

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-1968
STATE OF WISCONSIN**

Cir. Ct. No. 99 CV 2980

**IN COURT OF APPEALS
DISTRICT I**

THOMAS J. OTTO,

PLAINTIFF-APPELLANT,

v.

MILWAUKEE COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
ELSA C. LAMELAS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Thomas J. Otto appeals from an order dismissing his complaint against Milwaukee County, which alleged violations of WIS. STAT. § 109.01(3) (1999-2000),¹ breach of contract, and promissory estoppel. Otto

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

claims: (1) the law of the case doctrine precluded a subsequent trial court from dismissing his claims because the first trial court denied earlier dispositive motions; (2) dismissal of his WIS. STAT. ch. 109 claim was erroneous; (3) the trial court erred when it dismissed his breach of contract claim based on insufficient pleadings; (4) the trial court erred when it granted Milwaukee County summary judgment dismissing his promissory estoppel claim; and (5) the trial court erred when it made damage determinations. Because we resolve each issue in favor of upholding the judgment, we affirm.

I. BACKGROUND

¶2 In 1980, Otto began working for the Milwaukee County Parks Department. His last full day of work was September 3, 1996. After that, he did not show up for work until December 2, 1996, when he worked for five hours. On December 3, 1996, Otto faxed a report from the veterans administration to the parks department indicating that he was permanently restricted from working.

¶3 Otto did not comply with the rules in order to document his time off from work. On December 6, 1996, he was notified that a meeting regarding his job status would be held on December 19, 1996. Otto appeared with his union representative and advised that his new physician had removed his work restrictions and cleared him to return to work. Otto promised to provide the County with this documentation. He never provided the promised documentation.

¶4 During the pay period ending December 28, 1996, Otto exhausted his paid sick leave allowance and all other accrued balances, and went off the payroll. In February 1997, the County filed charges with the Milwaukee County Personnel Review Board seeking Otto's removal from county service. When the charges were filed, no one told Otto that he was suspended. Otto received written

notice from the personnel review board that charges had been filed against him and that the County was seeking that he be discharged. The form stated that: “In conjunction with the above charges, the employee (is not) suspended without pay until the Personnel Review Board conducts its hearing on the charges and makes its decision thereon.”

¶5 Otto waived his right to a hearing before the personnel review board. On August 7, 1997, he filed a request with the pension board requesting ordinary disability retirement. The personnel review board hearing was delayed pending resolution of the disability request. His disability request was based on mental illness, including thoughts of harming his supervisors. In January 1998, the pension board granted his request effective August 7, 1997—the date he filed for the disability.

¶6 After Otto retired, the pending charges before the personnel review board were withdrawn as he was no longer an employee. On April 13, 1999, Otto filed a complaint against Milwaukee County, alleging a violation of WIS. STAT. ch. 109 and breach of contract. The basis of his complaint was that the County failed to pay him during the suspension period starting December 6, 1996, through January 14, 1998, which was the date he resigned. Otto made the assertions based solely on the language located at the bottom of the written charges form seeking his discharge, which was filed with the personnel review board. He believed that he was suspended with pay.

¶7 The County filed a motion for summary judgment. The Honorable Victor Manian denied the motion in February 2000. The case was later assigned to the Honorable Elsa C. Lamelas in August 2000. On November 1, 2000, the parties appeared for a jury trial. Before the trial began, the trial court dismissed

the breach of contract claim and adjourned the trial to allow Otto to amend the complaint. The amended complaint stated three causes of action: violation of WIS. STAT. ch. 109, breach of contract, and promissory estoppel. On December 1, 2000, the County filed a motion to dismiss the entire complaint. The trial court dismissed the ch. 109 claim and the breach of contract claim. Subsequently, the County filed a motion seeking summary judgment on the remaining promissory estoppel claim. At a hearing on April 23, 2001, the trial court dismissed the remaining claim. Otto appeals from the order dismissing his complaint.²

II. DISCUSSION

A. *Law of the Case.*

¶8 Otto's first complaint is that Judge Lamelas should not have granted the County's renewed dispositive motions because Judge Manian had already denied them. He contends that the law of the case precludes a subsequent trial court from changing a ruling previously made. Otto is incorrect.

¶9 Although it is true that, in general, "a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation[.]" *State v. Brady*, 130 Wis. 2d 443, 447, 388 N.W.2d 151 (1986), the rule is not absolute. A court may, in its discretion, reconsider a prior ruling in a case whenever cogent, substantial, and proper reasons exist. *Id.* at 447-48. As we will explain, the subsequent trial court

² In reviewing this matter, we note that Deputy Corporation Counsel Timothy R. Schoewe failed to comply with the appellate rules requiring citation to the record. We remind Mr. Schoewe that a brief to this court requires the appropriate citation to parts of the record on which the argument relies. WIS. STAT. § 809.19(1).

properly exercised its discretion and set forth proper reasons for granting the motions that were earlier denied. Accordingly, we cannot conclude that the subsequent trial court violated the “law of the case” rule.

B. Chapter 109 Dismissal.

¶10 Otto contends that the trial court should not have dismissed his WIS. STAT. ch. 109 claim. We are not persuaded. A motion to dismiss a complaint for failure to state a claim upon which relief may be granted tests the legal sufficiency of the pleading. *Evans v. Cameron*, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985). As a question of law, we review the trial court’s decision independently, while valuing the trial court’s analysis. We must affirm an order dismissing a complaint for failure to state a claim if, upon review of the complaint, as liberally construed, it is quite clear that under no conditions can the plaintiff recover based upon the facts alleged and inferences reasonably drawn. *Bartley v. Thompson*, 198 Wis. 2d 323, 332, 542 N.W.2d 227 (Ct. App. 1995).

¶11 Here, the ch. 109 claim centers on WIS. STAT. § 109.01(3), which provides the definition of wages:

“Wage” or “wages” mean remuneration payable to an employee for personal services, including salaries, commissions, holiday and vacation pay, overtime pay, severance pay or dismissal pay, supplemental unemployment benefit plan payments when required under a binding collective bargaining agreement, bonuses and any other similar advantages agreed upon between the employer and the employee are provided by the employer to the employees as an established policy.

Part of the dispute surrounding this issue is that the statute does not refer to “suspension pay,” which is what the complaint alleged the County failed to pay Otto. Otto suggests that the statute includes suspension pay even though it is not

specifically identified. We disagree. The statute defines “wages” as “remuneration payable to an employee for personal services” It is undisputed that Otto did not perform any personal services for the County during the period he claims the County should have provided suspension pay. Therefore, as a matter of law, Otto’s claim for “suspension pay” does not implicate this statute.

¶12 Moreover, Otto did not allege in his complaint that suspension with pay was an advantage agreed upon between the employer and the employee. Further, the complaint did not allege that “suspension pay” was an established policy between Otto and the County to bring the statute into play. Thus, from our review of the complaint, liberally construed, we conclude that Otto could not recover “suspension pay” under WIS. STAT. § 109.01(3). Accordingly, the trial court’s decision granting the motion to dismiss this claim was correct.

C. Contract Claim.

¶13 Next, Otto argues the trial court erred when it dismissed his contract claim. We disagree. The trial court granted the County’s motion to dismiss the contract claim. Accordingly, the standard of review applied to this claim is the same as indicated above.

¶14 The trial court provided the following analysis. The only reference to a contract in the amended complaint is found at paragraph 20 and states “[t]he discharge charges or the charging document is a contract or agreement obligating defendant to pay plaintiff his wages while suspended.” The trial court reasoned that even if this document were liberally construed as the County’s offering of “a contract,” the complaint does not allege that Otto accepted the offer and there is no evidence of consideration. Thus, the complaint fails to sufficiently allege that this document was a binding contract.

¶15 Further, Otto also suggests that the contract breached was the collective bargaining agreement between his union and the County. This agreement, however, does not contain any provision relative to “suspension with pay.” Moreover, the agreement contains an exclusive dispute resolution mechanism, i.e., final and binding arbitration, which Otto did not utilize.

¶16 Accordingly, Otto’s claim based on breach of contract was properly dismissed. He failed to allege that a binding contract existed. Without a contract, Otto could not succeed on a breach of contract claim.

D. Promissory Estoppel.

¶17 Otto also argues that the trial court erred when it granted the County’s summary judgment motion dismissing the promissory estoppel claim. We are not persuaded. In reviewing a grant of summary judgment, we employ the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We first examine the pleadings and affidavits to determine whether a claim for relief has been stated. *Id.* If a claim for relief has been stated, we then determine whether any factual issues exist. *Id.* If there is no genuine issue as to any material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the trial court’s decision granting summary judgment. *Id.* Our review is *de novo*. *Id.*

¶18 Otto’s complaint asserting promissory estoppel alleges that he understood the written charging documents to mean he was being suspended with pay, and that he relied on the statement in the charging documents to his detriment; that is, he did not apply for unemployment benefits because he believed he was suspended *with* pay.

¶19 In order to advance a claim for promissory estoppel, Otto must allege three elements: (1) a promise was made which one would reasonably expect to induce action or forbearance by Otto; (2) the promise induced such action or forbearance; and (3) injustice can be avoided only by enforcing the promise. *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965).

¶20 The trial court granted summary judgment on two grounds. First, it concluded that based on the facts and documents in this case, even if the charging document constituted a promise to Otto, it was unreasonable for him to rely on it. The trial court pointed out that Otto was not served with the charging documents until February 12, 1997. The written charging document contained the statement which Otto argues indicated he was suspended with pay. However, the document was served together with an additional notice indicating that Otto was not suspended from duty until a hearing and a decision by the personnel review board. Moreover, it is undisputed that the single sentence on the charging document was Otto's sole basis for believing he was suspended with pay. Otto was never advised by anyone at his place of employment that he was suspended and he never asked anyone whether he was suspended. The trial court concluded that based on these facts and circumstances, it would be unreasonable as a matter of law for Otto to construe the single written sentence as a promise that he was suspended with pay. We agree with the trial court's analysis on this issue.

¶21 Second, the trial court addressed the third element required for promissory estoppel—injustice. The trial court noted that the only “detriment” Otto claimed as a result of his reliance on the “promise” was that he did not apply for unemployment benefits. However, to be eligible for unemployment, an individual must be available for work and be able to work. WIS. STAT.

§ 108.04(1)(b). Based on Otto's contentions that his mental disorder prevented him from being able to work, Otto would not have qualified for unemployment benefits. Based on the foregoing, the trial court reasoned that not enforcing the promise would not create an injustice. Again, we agree with the trial court's analysis. Accordingly, the trial court did not err when it granted the County's motion for summary judgment on the promissory estoppel claim.

E. Damage Assessment.

¶22 Otto contends that the trial court erred when it determined the appropriate period for damages in this case instead of allowing the jury to address that issue. Because we have concluded that the trial court did not err when it dismissed Otto's complaint in its entirety, the damage issue is not dispositive and we decline to address it. *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed).

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

