



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

March 19, 2014

To:

Hon. Jeffrey S. Froehlich
Circuit Court Judge
Calumet County Courthouse
206 Court Street
Chilton, WI 53014

Barbara Van Akkeren
Clerk of Circuit Court
Calumet County Courthouse
206 Court Street
Chilton, WI 53014

Randall R. Garczynski
Wisconsin Education Association Council
P.O. Box 8003
Madison, WI 53708-8003

Oyvind Wistrom
Lindner & Marsack, S.C.
411 E. Wisconsin Ave., #1800
Milwaukee, WI 53202

You are hereby notified that the Court has entered the following opinion and order:

2013AP2159-FT

Jennifer Berendsen v. School District of New Holstein
(L.C. # 2012CV85)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Jennifer Berendsen appeals from a judgment dismissing her claims against the School District of New Holstein arising from the district's failure to recall her from layoff once a teaching position became available. Pursuant to a presubmission conference and this court's order of October 16, 2013, the parties submitted memorandum briefs. Upon review of those memoranda and the record, we affirm.

The facts are undisputed. At the time she was laid off in February 2011, Berendsen was a business education teacher in the district. At that time, the district was a party to a collective bargaining agreement (CBA) that expired on June 30, 2011. Article IV, section 1 of the CBA granted recall rights based on seniority. On July 7, 2011, a business education teacher resigned,

but the district refused to recall Berendsen for the 2011-12 school year and hired another teacher. The district contended that because the CBA had expired, Berendsen had no right to be recalled.

Berendsen and the New Holstein Education Association sued the district for breach of the CBA. The circuit court granted summary judgment to the district because the district had no obligation to recall Berendsen once the CBA expired. The court reasoned that Berendsen's recall rights expired with the CBA. Berendsen appeals.

We review the circuit court's grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). "We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

On appeal, the parties agree that Berendsen's breach of contract claim only succeeds if the CBA, by its terms, created a recall right that the parties intended to survive the expiration of the CBA or if recall rights "vested" during the term of the CBA.

Berendsen argues that recall rights are the type of rights that survive the expiration of a CBA. She likens recall rights to retiree health benefits, which can survive the expiration of a CBA. *Roth v. City of Glendale*, 2000 WI 100, ¶¶25-29, 40, 237 Wis. 2d 173, 614 N.W.2d 467 (unless the current or future CBA states to the contrary, retiree health benefits are presumed to survive the expiration of the CBA). Berendsen reads *Roth* too broadly. *Roth* specifically addressed retiree health benefits and the public policy reasons favoring a determination that such

retirement benefits survive the expiration of the CBA. *Id.*, ¶¶27-32, 36. We do not read *Roth* to apply to all provisions of a CBA.

We find the analysis in *UAW Local 577 v. Hamilton Beach Manufacturing Co.*, 40 Wis. 2d 270, 162 N.W.2d 16 (1968), persuasive on the question of whether recall rights survive the expiration of a CBA. Seniority provisions, such as recall rights, are creatures of the contract. *See id.* at 281. The *Hamilton Beach* court noted that the seniority rights at issue in that case “can hardly be said to be vested” when a CBA sets out the ways in which seniority may be lost. *Id.* at 282. Likewise, in this case, Article V, sec. I(5) of the CBA provides that a teacher’s seniority ceases upon resignation, discharge, a layoff exceeding two years, and failure to report for re-employment. Because the CBA contemplates the circumstances under which seniority can be lost, we conclude that Berendsen’s recall rights under the CBA did not vest. *See id.* at 281.

We are further persuaded by *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 193, (1991), in which the Court addressed whether layoffs occurring after the CBA expired were governed by the expired labor agreement. The Court concluded that the layoff grievances were subject to the expired labor agreement’s arbitration clause only if the grievances involved rights that either vested under the agreement or “carried over” after the agreement expired. *Id.* at 209. We held above that Berendsen’s recall rights were not vested and did not survive the expiration of the CBA. *Litton* does not dictate a different result.

The circuit court did not err in granting summary judgment to the district.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is affirmed.

Diane M. Fremgen
Clerk of Court of Appeals