COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1996

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

NOTICE

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

No. 95-2621

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

MICHAEL B. STERN,

Plaintiff-Appellant,

v.

VILLAGE OF BAYSIDE, A MUNICIPAL CORPORATION, AND JOSEPH TANSKI,

Defendants-Respondents,

E. FRANCINE PRESS,

Defendant.

APPEAL from judgment of the circuit court for Milwaukee County: ARLENE D. CONNORS, Judge. *Affirmed*.

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. Michael Stern was terminated from the position of assistant Village manager of the Village of Bayside. He sued the Village,

Joseph Tanski, Village manager and Village clerk, and E. Francine Press, Village president, claiming breach of contract and violations of 42 U.S.C. § 1983. He appeals from the summary judgment granted in favor of the defendants. Stern contends on appeal: (1) notwithstanding the apparent invalidity of his contract because of noncompliance with statutory requirements, the contract is binding on the Village under principles of equitable estoppel; (2) he was entitled to procedural due process before termination because he had a protected property interest and a protected liberty interest in his employment; and (3) the Wisconsin open meetings law gives him substantive rights in his employment.[1] We reject each of these contentions and affirm.

BACKGROUND

For purposes of this appeal, the following facts are undisputed. Stern applied for the position of assistant Village manager in the fall of 1992. He applied because he understood that Tanski would be retiring as Village manager and that the person hired as assistant manager would be able to advance to the position of manager within a relatively short period of time. Tanski contacted Stern in the fall of 1992 offering him the position and saying that he would send the contract.

Stern received in the mail a three-page document, with the first page titled "Employment Agreement." The first page referred to an attached job description, briefly dealt with the supervision and evaluation of job performance and responsibilities in the absence of the Village manager and described salary and benefits through 1993. The second and third pages contained sections on the term and termination of employment. The term was one year, with automatic renewal at the end of one year unless either party gave written notice of termination sixty days before the end of the one-year term. The permissible grounds for termination during the one-year term were death, disability and certain specified conduct by Stern, including willful failure to perform his duties and willful conduct injurious to the Village.

[1] The amended complaint also alleged defamation. The trial court granted summary judgment in favor of the defendants on the ground that they had a conditional privilege. Stern does not challenge that ruling on appeal.

On November 5, 1992, Stern met with Tanski; both signed and dated the first page of the three page document. Immediately thereafter, Stern attended the Village board meeting at which the board members unanimously passed a motion that Tanski be authorized to hire Stern as assistant Village manager "with salary and benefits to be written into a Labor Agreement." No Village official other than Tanski signed any of the three pages sent Stern.

Village ordinances and job descriptions pertaining to the Village manager and the Village clerk do not authorize either to enter into any employment or other contracts binding on the Village. Only the Village president has the authority to sign contracts and other documents pertaining to the Village's business.

Stern began working as assistant manager on December 5, 1992. Village Resolution 93-2 was passed and adopted on January 14, 1993, approving Stern's salary. On May 7, 1993, Tanski, Press and the Village counsel informed Stern that at a closed session of the Village board meeting on the previous evening, the board voted unanimously to terminate his employment. After another closed session of the board on May 13, 1993, Stern received a written notice that his employment was terminated effective July 14, 1993. Then, in an open session on June 24, 1993, the board again discussed Stern's termination and voted to terminate him effective August 27, 1993.

There were a number of newspaper articles concerning Stern's termination during May, June and July. Stern filed a notice of claim with the Village on approximately September 14, 1993, and provided a copy to the press. On September 21, 1993, Press sent a press release on Stern's termination to certain local newspapers.

We review 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 one party is entitled to judgment as a matter of law. Sections 802.08(2) and (6), STATS.

BREACH OF CONTRACT--EQUITABLE ESTOPPEL

The trial court concluded that defendants were entitled to judgment as a matter of law on the breach of contract claim because Stern did not have a valid contract with the Village and was therefore an employee at will. The court relied on § 61.50(1), STATS., which provides that "every contract ... or other written instrument shall be executed on the part of the village by the president and clerk, sealed with corporate seal, and in pursuance only of authority therefor from the village board...." For purposes of their summary judgment motion, the defendants admit that Tanski signed a three-page agreement with Stern, but contend that it was never approved, authorized or ratified by the board, never signed by the Village president, and does not contain the corporate seal as required by § 61.50(1).

Stern concedes that the three-page document he considers his contract did not comply with the requirements of § 61.50(1), STATS. However, he contends, the trial court erred in not ruling that the Village is equitably estopped from asserting noncompliance with § 61.50(1) as a ground for the contract's invalidity.

Before addressing the issue of equitable estoppel, we must discuss further the issue of compliance with § 61.50(1), STATS. It appears Stern concedes only that the three-page document was not signed by the Village president and sealed with the corporate seal. It appears he does not concede that the three-page document was not authorized by the Village board and instead contends that there are issues of fact concerning whether the board authorized a contract with him consisting of the three-page document.[2] We disagree and conclude that there is no evidence, including reasonable inferences from the evidence drawn in Stern's favor, that the board authorized a contract with Stern consisting of the three-page document.

The resolutions of the board passed on November 5, 1992, and January 14, 1993, show that the board authorized Tanski to hire Stern and

[2] Stern makes this argument in the context of arguing that he has an implied contract for purposes of his § 1983 due process claim, which we address in the next section. But this argument is also pertinent to the question of compliance with § 61.50(1), STATS.

authorized Stern's salary. There is no evidence that the board ever discussed, considered or approved any written contract with Stern or any terms of a contract with him, beyond the reference to salary and benefits in the November 5, 1992 resolution and the approval of his salary in the January 14, 1993 resolution.

Tanski's affidavit denies that he was authorized to sign employment agreements binding on the Village and avers that he was authorized only to "outline Mr. Stern's salary and other economic benefits" as set forth in the first page. The affidavit of Perry Cohn, the Village president on November 5, 1992, avers that he had no knowledge of any written contract entered into with, or signed by, Stern and never authorized Tanski or anyone else to enter into an employment agreement with Stern beyond salary and economic benefits. Press, a trustee on November 5, 1992, and later the Village president, avers that she was never aware of any written document concerning Stern's employment except the first page of the three-page document Stern claims is his contract, and she never signed any contract pertaining to Stern's employment while president.

Stern argues that the November 5, 1993 resolution authorized Tanski to "draw up Stern's employment agreement." It may be reasonable to infer from the wording of the resolution that Tanski was authorized to draft a labor agreement that contained terms other than salary and benefits. However, it is not reasonable to infer from the resolution that Tanski was authorized to enter into a binding agreement with Stern on behalf of the board without the board's or president's approval of the agreement. Such an authorization would be inconsistent with the job description of the Village manager and the authority reserved to the president under the Village ordinance. Given the affidavits of Tanski, Cohen and Press, the inference Stern draws from the language of the November 5 resolution is not sufficient to create a genuine factual dispute over Tanski's authority to enter into a contract on behalf of the Village consisting of the three pages.

Stern points to the fact that Tanski's affidavit does not deny that he represented to Stern that he had a three-page contract with the Village. Even if it is reasonable to infer that Tanski made such a representation to Stern solely from Tanski's failure to deny that he did so, that inference is not sufficient to create a genuine factual dispute over whether Tanski actually had the board's

authorization to bind the Village to a contract consisting of the three pages in light of the evidence showing that he did not.

Finally, Stern points to the testimony of counsel for the Village, Thomas Drought. Drought identified the second and third pages, from notations at the bottom, as form provisions of a standard employment contract originating from his office on approximately October 22, 1992. Drought did not recall giving these to Tanski, but he assumes he did--either in response to a request from Tanski or at his (Drought's) suggestion that he send some language to be included in a contract. Drought did not know whether Tanski ever gave Stern a copy of those two pages, whether they were part of Stern's contract with the Village, and he was not involved in hiring Stern. Stern argues that Drought's and Tanski's "knowledge must be imputed to the village." Even if Drought knew that Tanski wanted these contract provisions for Stern's contract, which is a doubtful reading of Drought's testimony, there is still no evidence that either Drought or Tanski were authorized to bind the Village to a contract containing the terms on the second and third pages.

Having concluded that the Village did not authorize a contract with Stern consisting of the three-page document, and that the document did not contain the signature of the president and the corporate seal, as required by § 61.50(1), STATS., we now consider whether the Village is equitably estopped from asserting the invalidity of the contract.

The elements of equitable estoppel are: (1) action or nonaction that (2) induces reliance by another (3) to his or her detriment. ***City of Madison v. Lange***, 140 Wis.2d 1, 6-7, 408 N.W.2d 763, 765 (Ct. App. 1987). Stern acknowledges that before estoppel may be applied to a governmental unit, the claimant must show by clear and convincing evidence that the government's conduct would work a serious injustice and the public interest would not be unduly harmed. *See* ***id.*** But he contends that the evidence in this case meets this standard. The defendants respond that equitable estoppel is not available, as a matter of law, to impose liability under a contract with a governmental unit that was entered into in a manner prohibited by statute.

The trial court did not address the issue of estoppel, although the defendants concede that Stern raised this issue in opposing their motion for

summary judgment. We conclude that the facts pertinent to this issue are not disputed, and we choose to address it. We conclude that the doctrine of estoppel is not available to Stern to impose liability upon the Village because the contract did not comply with § 61.50(1), STATS.

In ***Federal Paving Corp v. Wauwatosa***, 231 Wis. 655, 286 N.W. 546 (1939), the court considered a claim against a city for the reasonable value of paving work. The court in a related case had already held that the contract the paving company entered into with the city was void because the city had failed to comply with the bidding requirements under § 62.15(3), STATS. The city's defense in ***Federal Paving*** was that, since the contract was void, the company could not recover under a theory of unjust enrichment. The court agreed.

Relying on well-established Wisconsin precedent, the court in ***Federal Paving*** concluded that, because the statute prohibited the city from entering into the contract in any way other than the specified way, the contract was void for failure to conform to the mandatory requirements. ***Id.*** at 658-59, 286 N.W. at 547-48. That being the case, neither unjust enrichment nor estoppel was available to bind the municipality. ***Id.*** at 660, 286 N.W. at 548. Because the court recognized this result might appear harsh, it surveyed other authorities and concluded that Wisconsin precedent was "sustained by the great weight of authority." ***Id.*** The court was satisfied that this authority and prior Wisconsin decisions were "sound in principle if there is to be effective enforcement of mandatory statutes and avoidance of circumvention of statutory prohibitions."

Federal Paving is still good law, *see* ***Village of McFarland v. Town of Dunn***, 82 Wis.2d 469, 474, 263 N.W.2d 167, 170 (1978); and it is dispositive. Stern attempts to distinguish ***Federal Paving*** on the ground that § 61.50, STATS., does not prohibit the Village from entering into a contract of the type Stern claims he had with the Village. That is true. It was also true in ***Federal Paving***: the statute there did not prohibit entering into the type of contact the city had with the paving company but instead required that a certain bidding process be followed first.[3] The court in ***Federal Paving*** was not concerned with whether

[3] In the related case, ***Bechtold v. Wauwatosa***, 228 Wis. 544, 560-65, 280 N.W. 320, 321-23 (1938), the court found that the city had not followed the statutory requirements for bidding procedures and the court therefore determined that the contract was void even though there was no showing that any taxpayer had suffered loss as a result.

the object of the contract or the type of contract was prohibited, but with whether the statute prohibited "... creation of a contract in any but a specified way...." ***Federal Paving***, 231 Wis. at 660-61, 286 N.W. 548. By imposing certain requirements for contracts made by a village, § 61.50(1) prohibits the creation of a contract in any way but that specified in the statute.

Stern also argues that this case is distinguishable from ***Federal Paving*** and others on which that court relied because his claim does not involve "the appropriation of public funds but rather deals with binding the municipality to non-monetary contractual provisions." We do not consider this a meaningful distinction. One evident purpose of § 61.50(1), STATS., is protection against unauthorized expenditure or obligation of public funds. The contractual terms that Stern argues are binding on the Village affect the length of Stern's employment and the conditions under which he may be terminated. This certainly affects the appropriation and expenditure of public funds.

We have considered Stern's argument that he was misled into believing that Tanski had the authority to bind the Village to the terms in the three-page document. Assuming that is true, that does not, in view of § 61.50(1), STATS., and ***Federal Paving***, bind the Village as it might bind a principal that was not a governmental unit. One contracting with a governmental unit is charged with knowledge of the applicable requirements and limitations because that can be readily determined by consulting statutes or ordinances. *See* ***Waisman v. Wagner***, 227 Wis. 193, 199, 278 N.W. 418, 420 (1938);[4] 56 AM. JUR. 2D *Municipal Corporations* § 504 (1994).

[4] Stern points out that ***Waisman***, 227 Wis. 193, 278 N.W. 418 (1938), is distinguishable because the statute at issue there permitted the city to acquire land only for certain purposes. The ***Waisman*** court held the conveyance to the city void because there was no allegation that it was for one of the statutory purposes. ***Waisman***, 227 Wis. 199, 200, 278 N.W. at 420. That factual distinction, which may be significant in another context, does not undermine the purpose for which we cite ***Waisman*** here: whatever the nature of the statutory requirements for contracting with a governmental unit, a person contracting with that unit is charged with knowledge of those requirements.

SECTION 1983--PROCEDURAL DUE PROCESS

Stern contends that defendants violated his constitutional right to due process prior to his termination, thereby entitling him to relief under 42 U.S.C. § 1983.[5] Whether his right to procedural due process was violated depends, as an initial matter, on whether he had either a property interest or liberty interest protected by the Fourteenth Amendment to the United States Constitution. ***Board of Regents v. Roth***, 408 U.S. 564, 569 (1972). We agree with the trial court that he had neither.

Whether Stern had a protected property interest in his employment is determined under state law. ***Unertl v. Dane County***, 190 Wis.2d 145, 151, 526 N.W.2d 775, 777 (Ct. App. 1994). Under Wisconsin law, an employee who may be terminated only for cause has a protected property interest in his or her employment. ***Id.*** at 152, 526 N.W.2d at 777. Stern argues that under state law he had an implied contract, consisting of the three pages, with the Village. Because the second and third pages permit termination during the first year only for cause (absent death or disability), Stern argues that he had a protected property interest in his employment under state law. The trial court found there was no implied contract because there was no evidence that a board member was aware of the contract or made any assurances to Stern.

We agree with the trial court's reason for deciding that Stern did not have a property interest in his employment. An implied contract, like an express contract, requires the element of mutual meeting of the minds and of intention to contract. ***Schaller v. Marine Nat'l Bank of Neenah***, 131 Wis.2d 389, 398, 388 N.W.2d 645 649 (Ct. App. 1986). As we have discussed above, there is

---

[5] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

no evidence that the Village, or anyone authorized to act on its behalf in this context, was even aware of the terms on the second and third pages, which Stern claims are part of his implied contract and give him a property interest in his continued employment.

We reject the contention that, based on Tanski's conduct alone, there is or may be an implied contract under Wisconsin law. Tanski had no authority under state or local law to enter into a contract on behalf of the Village containing the terms on the second and third pages.

In the absence of a contract or statute giving Stern the right to be terminated only for cause, he does not have a property interest in his employment. *See* ***Unertl***, 190 Wis.2d at 152, 526 N.W.2d at 777.

Stern also contends he had a liberty interest in his post-employment reputation, protected by the Fourteenth Amendment, and that the defendants deprived him of this interest by: (1) the press release of September 23, 1993, and (2) the failure of the Village to comment before that time. We agree with the trial court that the undisputed facts show that Stern was not deprived of a protected liberty interest.

Termination of an employee implicates a liberty interest protected by the Fourteenth Amendment when either (1) the individual's good name, reputation, honor or integrity is at stake by charges such as immorality, dishonesty, alcoholism, disloyalty or subversiveness, or (2) the governmental unit imposes a stigma on the employee that forecloses future employment opportunities. ***Lashbrook v. Oerkfitz***, 65 F.3d 1339, 1348 (7th Cir. 1985). An unelaborated charge of incompetence, neglect of duty and malfeasance of office, like a charge of mismanagement, is considered of a different order than charges of dishonesty, immorality and disloyalty: the former are not sufficient to give rise to a liberty interest requiring a hearing. ***Hadley v. County of DuPage***, 715 F.2d 1238, 1245 (7th Cir. 1983). Anytime an employee is involuntarily terminated, some stigma may attach that may affect future employment possibilities; but this type of harm in and of itself does not infringe on one's liberty interest. ***Lashbrook***, 65 F.3d at 1348. Instead, the charges must have serious and severe repercussions so as to make it "virtually impossible" to find

new employment in that field. *See* ***Ratliff v. City of Milwaukee***, 795 F.2d 612, 625 (7th Cir. 1986).

The record does not disclose any public comments made by the defendants at the time Stern was terminated. The various articles published during the summer, before Stern filed the notice of claim, do not contain any statements by the defendants about Stern. It is undisputed that the press release was made after Stern filed a notice of claim, and supplied that to the press.

The negative comments the press release made about Stern were: he knew too little about fulfilling the requirements of the assistant Village manager's position; his superior reported that he did his job poorly; the Village manager recommended that Stern be dismissed because of inadequate job performance; he was negligent in his work; he failed to perform his duties; he did not perform his duty in that he asserted he knew of an ethics violation but did not write a report of that violation; he blames others for not disclosing an ethics violation that he failed to report; and his truthfulness was challenged when he denied that residents complained about his offensive treatment of them.

We conclude that, as a matter of law, these statements do not charge Stern with immorality, dishonesty, disloyalty or otherwise impugn his moral character or effectively foreclose future employment opportunities. The statements do charge negligence and poor job performance, but that is not sufficient for a claim of deprivation of a liberty interest. ***Hadley***, 715 F.2d at 1245.[6] The claim that his "truthfulness was challenged when he denied that residents complained about his offensive treatment of them" indicates a dispute between Stern and certain residents over his treatment of them rather than a charge of dishonesty or immorality of the type that would impugn his character.

---

[6] We are not here concerned with whether these statements are defamatory. As noted earlier, the trial court granted the defendants' summary judgment on the defamation claim and Stern has not appealed. For purposes of the deprivation of liberty claim, it is not sufficient that the statements are defamatory because there must be an inference of dishonesty or criminal behavior. ***Hadley v. County of DuPage*** 715 F.2d 1238, 1247 (7th Cir. 1983).

Stern provides no authority for his position that the defendants' *failure* to make a public statement about his termination at the time of his termination implicates a protected liberty interest. This contention lacks merit and we reject it.

SECTION 1983--OPEN MEETINGS LAW

Stern contends that the defendants violated a provision of Wisconsin's open meetings law, § 19.85(1)(c), STATS., by discussing and voting on his termination in closed session without giving him notice on two occasions--May 6 and May 13, 1995.[7] These two violations, Stern argues, entitle him to a remedy under 42 U.S.C. § 1983, in addition to remedies and penalties provided by statute.[8] It appears the remedy he seeks is voiding the actions taken by the board at those two meetings. He contends that the meeting on June 24, 1993, which did comply with the statute, did not provide an adequate remedy because the board had already made up its mind to terminate him.

---

[7] Section 19.85, STATS., provides in part:

> (1) ... A closed session may be held for any of the following purposes:
>
> ...
>
> (b) Considering dismissal, demotion, licensing or discipline of any public employe ... or the investigation of charges against such person, ... and the taking of formal action on any such matter; provided that the ... public employe ... is given actual notice of any evidentiary hearing which may be held prior to final action being taken and of any meeting at which final action may be taken. The notice shall contain a statement that the person has the right to demand that the evidentiary hearing or meeting be held in open session....

[8] Section 19.96, STATS., provides:

> Any member of a governmental body who knowingly attends a meeting of such body held in violation of this subchapter, or who, in his or her official capacity, otherwise violates this subchapter by some act or omission shall forfeit without

Stern does not explain the precise nature of the federal right he is asserting. In any event, we agree with the court in ***Callaway v. Hafeman***, 628 F. Supp. 1478, 1487 (W.D. Wis. 1986), that the Wisconsin open meetings law does not grant substantive rights to a terminated employee that are protected by the due process clause of the Fourteenth Amendment.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

(..continued)

> reimbursement not less than $25 nor more than $300 for each such violation....

Section 19.97, STATS., provides for enforcement by the district attorney and by the person with the complaint if the district attorney fails to commence an action when requested.