COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2421 **Cir. Ct. No. 00CV2942**

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

JAMES C. THOMSON,

PLAINTIFF-APPELLANT,

V.

UNITED WATER SERVICES MILWAUKEE, LLC, AND UNITED WATER RESOURCES, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Reversed.*

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

¶1 PER CURIAM. James C. Thomson appeals from the order granting summary judgment and dismissing his breach of contract action against United Water Services Milwaukee, LLC, and United Water Resources, Inc. (collectively, UW). Thomson contends that the circuit court erred in granting summary judgment because a genuine issue of material fact remains in dispute –

whether he was laid off as part of an overall "workforce downsizing," in violation of UW's contractual obligation not to "layoff" former Milwaukee Metropolitan Sewerage District (MMSD) employees for ten years from the date UW took over MMSD's business operations. Regarding the proper definition of "layoff" under the contract, we conclude: (1) the contract's definition of "layoff" includes termination as part of an overall "workforce downsizing;" (2) "workforce downsizing" necessarily includes a reduction in the number of employees; and (3) "workforce downsizing" also includes termination as part of an overall plan to reduce labor costs. Because there remains a genuine issue of material fact as to whether Thomson was terminated as part of an overall "workforce downsizing," *i.e.*, whether he was terminated as part of an overall plan to reduce the number of employees or labor costs, we conclude that the circuit court improperly granted summary judgment.

I. BACKGROUND.

¶2 On May 21, 1990, Thomson was hired by MMSD.[1] In 1998, part of MMSD's business was privatized when United Water Services Milwaukee, LLC, a subsidiary of United Water Resources, Inc., took over certain MMSD operations. The transfer of operations was governed by a number of contractual agreements. One of the contracts MMSD entered into with UW required UW to agree to continue the employment of non-represented employees. Specifically, the contract stated that UW would not "layoff" former MMSD employees for a ten-year period from the commencement of business operations.

[1] A number of the facts involved in this appeal are taken from ***Thomson I***. *See* ***Thomson v. United Water Servs., LLC***, No. 00-3332, unpublished slip op. (WI App Oct. 9, 2001).

¶3 On February 10, 1999, slightly over a year later, UW offered early retirement to Thomson. He declined to accept and was subsequently offered early retirement again in July of 1999 and March of 2000. Finally, UW terminated Thomson on March 29, 2000. Thomson then commenced the present breach of contract action on April 12, 2000.

¶4 After filing his lawsuit, Thomson served the defendants with written interrogatories and document requests seeking all information related to UW's optimum staffing considerations, employee attrition schedules, and staff reduction expectations. UW refused to produce the requested documents, claiming they were irrelevant to the contract dispute. Thomson then filed a motion to compel discovery and UW moved for summary judgment. The circuit court denied Thomson's motion to compel discovery and granted UW's motion for summary judgment.

¶5 Thomson appealed the circuit court's rulings to this court. We concluded that the circuit court prematurely granted summary judgment because discovery was necessary to determine whether Thomson was laid off in violation of the contract. We also concluded that the circuit court should have granted Thomson's motion to compel discovery to permit Thomson an opportunity to prove that he was laid off as part of an overall workforce downsizing. Accordingly, the judgment was reversed and the cause was remanded to allow Thomson to complete discovery as to whether he was laid off, *i.e.*, whether any employee was hired to replace him or whether his termination was part of an overall workforce downsizing.

¶6 On remand, Thomson completed discovery. Through discovery, it was established that Thomson's termination led to a series of promotions from

within UW, followed by a new hire at the bottom of the chain of employment. Specifically, Thomson's position was filled by Mary Roe, a then-existing UW employee. Roe's position was then filled by Merlin Jacobs, also a then-existing UW employee. Jacob's position was then filled by Ken Moore, another UW employee. Finally, Moore's position was filled by Michael Kehoe, who was not an existing UW employee at the time of his hire.

¶7 Thomson was terminated on March 29, 2000. Kehoe was hired nearly two years after Thomson's discharge. At the time of his termination, Thomson was paid a biweekly salary of $2,099.20. His replacement, Roe, was paid a biweekly salary of $2,119.23. However, no additional information was offered by the parties or available in the record with respect to the wages of the other UW employees in question at the date of Thomson's termination compared to their new wages as of the date of their promotions. Further, no information is available regarding the wages of Kehoe at the date of his hire. Finally, no information exists in the record regarding the specific dates of the promotions or the new hire, except that Roe filled Thomson's position sometime after May 5, 2000.

¶8 On June 10, 2002, UW filed a second motion for summary judgment. On July 30, 2002, a hearing was held on the motion. At the summary judgment hearing, with respect to the eventual hiring of Kehoe to complete the chain of employment, Thomson argued:

> [T]he chain of events that is described by the defendant is not a chain of events at all. In fact, the person hired from the outside was not hired until two years after Mr. Thomson's discharge. And he was … [t]hree positions lower than Mr. Thomson's job…. And, to take the company's analysis, to bring in a janitor, for example, years after the fact to wipe away a prior layoff would provide no protection whatsoever to the individuals under the contract.

> ….
>
> [T]his fill occurred long after this lawsuit was filed.
>
> And, for an employer under a contract that employs with a guarantee of ten years without layoff, after a lawsuit is filed to then put somebody in a low-level position two years after the fact and then point to it and say, ["L]ook, there was no position elimination[,"] flies in the face of the protection that was afforded to the parties in the first place under the contract.

UW responded:

> [A]s we discussed, every position was filled and there wasn't a reduction as a result of his termination.
>
> In regards to the time it takes to fill these positions, I have got a number of points that go towards that. [O]bviously it takes time to fill these positions. There are certain requirements regarding posting and time for posting internally before they can interview. There [are] also probationary periods that go along with these positions, and they are not going to fill the promoted person's position until … that probationary time is gone.

The circuit court agreed with UW, and on August 19, 2002, it entered an order granting UW's motion for summary judgment.

II. ANALYSIS.

¶9 This appeal involves issues decided pursuant to summary judgment. We review a trial court's grant of summary judgment *de novo*, owing no deference to the trial court's decision. ***Deminsky v. Arlington Plastics Mach.***, 2001 WI App 287, ¶8, 249 Wis. 2d 441, 638 N.W.2d 331. Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995). Thus, we will reverse a decision granting summary judgment if either: (1) the trial

court incorrectly decided legal issues; or (2) material facts are in dispute. *See* ***Deminsky***, 249 Wis. 2d 441, ¶9.

¶10 Our summary judgment methodology is often repeated. We must first determine whether the complaint states a claim. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). If the plaintiff has stated a claim and the pleadings show the existence of factual issues, then we must examine whether the moving party has presented a defense that would defeat the claim. ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If the defendant has made a prima facie case for summary judgment, the court examines the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file to determine whether a genuine issue exists as to any material fact, or whether reasonable conflicting inferences may be drawn from undisputed facts, therefore requiring a trial. ***Green Spring Farms***, 136 Wis. 2d at 315. Thus, summary judgment is only appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. RULE 802.08(2) (2001-02).

¶11 In determining whether material facts are at issue, we must ask whether "only one reasonable inference may be drawn from the undisputed facts." ***Groom v. Prof'ls Ins. Co.***, 179 Wis. 2d 241, 249, 507 N.W.2d 121 (Ct. App. 1993). If so, "the drawing of that inference is a question of law, and an appellate court may draw it." ***Id.*** However, if review of the record reveals that disputed material facts exist or undisputed material facts exist from which reasonable alternative inferences may be drawn, then summary judgment is inappropriate. ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

¶12 In order to resolve the instant dispute, we must first revisit the definition of "layoff" under the contract between MMSD and UW. Then, we must apply that definition to the facts surrounding Thomson's employment situation in order to determine if there is any genuine issue of material fact as to whether a "layoff" occurred.

¶13 In ***Thomson I***, after analyzing the "no layoff" provision in the contract and the affidavits of those who had participated in the drafting of the provision, we concluded:

> [T]he contracting parties intended "layoff" to mean the arbitrary termination of an individual's employment. According to the affidavits, an example of an arbitrary termination is the dismissal of an employee for the purpose of eliminating that employee's position. However, under this contract, an employee is not laid off if someone is hired to replace the terminated individual. This was the intent of the parties and, therefore, Thomson, as a third-party beneficiary to the contract, is bound by the meaning intended by MMSD and UW.

Thomson v. United Water Servs., LLC, No. 00-3332, unpublished slip op. at ¶18 (WI App Oct. 9, 2001). Based on the intent of the parties, we further clarified that examples of a "layoff" under the contract include: (1) the termination of an employee for the purpose of eliminating that employee's position, *see* ***id.*** at ¶¶18-20; or (2) the termination of an employee as part of an overall "workforce downsizing," *see* ***id.*** at ¶23.

¶14 In ***Thomson I***, we indicated that one example of "workforce downsizing" is where an employee is terminated, and although that employee's position itself is not eliminated because it is "filled" by an inter-company transfer or through promotion, another individual is not "hired" to fill the vacancy in the company's workforce created by the termination. *See* ***id.*** at ¶¶19, 23-25. This

methodology is based on a "head count" analysis, which asks, "Was the overall head count of the workforce reduced, either directly or indirectly, by termination of that employee?" We will refer to this type of workforce downsizing as "head count downsizing."

¶15 However, a second type of "workforce downsizing" occurs when an employee is terminated, and although that employee's position itself is not eliminated and the overall head count is not reduced, the termination is part of an overall plan to reduce labor costs. For example, a company could terminate four employees who were each making $40,000 per year. The company could then hire four replacements and pay them each $10,000 per year, saving the company $120,000 in labor costs per year. In this type of example, although the overall head count may not be reduced, "workforce downsizing" occurs if the termination and subsequent new hire is part of an overall plan to reduce labor costs. We will refer to this type of workforce downsizing as "labor cost downsizing."

¶16 Here, Thomson claims both "head count" and "labor cost" downsizing. Thomson alleges:

> UW's own document entitled "Milwaukee Headcount" states that as of March 2000, UW had 236 employees, [and] as of April 2000[,] UW had only 234….
>
> The bottom-line is that UW's "targeting" of Mr. Thomson for discharge resulted in a reduction of UW's workforce…. The only person UW claims was "hired" … was one, Michael Kehoe, who was put into a low-level operator position nearly **2 years after** Mr. Thomson's discharge. Accordingly, these material issues of fact are appropriate for the jury to consider whether Mr. Thomson's discharge was a layoff….
>
> ….
>
> UW's claim that it derived no economic benefit from Thomson's discharge is also untrue. It is obvious that UW

> derived an economic benefit from the fact that UW's headcount was reduced….

(Emphasis in original.)

¶17 Therefore, we must first determine whether the nearly two-year delay in hiring an employee to fill the vacancy created by Thomson's termination was unreasonably lengthy, thereby negating any causal link between Thomson's termination and Kehoe's hire, and thus, resulting in "head count downsizing." Additionally, we must determine whether Thomson's termination was part of an overall plan to reduce labor costs, thus resulting in "labor cost downsizing."

¶18 We conclude that there remains a genuine issue of material fact as to whether Thomson's termination was a result of either head count or labor cost downsizing. With respect to head count downsizing, the crux of the matter is whether the nearly two-year delay in hiring a new employee to occupy the vacancy created by Thomson's termination was reasonable, or whether Thomson's dismissal was, in fact, part of an overall plan to reduce the number of employees, and that the subsequent new hire at the end of the employment chain was merely a guise designed to mask this plan.

¶19 The parties have presented arguments and evidence supporting both conclusions. In granting summary judgment, the circuit court concluded:

> Mr. Thomson was let go. Was that a layoff under this contract? There is no dispute that somebody got that position, so it is not that the position was terminated. There is an issue as to whether someone was hired. And I think that issue has to be answered in the context of the entire series of actions that happened here.
>
> This was a fact question. Somebody was brought into that position, which created another position within the company, and this started a series of needs to replace people. In the end result, in order to keep the same number

> of employees without cutting salaries or creating an economic benefit for the company, all the positions identified were filled. To say they have to be filled every day at all times I think is unreasonable. Obviously it takes time to post, to interview, to give people time under a probation agreement to show they can do the job before moving on to the next position.
>
> And I just don't think there is a factual showing that there is any lack of compliance with the good faith effort to fill these positions. [H]is position was filled by a person of equal or better salary, and whatever vacancies [that] were created were also filled, first inter-company and at the bottom of the chain by hiring from outside.

¶20 As appropriately stated by the circuit court, "This was a fact question," and while we conclude that the circuit court's analysis is reasonable, we also conclude that it is not the only reasonable conclusion that may be drawn from the facts. The trial court inferred that the nearly two-year delay was readily justifiable. However, one could just as easily infer that the nearly two-year delay demonstrates a lack of a reasonable effort to fill the vacancy and, ultimately, UW's intent to reduce its number of employees. One could also just as readily infer that hiring Kehoe was a remedy created to cover up the vacancy in light of the pending litigation.

¶21 Although counsel for UW offered a number of reasons for the delay at the summary judgment hearing, which the circuit court relied upon in rendering its decision, none of these rationalizations are present in the record. In fact, the only support for UW's argument that the nearly two-year delay was reasonable is an affidavit from Lois Stellmach, the Human Resources Manager for UW, who stated: "At no time did [UW] intend to not fill any of the positions…. Rather, whenever one of the positions was vacated and before [UW] hired a replacement it intended to fill and was in the process of filling the open positions." However,

this affidavit does not offer specific reasons why it took nearly two years to fill the vacancy.

¶22 Additionally, with respect to labor cost downsizing, there remains a genuine issue of material fact as to whether Thomson's termination was part of an overall plan to reduce labor costs. Although it is clear from the record that the person who filled Thomson's position actually made slightly more biweekly, it remains unclear whether the company derived an overall economic benefit considering the sum total of the four employees' salaries before Thomson's termination (Thomson, Roe, Jacobs and Moore), compared with the sum total of the four employees' salaries after Thomson's termination (Roe, Jacobs, Moore and Kehoe). If Thomson can establish that the post-termination salaries were significantly lower, he may be able to establish workforce downsizing by proving the planned reduction of overall labor costs.[2]

¶23 "We have often stated summary judgment is a drastic remedy and should not be granted unless the material facts are not in dispute, no competing inferences can arise, and the law that resolves the issue is clear." ***Lecus v. American Mut. Ins. Co. of Boston***, 81 Wis. 2d 183, 189, 260 N.W.2d 241 (1977). Here, "[t]he record is insufficiently developed to dispositively resolve these issues." *See* ***Estate of Hegarty ex rel. Hegarty v. Beauchaine***, 2001 WI App 300,

[2] On the other hand, we do not conclude that to avoid allegations of workforce downsizing, all positions must be filled every day at all times. We agree with the circuit court's understanding that it takes time to find a suitable replacement. Obviously it takes time to post job openings, locate suitable applicants, accept applications, complete an interview process, prepare an offer, and await acceptance. Here, however, the utter lack of evidence explaining the reason for the delay or providing the labor costs before and after Thomson's termination creates a situation where a number of genuine issues of material fact remain in dispute. Accordingly, a significant jury question exists.

¶55, 249 Wis. 2d 142, 638 N.W.2d 355. Thus, summary judgment was inappropriate.

¶24 Based on the foregoing reasons, the trial court is reversed.

By the Court.—Order reversed.

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