COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2010AP471
2010AP472

Cir. Ct. Nos. 2008CV134
2008CV330

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

STEVEN NICOLAI,

PLAINTIFF-APPELLANT,

V.

CITY OF WHITEHALL AND LEAGUE OF WISCONSIN MUNICIPALITIES MUTUAL INSURANCE,

DEFENDANTS-RESPONDENTS.

APPEALS from judgments of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Steven Nicolai appeals summary judgments in favor of his employer, the City of Whitehall. Nicolai brought an unpaid wage

claim against the City, pursuant to WIS. STAT. § 109.03(5),[1] and also sought a declaratory judgment that the City had misclassified him as an overtime-exempt employee and therefore owed him overtime wages. In the alternative, Nicolai alleged the City breached his employment contract by failing to compensate him for compensatory time it promised him in lieu of overtime. Nicolai also sought equitable relief. We conclude the circuit court properly granted summary judgment on Nicolai's § 109.03(5) wage claim, breach of contract claim, and equitable claims. However, summary judgment was improper on Nicolai's declaratory judgment claim because there are disputed factual issues as to whether Nicolai is an overtime-exempt employee. We therefore affirm in part, reverse in part, and remand for further proceedings on the declaratory judgment claim.

BACKGROUND

¶2 The City has employed Nicolai as superintendent of its municipal golf course since 1996. Whitehall Golfers, Inc., a private corporation, operates the course pursuant to a lease with the City. Under the lease, the City is required to provide one full-time employee—the golf course superintendent—who is responsible for maintaining the course. Whitehall Golfers employs all other employees required to operate the course and clubhouse, including a grounds crew that works under the superintendent's direction and supervision.

¶3 Nicolai is paid on a salary basis for a forty-hour workweek. The golf course is only open about seven months per year. Nicolai often works fewer than forty hours per week when the course is closed, but he sometimes works

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

more than forty hours per week during the golf season. When the City hired Nicolai, it informed him by letter that he was not eligible for overtime pay and would not be paid extra if he worked more than forty hours in a week. However, the letter stated Nicolai would "accumulate any extra hours worked beyond 40 hours per week as Compensatory Time." The letter referred Nicolai to the City's personnel policies "to inform [him] of all benefits and procedures."

¶4 From 1996 to 2008, the City's compensatory time policy provided:

> [E]mployees may receive, at their option, in lieu of overtime pay, compensatory time off at a rate of one and one-half (1½) hours for each hour of overtime or extra hours worked. Employees not eligible for overtime pay receive compensatory time earned, if required to work after or before regular hours.
>
> ….
>
> Public Safety Employees (Police) may not accrue more than 480 hours of compensatory time. All other employees may not accrue more than 240 hours of compensatory time.

Employees could use their compensatory time to take time off from work without using vacation or sick leave. When an employee stopped working for the City, the City paid the employee for all unused compensatory time at the employee's current rate of pay.

¶5 Employees' compensatory time balances were shown on pay stubs they received with their bi-weekly paychecks. According to Karen Witte, the city clerk/treasurer, before 2004, the City's computerized payroll system was not capable of limiting the amount of compensatory time that showed up on an employee's pay stub to 240 hours. However, in late 2004 the City acquired new payroll software capable of limiting employees' compensatory time balances. Thus, while Nicolai's last pay stub from 2004 showed a compensatory time

balance of 3,513.55 hours, his first paycheck of 2005 showed a balance of 240 hours.

¶6 In 2008, the City amended its compensatory time policy. Under the amended policy, overtime-exempt employees could no longer accrue compensatory time, but they were permitted to keep and use whatever compensatory time they had banked under the old policy. Like the old policy, the amended policy provided that both exempt and non-exempt employees would be paid for any unused compensatory time when their employment with the City ended.

¶7 Nicolai filed two wage claims with the department of workforce development, pursuant to WIS. STAT. ch. 109. He alleged the City was required to pay him for all unused compensatory time he had earned during his tenure as golf course superintendent—3,513.55 hours accrued from 1996 to 2004, and 334.54 hours accrued during 2005 and 2006. An investigator with the department's labor standards bureau concluded Nicolai could not assert wage claims under ch. 109 because he was "employed as a manager" and therefore was not an "employee," as ch. 109 defines that term. Nicolai sought administrative review of the investigator's decision. The labor standards bureau section chief upheld the decision, concluding that Nicolai, as a managerial employee, was not entitled to assert ch. 109 wage claims.

¶8 Nicolai then filed two lawsuits against the City in circuit court.[2] In each lawsuit, Nicolai asserted six claims: (1) a claim for declaratory judgment that

[2] Nicolai's first lawsuit alleged the City owed him overtime or compensatory time that he earned during 2005 and 2006. His second lawsuit sought overtime or compensatory time that he earned from 1996 to 2004, and during 2007.

he was not overtime-exempt and therefore was entitled to overtime pay; (2) a WIS. STAT. § 109.03(5) wage claim; (3) a breach of contract claim; (4) a promissory estoppel claim; (5) an unjust enrichment claim; and (6) a quantum meruit claim.

¶9 The City moved for summary judgment in both cases. The circuit court granted the City's motions. On the declaratory judgment claim, the court concluded Nicolai was an executive employee and was therefore exempt from statutory overtime requirements. Deferring to the department of workforce development's decision, the court also concluded Nicolai was a managerial employee and therefore could not bring a wage claim under WIS. STAT. § 109.03(5). On the breach of contract claim, the court determined Nicolai was not entitled to a payout of compensatory time under the City's compensatory time policy. Finally, the court concluded the facts of the case did not support any of Nicolai's equitable claims. Nicolai appealed the circuit court's judgments, and we consolidated the two cases on appeal.

DISCUSSION

¶10 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Szymczak v. Terrace at St. Francis***, 2006 WI App 3, ¶10, 289 Wis. 2d 110, 709 N.W.2d 103. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

I. Declaratory judgment claim

¶11 Nicolai first contends the circuit court erred by dismissing his declaratory judgment claim after concluding, as a matter of law, that he is an overtime-exempt employee.[3] The general rule is that an employee is entitled to overtime pay for any hours worked in excess of forty hours per week. 29 U.S.C. § 207(a)(1) (2010).[4] Certain employees, however, are exempt from statutory overtime requirements. *See* 29 U.S.C. § 213. The City contends that Nicolai is overtime-exempt under the executive exemption. *See* 29 U.S.C. § 213(a)(1). The executive exemption applies to any employee:

> (1) Compensated on a salary basis at a rate of not less than $455 per week …;
>
> (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
>
> (3) Who customarily and regularly directs the work of two or more other employees; and
>
> (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

[3] Nicolai's declaratory judgment claim also asked the circuit court to declare that he was entitled to a compensatory time payout under the City's compensatory time policy. This claim merely duplicates Nicolai's breach of contract claim and fails for the same reasons, which are set forth below. *See infra*, Part III. Accordingly, we decline to address separately this aspect of Nicolai's declaratory judgment claim.

[4] While Wisconsin has its own statutes and regulations governing overtime pay, for municipal employees like Nicolai, Wisconsin adopts the applicable federal overtime rules. *See* WIS. ADMIN. CODE § DWD 274.08 (Aug. 2005).

All subsequent references to the United States Code are to the 2010 version.

29 C.F.R. § 541.100(a) (2010).[5]

¶12 Nicolai argues there are factual disputes as to whether his position meets each of the executive exemption's four prongs. However, with respect to the first, second, and fourth prongs, Nicolai merely asserts that the facts are disputed, without specifically identifying any disputed facts. Because Nicolai does not elaborate on what facts he believes are disputed or why those alleged disputes are material, we will not address his argument regarding the executive exemption's first, second, and fourth prongs. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider undeveloped arguments); *see also* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (court of appeals has neither duty nor resources to "sift and glean" the record for facts supporting a party's argument).

¶13 However, because there are disputed issues of material fact with respect to the third prong of the executive exemption, we conclude the circuit court improperly dismissed Nicolai's declaratory judgment claim. The third prong of the exemption states that an executive employee "*customarily and regularly* directs the work of *two or more other employees*[.]" 29 C.F.R. § 541.100(a)(3) (emphasis added). The phrase "two or more other employees" means "two full-time employees or their equivalent. One full-time employee and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent." 29 C.F.R. § 541.104(a). To meet this requirement, an executive employee must supervise a combined eighty hours of subordinate help in a workweek. *See* ***Perez v. RadioShack Corp.***, 552 F. Supp. 2d

[5] All subsequent references to the Code of Federal Regulations are to the 2010 version.

731, 741 (N.D. Ill. 2005) ("[T]he court defers to the regulations and case law, all of which suggest that the [Fair Labor Standards Act] imposes a bright-line 80 hours per week subordinate supervision requirement in order for the executive exemption to apply."); ***Johnson v. Big Lots Stores, Inc.***, 604 F. Supp. 2d 903, 910-11 (E.D. La. 2009); ***Rubery v. Buth-Na-Bodhaige, Inc.***, 470 F. Supp. 2d 273, 277-78 (W.D.N.Y. 2007); *see also* ***Secretary of Labor v. Daylight Dairy Prods., Inc.***, 779 F.2d 784, 787 (1st Cir. 1985), *disapproved on other grounds by* ***McLaughlin v. Richland Shoe Co.***, 486 U.S. 128 (1988).

¶14 The phrase "customarily and regularly" means "a frequency that must be greater than occasional but which, of course, may be less than constant." 29 C.F.R. § 541.701. Federal courts have held that an employee "customarily and regularly" supervises two full-time subordinates if he or she supervises subordinates who work a combined 80 hours per week at least eighty percent of the time. *See, e.g.*, ***Perez***, 552 F. Supp. 2d at 741-42; ***Rubery***, 470 F. Supp. 2d at 278; *see also* ***Daylight Dairy Prods., Inc.***, 779 F.2d at 787-88 (supervising eighty hours per week seventy-six percent of the time "falls short of 'regular and customary' supervision").

¶15 Here, the parties agree that Nicolai supervises the seasonal grounds crew employed by Whitehall Golfers. However, the parties have submitted conflicting evidence on whether Nicolai regularly and customarily supervises eighty hours of grounds crew work per week. According to Nicolai, the grounds crew only worked a combined eighty hours per week during eleven weeks in 2002 (twenty-one percent of the year), three weeks in 2003 (about six percent of the year), zero weeks in 2004 (zero percent of the year), and eleven weeks in 2007 (twenty-one percent of the year). Based on this evidence, Nicolai argues that, even assuming he supervised every hour worked by the grounds crew, he never

supervised a combined eighty hours of subordinate work more than twenty-one percent of the time. He contends this does not constitute "customary and regular" supervision of eighty subordinate hours per workweek.

¶16 However, the City argues that the grounds crew worked about 2,200 hours during 2007 and 2,400 hours during 2008. The City notes that the golf season in northern Wisconsin ordinarily runs from April through October and lasts about twenty-eight weeks. Accordingly, the City contends the grounds crew worked an average of about eighty-two hours per week during the 2007 and 2008 golf seasons.

¶17 On this record, we conclude there are disputed issues of material fact as to whether Nicolai customarily and regularly supervises two full-time employees. Nicolai and the City dispute the number of hours worked by the grounds crew and whether those hours meet the eighty-hour standard frequently enough to constitute customary and regular supervision. The circuit court therefore erred when it determined, as a matter of law, that Nicolai met the third prong of the executive exemption. Accordingly, we reverse the summary judgments with respect to Nicolai's declaratory judgment claim and remand for a determination of whether Nicolai customarily and regularly supervises two full-time employees.

II. WISCONSIN STAT. § 109.03(5) wage claim

¶18 Nicolai next contends the circuit court erred by granting the City summary judgment on his WIS. STAT. § 109.03(5) wage claim. Subsection 109.03(5) provides, "Each *employee* shall have a right of action against any employer for the full amount of the employee's wages due on each regular pay day as provided in this section and for increased wages as provided in s. 109.11(2), in

any court of competent jurisdiction." (Emphasis added.) Thus, only an "employee" may assert a § 109.03(5) wage claim. An "employee" does not include "a person employed in a managerial … capacity …." WIS. STAT. § 109.01(1r). The department of workforce development concluded Nicolai is employed in a managerial capacity and therefore is not an employee for purposes of WIS. STAT. ch. 109. In granting summary judgment to the City, the circuit court deferred to the department's conclusion.

¶19 Nicolai and the City dispute what level of deference we should accord the department's conclusion that Nicolai is employed in a managerial capacity. However, the parties have incorrectly framed the issue. After the department dismissed Nicolai's wage claims, Nicolai filed two lawsuits in circuit court, but neither lawsuit sought review of the department's decision. Instead, Nicolai asserted an independent claim in the circuit court that he was entitled to recover under unpaid wages under WIS. STAT. ch. 109. Accordingly, this appeal requires us to review the circuit court's decision, not the department's. In so doing, we must interpret the phrase "employed in a managerial … capacity[,]" as it is used in WIS. STAT. § 109.01(1r). Statutory interpretation presents a question of law that we review independently. ***Landwehr v. Landwehr***, 2006 WI 64, ¶9, 291 Wis. 2d 49, 715 N.W.2d 180.

¶20 WISCONSIN STAT. ch. 109 does not define the term "managerial." In the absence of a statutory definition, we give the term "managerial" its ordinary and accepted meaning, as provided by a recognized dictionary. *See* ***Landwehr***, 291 Wis. 2d 49, ¶16. The common meaning of managerial is "of, relating to, or characteristic of a manager." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1372 (unabr. 1993). "Manager," in turn, is defined as "a person that conducts, directs, or supervises something." ***Id.***

¶21 Nicolai concedes that, as golf course superintendent, his primary duty is keeping the municipal golf course in good playing condition. Performing this duty requires him to train, direct, and supervise the grounds crew. It requires him to make recommendations to Whitehall Golfers regarding the purchase of equipment and supplies necessary to maintain the course. It requires him to make discretionary decisions regarding what fertilizer and pesticide to use, and whether the course should be aerated. It requires him to identify turf diseases and determine how to treat them. It requires him to comply with state and federal regulations and to submit reports to the department of natural resources evidencing compliance. Based on this undisputed evidence, we conclude Nicolai's job requires him to direct and supervise maintenance of the municipal golf course. That Nicolai's job entails some manual labor does not alter our conclusion. Accordingly, Nicolai is employed in a managerial capacity, and the circuit court properly granted the City summary judgment on his WIS. STAT. § 109.03(5) wage claim.

III. Breach of contract claim

¶22 Nicolai next argues that factual disputes preclude summary judgment on his breach of contract claim. This claim is more accurately described as a "breach of personnel policy" claim, as it is based on Nicolai's contention that, pursuant to the City's personnel policies, he is entitled to a payout of the compensatory time he earned under the City's pre-2008 compensatory time policy. The parties dispute the amount of compensatory time Nicolai accrued under the pre-2008 policy, with the City arguing Nicolai earned only 240 hours and Nicolai contending he earned over 3,000 hours. However, regardless of the number of hours Nicolai accrued, we conclude the circuit court properly granted summary

judgment because the City's policies indisputably do not entitle Nicolai to a payout of compensatory time.

¶23 The City's pre-2008 compensatory time policy only allowed an employee to receive a payout of compensatory time under one circumstance—termination of employment with the City. Similarly, the compensatory time policy enacted in 2008 provided that an employee could only receive a compensatory time payout upon termination. The City amended its compensatory time policy in 2010, and like the previous policies, the current policy only entitles employees to cash out their compensatory time when their employment terminates. Nicolai still works for the City. Accordingly, neither the pre-2008 policy, the 2008 policy, nor the current policy entitles him to a compensatory time payout. If Nicolai still has unused compensatory time when his employment with the City terminates, he may be entitled to a payout at that point. Until that time, though, the City's personnel policies do not require it to pay Nicolai for his unused compensatory time.

IV. Equitable claims

¶24 Finally, Nicolai contends the circuit court erred by granting summary judgment on his equitable claims. In the circuit court, Nicolai alleged he was entitled to recover under the equitable theories of promissory estoppel, unjust enrichment, and quantum meruit. On appeal, Nicolai merely asserts he is entitled to equitable relief, without identifying any particular theory of recovery. He does not identify the elements of promissory estoppel, unjust enrichment, or quantum meruit, nor does he explain how any disputed issues of material fact relate to those theories of recovery. Nicolai's argument is undeveloped, and we decline to

address it. *See* ***Pettit***, 171 Wis. 2d at 646-47. We therefore affirm the summary judgments with respect to Nicolai's equitable claims.

¶25 No costs to either party.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded for further proceedings.

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