COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP427 **Cir. Ct. No. 2001CV2526**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DONALD WOLLHEIM,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

UNIVERSITY OF WISCONSIN MEDICAL FOUNDATION, INC.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Dane County: DAVID T. FLANAGAN, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 LUNDSTEN, P.J. Dr. Donald Wollheim seeks to hold the University of Wisconsin Medical Foundation liable for what he asserts was his improper dismissal from employment with the University of Wisconsin Medical School and the Foundation. Dr. Wollheim claims that the Foundation breached its

employment contract with him when it terminated his fixed-term academic staff appointment before the end of the term and without affording him procedural guarantees, including notice and a hearing, as required by WIS. STAT. § 36.15(3) (2003-04)[1] and administrative code provisions promulgated pursuant to that statute. The circuit court granted summary judgment in favor of the Foundation and dismissed the suit. Dr. Wollheim appeals, and we affirm the circuit court.[2]

Background

¶2 On October 12, 2000, Dr. Wollheim was offered employment by means of a letter signed by representatives of the UW Medical School and the Foundation. Among other terms, the letter offered Dr. Wollheim an academic staff appointment as a Clinical Assistant Professor in the Department of Surgery at the Medical School for a fixed term commencing November 1, 2000, and ending June 30, 2003. The letter contained compensation information and stated that Dr. Wollheim would be expected to provide clinical patient care at the Columbus Community Hospital. Dr. Wollheim accepted this offer on November 1, 2000, and commenced working for both the Medical School and the Foundation.

¶3 For reasons not germane to our discussion, the Foundation was dissatisfied with Dr. Wollheim. A representative of the Foundation advised the Medical School of the Foundation's dissatisfaction, and the Medical School

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The Foundation cross-appeals, arguing that compliance with procedural guarantees under WIS. STAT. § 36.15(3) and WIS. ADMIN. CODE § UWS 11.11 (Apr. 2001) was not required because Dr. Wollheim was a probationary employee to whom the procedural guarantees do not apply. We need not address the cross-appeal because we reject the challenges made by Dr. Wollheim in his appeal.

decided to terminate Dr. Wollheim. On February 23, 2001, Dr. Wollheim was informed that his employment would be terminated. His last day of work was March 26, 2001.[3] The parties agree that neither the Medical School nor the Foundation provided notice or a hearing to Dr. Wollheim within the meaning of WIS. STAT. § 36.15(3).

¶4 The UW Medical School is authorized by the Board of Regents to offer "academic staff appointments" as that phrase is used in WIS. STAT. § 36.15. There is no dispute that the Medical School, in its role as an employer of persons having an academic staff appointment, is obligated to provide the procedural guarantees mandated by § 36.15(3).

¶5 The Foundation is a non-profit, tax-exempt medical education and research organization created pursuant to WIS. STAT. § 448.08(6)(b) (1993-94). The Foundation operates subject to an "Agreement Between the Board of Regents of the University of Wisconsin System and the University of Wisconsin Medical Foundation" ("Regents Agreement"). The Regents Agreement provides, in part:

> The Board of Regents recognizes that the Foundation is entering into this Agreement on the assumption that, other than open meetings, public records …, the Foundation may operate as a private non-profit, tax-exempt entity, free from the restrictions or requirements that apply to state agencies.

This agreement also provides that any physician appointed to the Medical School faculty must also accept employment with the Foundation.

[3] Dr. Wollheim asserts that the only communication he received regarding his termination came from the Foundation. He does not explain, however, why this assertion matters and, in particular, does not explain why this alleged fact matters for purposes of his argument that the Foundation is liable for not providing procedural guarantees.

¶6 On September 18, 2001, Dr. Wollheim sued the Foundation and the Medical School. Dr. Wollheim's subsequent amended complaint alleged that the Foundation and the Medical School breached contractual obligations when they terminated his fixed-term academic staff appointment prior to the end of the appointment term without affording him the procedural guarantees required by WIS. STAT. § 36.15.[4] Subsequently, the Medical School was dismissed from the action.[5]

¶7 With respect to the Foundation, the circuit court rejected Dr. Wollheim's argument that the Foundation was liable for any failure to comply with the termination procedures set forth in WIS. STAT. § 36.15. The circuit court then turned its attention to whether the Foundation needed "just cause" to dismiss Dr. Wollheim. The court concluded that just cause was required because Dr. Wollheim was not serving a probationary period when he was dismissed, but that the undisputed facts showed that just cause supported dismissal. The circuit court granted summary judgment in favor of the Foundation and dismissed the suit.

[4] The specific procedures that Dr. Wollheim asserts he was improperly denied are set forth in WIS. ADMIN. CODE Chapter UWS 11. However, for the most part, in this opinion we refer only to WIS. STAT. § 36.15. The parties do not dispute the particulars of Chapter UWS 11 or how those particulars should apply in this case. Rather, the question here, more generally, is whether the Foundation is liable for the alleged failure to provide Dr. Wollheim the procedural guarantees pursuant to § 36.15.

[5] Dr. Wollheim first named the Medical School as a defendant. He later substituted the University of Wisconsin Board of Regents for the Medical School. The parties, nonetheless, speak in terms of suit against the Medical School, and we follow their lead.

Discussion

¶8 The circuit court dismissed Dr. Wollheim's breach of contract claim against the Foundation on summary judgment. We perform summary judgment analysis *de novo*, applying the same method employed by circuit courts. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). That method is well established and need not be repeated in its entirety. *See*, *e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. It is sufficient to say here that summary judgment is appropriate when there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. *See id.*, ¶24.

¶9 Dr. Wollheim does not argue that there is a factual dispute that should have prevented summary judgment against him. Rather, he argues that, as a matter of law based on undisputed facts, the Foundation was liable for what he alleges was a failure to provide statutorily mandated procedural guarantees prior to his dismissal. More specifically, Dr. Wollheim argues that the Foundation breached its employment contract with him when it dismissed him without providing the procedural guarantees under WIS. STAT. § 36.15. It is undisputed that neither the Foundation nor the Medical School provided these procedures.

¶10 WISCONSIN STAT. § 36.15(3) directs that a person having an academic staff appointment may be dismissed only after "due notice and hearing." It is undisputed that Dr. Wollheim had an academic staff appointment within the meaning of the statute. We must resolve whether the Foundation is an entity that was required by § 36.15 to provide procedural guarantees, or whether the Foundation is otherwise liable for any failure to provide Dr. Wollheim applicable procedural guarantees mandated by § 36.15(3).

¶11 We begin by quoting WIS. STAT. § 36.15 and giving a brief description of that statute. Section 36.15 provides, in pertinent part:

> **36.15 Academic staff appointments.** (1) DEFINITIONS. In this section:
>
> ….
>
> (b) "Professional appointment" means an academic staff appointment for a fixed or indefinite term granted to a professional employee who is involved in the guidance or counseling of students, assisting the faculty in research, public service or in the instruction of students or who is involved in other professional duties which are primarily associated with institutions of higher education; including, but not limited to, such employment titles as visiting faculty, clinical staff, lecturer, scientist, specialist and such other equivalent titles as the board approves.
>
> **(2)** APPOINTMENTS. Appointments under this section shall be made by the board, or by an appropriate official authorized by the board, under policies and procedures established by the board and subject to s. 36.09(1)(i)….
>
> ….
>
> **(3)** PROCEDURAL GUARANTEES. A person having an academic staff appointment for a term may be dismissed prior to the end of the appointment term only for just cause and only after due notice and hearing.… In such matters the action and decision of the board, or the appropriate official authorized by the board, shall be final, subject to judicial review under ch. 227. The board shall develop procedures for notice and hearing which shall be promulgated as rules under ch. 227.

Subsection (2) above identifies who is authorized to bestow academic staff appointments. That authority rests with "the board, or … an appropriate official authorized by the board." In this instance, "board" means the Board of Regents of the University of Wisconsin System. *See* WIS. STAT. § 36.05(2). There is no evidence in the record that the Foundation, or any person acting on behalf of the

Foundation, is an "official" authorized by the Board of Regents within the meaning of § 36.15(2).

¶12 Subsection (3) of WIS. STAT. § 36.15 provides procedural guarantees with respect to dismissal to persons having an "academic staff appointment." This subsection states that the Board of Regents shall develop procedures for notice and hearing. This subsection also states that "[i]n [dismissal] matters the action and decision of the board, or the appropriate official authorized by the board, shall be final," with the exception that such decision is subject to judicial review.

¶13 Thus, it is apparent that the Board of Regents, or an official authorized by the board, is both an entity empowered to grant academic staff appointments and an entity required to comply with the procedural guarantees under WIS. STAT. § 36.15(3). The parties agree that the officials who acted on behalf of the UW Medical School were both authorized to grant academic staff appointments and, when dismissing Dr. Wollheim, were obligated to comply with the procedural guarantees promulgated pursuant to § 36.15(3). The question here is whether the Foundation is liable for the alleged failure to provide Dr. Wollheim the procedural guarantees pursuant to § 36.15.

¶14 The circuit court concluded that the Foundation was not obligated to comply with WIS. STAT. § 36.15(3). We agree and, in essence, have the same problem with Dr. Wollheim's argument as did the circuit court; that is, Dr. Wollheim has failed to connect the dots.

¶15 Dr. Wollheim reasons as follows:

1) The Foundation and the Medical School were joint employers and jointly hired him.

2) The Foundation and the Medical School jointly offered him an academic staff appointment.

3) He was dismissed from his academic staff appointment without benefit of the procedural guarantees required by WIS. STAT. § 36.15(3).

4) The Medical School was obligated to provide § 36.15(3) procedural guarantees when dismissing him and failed to do so.

5) The Foundation, as a party that offered him an academic staff appointment, and as a joint employer with the Medical School, was likewise obligated to provide § 36.15(3) procedural guarantees when dismissing him.

Although we agree with some of these assertions, we do not agree, either as a factual matter or as a legal matter, that the Foundation "jointly" offered Dr. Wollheim an academic staff appointment or that the Foundation is obligated under § 36.15 by virtue of its joint employer relationship with the Medical School.

¶16 At bottom, Dr. Wollheim fails to support his premise that, when two entities jointly employ a person, each has exactly the same obligations with respect to that person. Dr. Wollheim gives us no reason to think that joint employers cannot have, with respect to a joint employee, both joint obligations and separate obligations.

¶17 Dr. Wollheim asserts that the Foundation jointly offered him an academic staff appointment because one of the signators on the letter offering him his academic staff appointment was a representative of the Foundation. He broadly asserts that the Foundation "joined in the appointment of Dr. Wollheim to this position when it signed the appointment letter" and the Foundation "clearly participated in the appointment of Dr. Wollheim." But it is not apparent to us why each signator must be charged with having made every offer contained in the letter. Dr. Wollheim admits that representatives of the Medical School who signed

the letter were authorized to make the academic staff appointment offer. At the same time, he does not argue that any representative of the Foundation was authorized to offer such an appointment. Although certain offers in that letter may be joint, Dr. Wollheim provides no reason compelling the conclusion that the offer of an academic staff appointment was made by the Foundation. This is not to say that Dr. Wollheim does not make specific arguments, only that his arguments do not persuade us. We now turn our attention to Dr. Wollheim's specific arguments.

¶18 Dr. Wollheim asserts that the "trigger" for application of WIS. STAT. § 36.15(3) is his status as an academic staff appointee entitled to procedural guarantees under the statute. He contends that the statute does not address "who might be carrying out the termination or limit its application to exclude … terminations that might be carried out through the joint participation of a private entity." Instead, Dr. Wollheim says, the statute "simply invalidates any termination of a fixed-term Academic Staff appointment if it is not performed in the manner set forth." This argument goes nowhere. Even if one "trigger" for required compliance with § 36.15(3) is an employee's status as an "academic staff appointment," such status does not tell us *who* must comply.

¶19 In his effort to explain why the Foundation is contractually bound to comply, Dr. Wollheim relies on ***M&I First National Bank v. Episcopal Homes Management, Inc.***, 195 Wis. 2d 485, 536 N.W.2d 175 (Ct. App. 1995). He asserts that ***Episcopal Homes*** requires that WIS. STAT. § 36.15(3) and regulations promulgated pursuant to that statute are part of his employment contract with the Foundation as well as the Medical School. However, we conclude that ***Episcopal Homes*** does not provide support for such a proposition.

¶20 In ***Episcopal Homes***, two residents of a residential facility for the elderly owned by Episcopal Homes Management argued that their residency agreement with Episcopal Homes Management was a rental agreement subject to administrative code provisions governing landlord/tenant relationships. ***Id.*** at 488-89. A creditor, M&I Bank, seeking to avoid the consequences of the application of the administrative code, argued that the agreement did not establish a landlord/tenant relationship. ***Id.*** at 501, 503-05. After determining that the essence of the agreement was a rental agreement involving the exchange of money for housing, we concluded that the residency agreement constituted a rental agreement within the meaning of WIS. ADMIN. CODE § ATCP 134.02(10). ***Episcopal Homes***, 195 Wis. 2d at 500-06. We then stated: "Since we have concluded that [Episcopal Homes Management] and the residents contracted in a landlord/tenant relationship and forged a rental agreement, we must apply the relevant provisions of the administrative code to that agreement." ***Id.*** at 507.

¶21 As the Foundation points out, Dr. Wollheim ignores a critical distinction between ***Episcopal Homes*** and this case. In ***Episcopal Homes***, the path was direct—once we determined that the agreement was a rental agreement between Episcopal Homes Management and the residents, it followed that the relationship was subject to the administrative code provisions governing landlord/tenant relationships. In contrast, Dr. Wollheim has not demonstrated that the Foundation fits a category of entities that are subject to WIS. STAT. § 36.15 and, therefore, has not demonstrated that the Foundation was obligated to comply with § 36.15 in dealing with him.

¶22 In a separate section of his brief, Dr. Wollheim advances an alternative argument. He states that, even if we disagree with his contention that the Foundation was directly required to comply with WIS. STAT. § 36.15(3), the

Foundation is nonetheless liable for the Medical School's failure to comply. This is true, Dr. Wollheim argues, because it is well-settled law, "in the context of a joint undertaking by parties to a contract, [that] both are bound to the performance promised." According to Dr. Wollheim, the Foundation owes "all duties associated with the appointment" because the Medical School and the Foundation jointly offered Dr. Wollheim the academic staff appointment.

¶23 In support of this alternative argument, Dr. Wollheim points to and quotes the following language from RESTATEMENT (SECOND) OF CONTRACTS:

> Where two or more parties to a contract promise the same performance to the same promisee, each is bound for the whole performance thereof, whether his duty is joint, several, or joint and several.

RESTATEMENT (SECOND) OF CONTRACTS § 289(1), at 410 (1981). If Dr. Wollheim means to say that the restatement supports the proposition that, when parties jointly undertake to contract, both are bound to perform on promises made *by either party individually*, he is wrong. Rather, this restatement language says that, when a party makes a promise, that party is "bound for the whole performance thereof," even if the promise is made jointly with another. This principle does not advance Dr. Wollheim's position because it does not help him establish that the Foundation promised to abide by WIS. STAT. § 36.15 or WIS. ADMIN. CODE § UWS 11.11.

¶24 Dr. Wollheim also relies on ***Kennedy v. South Shore Lumber Co.***, 102 Wis. 284, 78 N.W. 567 (1899). In ***Kennedy***, a supplier of "saw logs" and a sawmill jointly employed a "scaler." Subsequently, the sawmill became dissatisfied with the scaler and unilaterally prevented him from working. The scaler sued the sawmill. ***Id.*** at 285-86. The ***Kennedy*** court discussed the

difference between terminating the scaler, something the sawmill was not contractually permitted to do without consent of the joint employer, and breaching the employment contract, something the sawmill could do and did do. *See* ***id.*** at 287-88. The ***Kennedy*** court stated:

> The [sawmill] could not terminate the contract of hiring without the consent of the joint employer, … but either joint party could commit a breach of it, rendering both such parties liable in damages to plaintiff; and upon settlement between such joint employers, the one at fault would be chargeable with the loss.

Id. at 288. Relying on a portion of the text we quote above, Dr. Wollheim characterizes ***Kennedy*** as holding "that a joint employer can be held liable for the other employer's breach." We agree that ***Kennedy*** provides some support for the proposition that a joint employer may be held liable for the other employer's breach, depending on the circumstances. But ***Kennedy*** does not address the issue we face today. That is, it does not address whether the sawmill was liable for a promise or obligation flowing between the other joint employer and the scaler *because of the joint employer relationship*. Thus, like the restatement on contracts, ***Kennedy*** fails to support Dr. Wollheim's argument that the Foundation is liable for any failure on the part of the Medical School to abide by a promise or obligation flowing solely between the Medical School and Dr. Wollheim.

¶25 Finally, Dr. Wollheim argues that, if we permit the Foundation to escape compliance with the statute and code, state agencies will be able to avoid compliance with statutes such as WIS. STAT. § 36.15 by using joint employment agreements with non-state entities. But Dr. Wollheim does not assert, much less show, that the Medical School's relationship with the Foundation caused the dismissal of his suit against the Medical School. Moreover, nothing we say in this opinion affects either the Medical School's obligation to comply with the

procedural guarantees required under § 36.15 or the right of a party to seek a remedy against the Medical School if it fails to comply with those procedures.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.