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DISTRICT I

February 13, 2024

To:

Hon. Hannah C. Dugan
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Appeals Division
Electronic Notice

Ralph J. Ehlinger
Electronic Notice

Gabe Johnson-Karp
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1557 Kevin J. Renken v. Mark A. Mone (L.C. # 2019CV8966)

Before White, C.J., Donald, P.J., and Geenen, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kevin J. Renken appeals an order of the circuit court denying his claim for attorney fees and costs under the Wisconsin Equal Access to Justice Act (WEAJA). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1]

Renken is a professor of mechanical engineering at the University of Wisconsin-Milwaukee (UWM). In February 2019, seven members of the faculty in UWM's mechanical

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

engineering department, including the department chairperson, filed a complaint against Renken. The complaint contained detailed allegations of Renken's allegedly "disruptive, abusive and bullying behavior," in violation of UWM's Code of Conduct, and alleged that Renken had a long history of abusive conduct. The committee responsible for reviewing complaints against faculty referred the complaint to the Faculty Rights and Responsibilities Committee (FRRC), which "conducts fact-finding concerning allegations of misconduct ... and makes recommendations to the Chancellor concerning disciplinary action."[2] Renken filed a response to the complaint denying that he had a long history of abusive behavior, but largely ignoring the specific complaints about his conduct. Ultimately, the FRRC issued a tentative determination, finding a number of the allegations credible and that the behavior violated the UWM Code of Conduct. The FRRC recommended that Renken be excluded from department and college meetings and committees for one year, that he undergo counseling before being allowed to return, and that a formal letter of reprimand be placed in his personnel file. Renken responded to the FRRC's findings by simply highlighting the portions with which he disagreed and generally stating that he disagreed with the FRRC's findings. Based on Renken's history of combative behavior, the FRRC amended its disciplinary recommendation to a suspension for two academic years without pay and specified that future similar conduct should be seen as "misconduct of sufficient magnitude to warrant consideration of dismissal for cause." The FRRC forwarded its findings and recommendation to the Chancellor.

[2] *See* University of Wisconsin-Milwaukee Policies and Procedures (July 2018), §5.44(4), https://web.archive.org/web/20190206001943/https://uwm.edu/secu/wp-content/uploads/sites/122/2014/06/PP-Chapter5.pdf (last visited Feb. 5, 2024).

After the FRRC submitted its recommendation to the Chancellor, Renken submitted a response to the FRRC stating that he wished to invoke his right to a hearing. The FRRC responded that because it had completed its investigation and made its recommendation, the FRRC procedures no longer applied. In short, Renken's request for a hearing was untimely. Renken then submitted written objections to the FRRC's findings denying some conduct but primarily arguing that multiple statements attributed to him and discussed in the findings were protected by the First Amendment and did not constitute bullying. Renken also alleged that he was denied his right to a hearing, and again requested a hearing on the matter.

The Chancellor disagreed, adopting most of the FRRC's findings and denying Renken's request for a hearing because Renken did not request one during the FRRC's investigation. The Chancellor did not adopt the FRRC's disciplinary recommendation; instead, he reduced the suspension without pay from two years to one year; cancelled Renken's fall 2019 semester sabbatical; banned Renken from campus during his suspension; and forbade contact with individuals from UWM except through a dean or assistant dean.

Renken sought judicial review of the Chancellor's decision pursuant to WIS. STAT. CH. 227, challenging the merits of the decision as well as his right to a hearing. The circuit court found that Renken should have received a hearing and remanded the matter back to UWM for an administrative hearing. The circuit court did not address the merits of Renken's petition.

After the circuit court remanded the matter to UWM for a hearing, Renken filed a motion for attorney fees and costs pursuant to the WEAJA, claiming that he was the "prevailing party" and that an award of fees in his favor was required because the Chancellor's decision was not "substantially justified." Renken also sought fees and costs associated with a dismissed federal

proceeding stemming from the same faculty complaint. The circuit court denied the motion as premature, noting that its remand order did not make Renken a prevailing party at that point.

Following the circuit court's remand order, a new FRRC committee held a hearing and found that the Chancellor "had just cause to impose discipline upon Professor Renken based on five findings of misconduct and violations of provisions of the UWM Code of Conduct." The FRRC submitted its findings and recommendations to the Chancellor. The Chancellor agreed with the FRRC's recommendation to impose a loss of sabbatical, a behavioral assessment, additional training, and a prohibition on serving on faculty committees.

Renken then renewed his motion for attorney fees and costs under the WEAJA, claiming that he was now a prevailing party. The circuit court denied the motion, noting that while Renken was a "partially" prevailing party, he was not entitled to fees and costs because the Chancellor "acted in a substantially justified manner" when he initially denied Renken's request for a hearing. Specifically, the circuit court stated that while Renken was indeed entitled to a hearing, it was not unreasonable for the Chancellor to find Renken's hearing request untimely under the governing procedures. This appeal follows.

Pursuant to the WEAJA, a circuit court must award fees when the statutory prerequisites are met:

> [I]f an individual ... is the prevailing party in any action by a state agency ... and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

WIS. STAT. § 814.245(3). In other words, two conditions must be met before the court is required to award a party attorney fees: (1) the party is the prevailing party; and (2) the state agency was not substantially justified in taking its position, or special circumstances exist that would make the award unjust. The relevant issue here is whether the Chancellor was substantially justified in determining that Renken was not entitled to hearing.

For purposes of the WEAJA, the term "substantially justified" means "having a reasonable basis in law and fact." WIS. STAT. § 227.485(2)(f). The government has the burden to prove its position was substantially justified. ***Sheely v. DHSS***, 150 Wis. 2d 320, 337, 442 N.W.2d 1 (1989). To meet its burden, the government "must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." ***Id.***

The mere fact that the government did not completely prevail at a contested case hearing does not raise a presumption that its position was not substantially justified. ***Id.*** at 338. Moreover, the ***Sheely*** court observed that, "when a state agency makes an administrative decision and the agency's expertise is significant in rendering that decision, [we] will defer to the agency's conclusions if they are reasonable; even if we would not have reached the same conclusions." ***Id.*** Ultimately, we review the circuit court's decision on whether a government agency's position was substantially justified for an erroneous exercise of discretion. ***Id.*** at 337. We uphold discretionary determinations if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. Because the circuit court did not err in determining that the Chancellor was substantially justified

in denying Renken a hearing, we agree that Renken is not entitled to attorney fees and costs associated with this matter.

Turning to the three questions we must consider, we first address whether there was a reasonable basis in truth for the facts alleged in the complaint against Renken. As the circuit court stated, the facts underlying the complaint are not disputed. Renken did not deny much of the conduct alleged, including allegations that he referred to his colleagues using derogatory language, swore repeatedly during meetings, and insulted colleagues in meetings. Renken also did not deny that he first sought a hearing after the initial FRRC completed its investigation.

Next, we conclude that the circuit court reasonably found that there was a reasonable basis in law for the Chancellor's decision. The circuit court found that the governing regulation—WIS. ADMIN. CODE § UWS 6.01—was unclear as to whether or when the Chancellor was required to grant Renken's request for a hearing.[3] Specifically, the circuit court stated that

[3] WISCONSIN ADMIN. CODE § UWS 6.01 provides:

> The faculty of each institution, with the approval of the chancellor, shall establish rules and procedures to deal with allegations by the administration, students, academic staff members, other faculty members, university staff members, or members of the public concerning conduct by a faculty member which violates university rules or policies, or which adversely affects the faculty member's performance of his/her obligation to the university but which allegations are not serious enough to warrant dismissal proceedings under ch. UWS 4. Such rules and procedures shall include, but not necessarily be limited to, the following:
>
> > (1) Review of and administrative action on the complaint by the chancellor. Administrative action may include dismissing the complaint, invoking an appropriate disciplinary action, or referring the complaint to the standing faculty committee created under sub. (2).
> >
> > (2) Provision for a hearing before a standing faculty committee selected by the faculty of each institution in such manner as they shall determine. Such hearing shall be held at the request of the

(continued)

while the administrative code addresses hearing requests upon the Chancellor's review of a complaint against a faculty member, UWM's internal policies and procedures provide an opportunity for a hearing during the FRRC investigation, which occurs prior to the Chancellor's review. The circuit court found while the plain language of § UWS 6.01 required the Chancellor to grant Renken a hearing upon his request, it was not unreasonable for the Chancellor to find the request untimely in accordance with the UWM's internal policy. The fact that the circuit court disagreed with the Chancellor's determination does not compel a conclusion that the Chancellor's determination lacked a reasonable basis in law. *See* ***Sheely***, 150 Wis. 2d at 338.

We also conclude that there is a reasonable connection between the facts alleged and the legal theory advanced by the Chancellor. As stated, there is no material dispute as to the allegations in the complaint. Renken did not deny the bulk of the allegations. Those allegations were also investigated by the FRRC, in accordance with UWM's policies and procedures, and Renken requested a hearing after the investigation was completed. Based on his interpretation of the relevant procedural regulations, the Chancellor denied the hearing request and substantially agreed with the FRRC's factual determinations. The connection between the facts at issue and the Chancellor's decision, though ultimately found to be erroneous by the circuit court, is clear.

> chancellor or, if the chancellor invokes a disciplinary action, at the request of the faculty member concerned.
>
> (3) Guarantee of adequate due process to include, but not limited to, written notification of the complaint, fair and complete hearing procedures, written statement of findings, transmittal of findings to the faculty member involved and appropriate administrative officials within a reasonable period of time, and prohibition of further jeopardy for the same alleged misconduct after a final decision.

For the foregoing reasons, we affirm the circuit court.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals