COURT OF APPEALS DECISION DATED AND FILED

July 24, 2003

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. 02-2958

Cir. Ct. No. 00-CV-2779

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

JAMES M. KRISKA,

PLAINTIFF-APPELLANT,

V.

MADISON AREA TECHNICAL COLLEGE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed*.

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

¶1 VERGERONT, P.J. This appeal requires us to construe an early retirement provision in an employment contract between James Kriska and Madison Area Technical College (MATC). The circuit court concluded that the contract did not require MATC to pay a supplemental contribution on Kriska's behalf to the Wisconsin Retirement System (WRS) and therefore granted summary

judgment in favor of MATC. Kriska appeals, contending that the contract language plainly requires MATC to make the contribution. We agree with the circuit court that the language of the early retirement provision is ambiguous, although our analysis differs somewhat. We further agree that, based on the undisputed evidence, MATC's construction best reflects the intent of the parties. We therefore affirm.

BACKGROUND

¶2 The relevant facts are not disputed. Beginning in 1979 until his retirement on June 30, 2000, Kriska was employed by MATC in an administrative staff position known as "controller." At the time of his retirement he was fifty-nine years old and had over thirty years of service in the WRS. From July 1, 1999 to June 30, 2000, he was employed pursuant to a "Notice of Appointment and Acceptance." This employment contract provided that Kriska's "appointment is made subject to all applicable laws, rules, regulations and board policies in existence or hereinafter created or amended during the term hereof." Among the applicable board policies were those contained in the "Administrative Conditions of Employment."

¶3 On January 21, 2000, Kriska gave MATC notice of his intent to retire on June 30, 2000. At that time, the "Administrative Conditions of Employment" provided:

> Retirement
>
> The Board shall pay the employee's portion of the contribution to the Wisconsin Retirement System. Employees retain full vesting rights to these contributions.
>
> Administrative staff who have been employed by the college for a period of ten (10) or more years and who have attained the age of fifty-seven (57) years, may elect to retire

> with 90 days notice to the college President. Under this option, the District will supplement the WRS payment so that the total benefit received is equal to the WRS benefit that would have been received had the employee been age sixty-five (65) on the date of retirement….

¶4 WRS, to which this provision refers, is the state's general system for providing post-retirement benefits to former state and state-affiliated employees. WIS. STAT. §§ 40.20-40.32 (2001-02).[1] MATC contributes to the WRS on a regular basis for its employees. The WRS has two methods of calculating benefits, and by law must pay the higher of the two. The formula method multiplies the employee's final average (of three highest years) monthly earnings times the formula factor for the employment category times the years of creditable service. WIS. STAT. § 40.23(2m)(e). If the employee at retirement is not at least fifty-seven years old with at least thirty years of creditable service, there is a specified reduction based on the employee's age, § 40.23(2m)(f), which is known either as an "actuarial reduction" or "age reduction factor." The money-purchase method multiplies the dollar amount in the employee's account at the time of retirement by an actuarial factor ("money-purchase factor"). *See* § 40.23(3). This factor is based on the employee's age at retirement and is higher if the employee retires at sixty-five than at fifty-nine.

¶5 The WRS assets are divided into two funds, a fixed fund and a variable fund, the latter involving more risk. Prior to 1981 state employees could choose to participate in the variable fund, and, if they did, 50% of their retirement contributions went into that fund and 50% into the fixed fund. Individuals who receive their benefits under the formula method and who participate in the variable

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

fund also receive a "variable adjustment," which is arrived at by multiplying the difference between the value in the employee's variable fund and the fixed fund account (either a "variable excess" or a "variable deficiency") times the money-purchase factor. *See* WIS. STAT. § 40.28.

¶6 WISCONSIN STAT. § 40.23(2m)(g) provides that an employer may elect to pay the cost of offsetting the actuarial reduction. The Department of Employe Trust Funds (DETF), which administers the WRS, *see* WIS. STAT. § 40.03, has established an "Actuarial Reduction Program." Employers may apply to participate in this program for any given employee by filling out an "Election to Pay Cost of Actuarial Reduction" form prior to an employee's termination date. Section 40.23(2m)(g) applies only to actuarial reductions under the formula method. There is no statute specifically addressing employer elections to offset the result of a lower money-purchase factor for employees retiring before sixty-five,[2] and no established DETF program for this purpose.

¶7 Kriska's WRS retirement benefits were computed under the formula method, because that was higher, and that method resulted in $4,700 or $4,800 per month. In addition, because he had participated in the variable fund and had more money in his variable fund account than his fixed fund, he was entitled to a variable adjustment of $700 to $800 in an additional monthly payment, arrived at using the money-purchase factor of his age at retirement—fifty-nine.

¶8 On the form Kriska filled out giving notice of his intent to retire, he did not check the line for "Supplement to eliminate WRS penalty." He did not

[2] WISCONSIN STAT. § 40.05(2)(g) does allow, generally, for employers to make contributions for any participating employee in addition to those required by statute.

check this because, in his words, he "didn't realize there was a penalty involved in my situation for retiring early." Soon thereafter, he learned from another individual that the money-purchase factor for computing the variable adjustment was less for employees retiring before sixty-five, and he began to wonder whether the "supplement" from MATC referred to in the early retirement provision applied to this situation. Consequently, on February 3, 2000, he emailed William Strycker, Vice-President of Human Resources for MATC, asking about MATC's interpretation of the early retirement provision. At that time he was not aware that MATC had ever made a supplemental payment under the provision to someone in his situation—that is, someone who was at least fifty-seven and had thirty years of service when they retired. Later in February, he emailed Strycker again, asking for a response to the question whether MATC would make a contribution of $27,791 to his retirement account to make his variable adjustment the same as it would have been if he had retired at age sixty-five. Strycker's memo in response stated that the supplement referred to in the early retirement provision was only for actuarial reductions. Kriska wrote Strycker again in April 2000 on the matter. He received a letter from MATC counsel advising that the early retirement provision contemplated a supplement only if the retired employee was receiving an annuity that involved an age reduction factor, which applied only to benefits paid under the formula method, not the money-purchase method.

¶9 Kriska retired on June 30, 2000. After MATC disallowed his claim for $27,791, Kriska initiated this lawsuit, alleging that MATC had breached its contract with Kriska by not making a contribution in that amount to his retirement account. On cross–motions for summary judgment, the circuit court concluded that the language of the early retirement provision was ambiguous. It then considered extrinsic evidence, which the court held was undisputed. The court

construed the provision to mean that MATC is to make a supplemental contribution only when the employee suffers an actuarial reduction under the WRS rules.

DISCUSSION

¶10 On appeal, Kriska contends the circuit court erred in construing the early retirement provision because it unambiguously requires MATC to supplement an employee's WRS payment not only when the employee is subject to an actuarial reduction under the formula method, but also when any benefits are computed by the money-purchase formula, under which the money-purchase factor varies based on the age of retirement.

¶11 We review a circuit court's grant of summary judgments de novo, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

¶12 The primary goal of contract construction is to determine and give effect to the parties' intention at the time the contract was made. ***Farm Credit Serv. v. Wysocki***, 2001 WI 51, ¶12, 243 Wis. 2d 305, 314, 627 N.W.2d 444. When the language of the contract is unambiguous, we apply its literal meaning. ***Id.*** If we determine the language is ambiguous, we then consider extrinsic evidence to arrive at the parties' intent. ***Id.*** Whether a contract is ambiguous in the first instance is a question of law, which we decide independently of the circuit court. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987). Ambiguity exists in a contract if it is reasonably susceptible to more than one meaning. ***Id.***

¶13 Because Kriska's Notice of Appointment and Acceptance provides that his employment was "subject to all applicable laws, rules, regulations and board policies" and because the early retirement provision in the "Administrative Conditions of Employment" refers to the WRS, we conclude that, in deciding whether the early retirement provision is unambiguous, we must consider the statute and regulations governing the WRS. The three categories of situations in which employees exercising the early retirement option under this contract provision receive less than they would receive if they were sixty-five on their retirement date[3] are: (1) employees whose benefits are computed under the formula method and who are subject to the actuarial reduction; (2) all employees whose benefits are computed under the money-purchase formula; and (3) all employees whose benefits are computed under the formula method, but who also have participated in the variable fund and have a variable adjustment. As we have indicated above, Kriska falls into the third category.

¶14 Kriska contends that the only reasonable construction of the early retirement provision is that it obligates MATC to supplement an employee's WRS payments in all three situations. That is certainly a reasonable construction, and MATC does not argue otherwise. However, we conclude Kriska's proposed

[3] Both parties appear to assume that the language of the early retirement provision does not require MATC to pay an employee who takes early retirement a supplement to equal what he or she would receive if he or she did not actually retire until the age of sixty-five. This makes sense because such a construction would be unreasonable in that it would require knowing facts that cannot be known unless an employee actually works until the age of sixty-five: for the formula method, it would require knowing the three highest years of earnings, the years of creditable service, and the employment category at the age of sixty-five; and for the money-purchase method, it would require knowing what would be in the employee's account when he or she reached sixty-five. Therefore, we agree with the parties' implicit assumption that, whatever MATC's obligation is under the early retirement provision, it is based on the amount of highest years of earnings, years of creditable service, employment category, and amount in the employee's account as of the date of early retirement.

construction is not the only reasonable construction. The statutory scheme governing WRS benefits specifically provides for the employer to elect to supplement the reduced benefits because of early retirement in only one of the three situations: when the employee is subject to the actuarial reduction under the formula method. WIS. STAT. § 40.23(2m)(g). In view of this statutory scheme, it is reasonable to construe the early retirement provision to obligate MATC only to supplement benefits as specifically provided by statute.

¶15 Because the early retirement provision, read in light of the statutory scheme governing WRS benefits is ambiguous, we look to evidence outside the employment contract to determine the intent of the parties. The undisputed evidence in this case is that DETF has a program for supplemental employer contributions only for employees who suffer an actuarial reduction under the formula method. It is also undisputed that, since the inception of its early retirement program in the 1980's, MATC has intended that the supplemental payment by MATC is only for those employees suffering an actuarial reduction because of early retirement and that is the only situation in which MATC has ever made a supplemental payment. It is also undisputed that during his employment at MATC, Kriska reviewed and paid bills sent by WRS after MATC had agreed to make supplemental payments for employees under MATC's early retirement program; he was familiar with MATC's application of the early retirement provision; and he was not aware of any payment made that was not based on an actuarial reduction. It was not until after he applied for early retirement that he began to think that the language of the early retirement provision was meant to include supplemental payments by MATC in other situations.

¶16 Kriska contends that when MATC deleted the word "reduced" in a prior version of the early retirement provision, that indicated an intent to no longer

limit the supplemental payments to actuarial reductions.[4] We disagree. Without a clear reference to "actuarial reduction" the prior version was also ambiguous; therefore, the removal of the word "reduced," when unaccompanied by any change in MATC's implementation of the provision, is not evidence of a change in its intent.

¶17 Kriska also contends that, if we conclude the contract is ambiguous, we must employ the rule of contract construction under which we construe an ambiguity against the drafter. *See, e.g.,* ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶24, 233 Wis. 2d 314, 328, 607 N.W.2d 276. However, we do not apply this rule when it is not consistent with the evidence of the parties' intentions. ***Wilke v. First Fed. Sav. and Loan Assoc. of Eau Claire***, 108 Wis. 2d 650, 655, 323 N.W.2d 179 (Ct. App. 1982). *See also* **Roth v. City of Glendale**, 2000 WI 100, ¶51, 237 Wis. 2d 173, 614 N.W.2d 467, (Sykes concurring) (This is a "default rule" of contract construction and default rules apply "only in the event of an unresolvable ambiguity—a tie—and only at the end of the process after extrinsic evidence has failed to clear up the question."). In this

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[4] The prior version provided:

> B. Administrative/Administrative Support Staff who have been employed by the District for a period of 15 or more years and who have attained the age of 60 years, may elect to retire under this policy with 90 calendar days advanced notice to the District Director. Upon such an early retirement, the Administrative/Administrative Support Staff member shall be eligible to receive a monthly retirement payment equal to that which the Administrative/Administrative Support Staff member would receive from the Wisconsin Retirement System, had retirement taken place at age 65. *This payment shall be a combination reduced Wisconsin Retirement System payment and District payment with the sum equal to age 65 benefit.*

(Emphasis added.)

case there is undisputed evidence of the parties' intent. The undisputed evidence is that MATC's use of the word "supplement" in the early retirement provision has consistently meant supplemental payments to employees who experience an actuarial reduction. There is no evidence that Kriska had a contrary understanding of that provision either at the time he entered into the July 1, 1999-June 30, 2000 contract or anytime before giving notice of early retirement.

¶18 Finally, Kriska suggests we may not consider the prior practice of MATC in applying the early retirement provision because this principle applies only when both parties have equal bargaining power and actively bargain. It is true that ***Cutler-Hammer, Inc. v. Industrial Comm'n***, 13 Wis. 2d 618, 625-26, 109 N.W.2d 468 (1961), on which the circuit court relied, involved a collective bargaining agreement, and that was therefore the context in which that court considered and applied the employer's past practice. However, the court did not hold that evidence of one or both parties' past practice was relevant only in that context; indeed, it recognized that whether evidence of past practice was relevant in construing a contract was "part and parcel of the more embracing issue of whether parol testimony of surrounding circumstances is admissible for such purpose." ***Id.*** at 625. Generally, when contract terms are ambiguous, evidence of practical construction by the parties is highly probative of the intended meaning of those terms. ***Zweck v. DP Way Corp.***, 70 Wis. 2d 426, 435, 234 N.W.2d 921 (1975). The fact that in this case the evidence of past practice is evidence of how MATC administered the early retirement provision with respect to other employees does not make that evidence irrelevant on the issue of MATC's and Kriska's intent.

¶19 We conclude that the construction of the early retirement provision that best expresses the intent of the parties is that it obligates MATC to make a

supplemental payment to the retirement account of persons selecting the early retirement option only if they suffer an actuarial reduction under WIS. STAT. § 40.23(2m)(f). Since it is undisputed Kriska suffered no actuarial reduction, the circuit court correctly concluded that MATC did not breach its contract with Kriska.

By the Court.—Order affirmed.

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