383-84. By continuing to take OB night call for nearly three years at full salary, Appellant assented to the change in the terms of his employment. *See id.* at 384; *see also Country Club Oil Co.*

*v. Lee*, 58 N.W.2d 247, 251 (Minn. 1953) (“a contract will be treated as abandoned where the acts of one party inconsistent with its existence are acquiesced in by the other.”). Thus, Appellant cannot succeed on his breach of contract claim, and for this additional reason, the district court’s decision should be affirmed.

### **III. THE DISTRICT COURT PROPERLY DISMISSED APPELLANT’S UNJUST ENRICHMENT CLAIM.**

Aside from being time-barred, Appellant’s unjust enrichment claim is subject to dismissal for the additional reason that on the face of the Complaint, Respondent has not been unjustly enriched. In order to state a claim for unjust enrichment, Appellant must allege: (1) a benefit conferred; (2) the defendant’s appreciation and knowing acceptance of the benefit; and (3) the defendant’s acceptance and retention of the benefit under such circumstances that it would be inequitable for him to retain it without paying for it. *Acton Const. Co. v. State*, 383 N.W.2d 416, 417 (Minn. App. 1986), *review denied* (Minn. May 22, 1986). A claim for unjust enrichment requires a showing that a “party was unjustly enriched in the sense that the term ‘unjustly’ could mean illegally or unlawfully.” *First Nat’l Bank of St. Paul v. Ramier*, 311 N.W.2d 502, 504 (Minn. 1981) (citation omitted); *see also Mon-Ray, Inc. v. Granite Re, Inc.*, 677 N.W.2d 434, 440 (Minn. App. 2004). As the lower court observed, the crux of the unjust enrichment claim is whether Respondent unjustly retained a benefit to which it was not entitled. There is no evidence that Appellant might produce, consistent with his theory in this case, that would give rise to a viable cause of action for unjust enrichment.

**A. Appellant Did Not Plead Full Performance Under the Policy.**

The Court should reject Appellant's attempt to salvage his unjust enrichment claim by adding new allegations that are not in the Complaint. Although Appellant now asserts he "had fully performed under the policy" and "his rights in the Policy had vested," his Complaint contains no allegation that Respondent revoked the policy after he satisfied the Policy's requirements. (*See* App. Br. 20; A.A. 1-11.) In fact, Appellant does not allege that Respondent ever revoked the policy. (*See* A.A. 1-11.) Nor does he even allege that he met all the eligibility requirements under the Policy. (*See* A.A. 1-11.) For example, he has never alleged that he had the approval of the other physicians in the call rotation to stop taking OB night call. He simply glosses over that critical omission. Appellant's attempt to rely on allegations beyond the face of his Complaint should be rejected as nothing more than a desperate effort to avoid dismissal.

**B. Appellant Does Not Allege He Was Promised Additional Compensation for Working Night Call.**

Moreover, Appellant has not alleged that Respondent agreed to pay him something extra for working night call after April 2005. (*See* A.A. 1-11.) Nor does he allege that Respondent ever promised him that he would receive additional pay for that particular aspect of his job. (*See id.*) Thus, Appellant does not contend that he was ever denied payment for working OB night call or any other services he provided to Respondent within the confines of the employment relationship. Instead, Appellant claims Respondent was somehow "enriched" by his mere continued performance of his job at full salary.

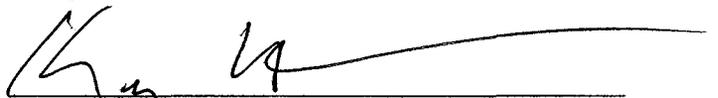
Appellant has no basis whatsoever to assert that his continuing to take OB night call at full salary constituted a benefit Respondent received illegally or unlawfully, or that was morally wrong. *See Guinness Import Co. v. Mark VII Distribs., Inc.*, 153 F.3d 607, 613 (8th Cir. 1998) (Appellant's "failure to establish that [movant] received something of value it was not entitled to is dispositive of [non-movant's] unjust enrichment claim"); *Griep v. Yamaha Motor Corp. U.S.A.*, 120 F. Supp. 2d 1196, 1201 (D. Minn. 2000) (concluding employee's unjust enrichment claim failed as a matter of law where employer "did not represent that [employee] would be paid an additional amount above his contract wages"). Appellant has always been paid commensurate with the work he has performed. While he was taking OB night call, he received his full, agreed-upon salary. When he stopped taking night call, he was paid less. There has been no unjust enrichment of any kind, and the district court properly concluded that Appellant failed to allege conduct giving rise to an unjust enrichment claim.

### CONCLUSION

Appellant's Complaint fails to state a viable claim for unjust enrichment. Additionally, each of Appellant's claims is time-barred. The district court properly concluded that Appellant's claims were subject to dismissal under Minn. R. Civ. P. 12, and its decision should be affirmed.

Dated: June 11, 2010

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief was prepared using Microsoft Word 2003, in Times New Roman font, 13 point, and according to the word processing system's word count, is no more than 4,733 words, exclusive of the cover page, table of contents, table of authorities, signature block and addendum, and complies with the typeface requirements of Minn. R. Civ. P. 132.01.

Dated: June 11, 2010



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Kerry L. Middleton

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