COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP964 **Cir. Ct. No. 2011CV1090**

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

DENNIS W. CAHOON,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AMERICAN FAMILY LIFE INSURANCE COMPANY AND AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Winnebago County: JOHN A. JORGENSEN, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Dennis Cahoon, a former American Family Mutual Insurance Company agent, appeals from a judgment dismissing his complaint against American Family Mutual Insurance Company on summary judgment.

Cahoon alleged that American Family wrongfully terminated him and breached its duties of good faith and fair dealing. American Family terminated Cahoon as a result of unlawful conduct involving a co-worker. We affirm the circuit court's grant of summary judgment.

¶2 On January 25, 2011, Cahoon was arrested for false imprisonment, battery and disorderly conduct. The arrest arose out of Cahoon's conduct, during business hours, toward a customer service representative employed in his American Family insurance agency office. Tim Hetzel, an American Family district manager, first learned of Cahoon's conduct from another agent who heard about it from an acquaintance of her daughter.

¶3 As of January 28, the criminal charges against Cahoon appeared in Wisconsin Circuit Court Access, a database of pending cases in the Wisconsin courts. Hetzel viewed the case record that day. Over the next two to three days, Hetzel learned more details about the January 25 incident and shared that information with his superiors. In a January 30 e-mail to one of those superiors, Keith Ryniak, Hetzel related that workers in the optical shop adjoining Cahoon's office heard the January 25 disturbance and were aware of prior disturbances in Cahoon's office. Hetzel told Ryniak that the doctor who runs the adjoining optical shop had warned Cahoon that the disturbances affected his customers and operations, and if the conduct did not stop, the doctor would contact the police. Hetzel opined that "our image to the public has been damaged by this ongoing abusive relationship at our agency."

¶4 In a midmorning January 31, 2011 telephone conference, Hetzel informed Cahoon that he was being terminated as an American Family agent because he failed "to uphold[] a[n] image in the community." By the early

afternoon of January 31, Hetzel had a copy of the Oshkosh Police Department incident report which formed the basis for the charges against Cahoon. Hetzel believed that the decision to terminate Cahoon had already been made based upon the information previously gathered.[1] Hetzel e-mailed Cahoon on February 1 confirming the termination of his agency. American Family sent Cahoon a letter dated February 2 terminating his agency as of February 1 for the reasons set forth in the January 31 telephone conference.

¶5 Cahoon availed himself of the termination review provisions of his American Family Agent Agreement (the agreement). The termination was affirmed upon review. Cahoon then filed his wrongful termination complaint. The circuit court dismissed Cahoon's complaint on summary judgment after concluding that it was undisputed that American Family had cause to terminate Cahoon due to his conduct and properly terminated him under the terms of the agreement. Cahoon appeals.

¶6 Our review is de novo, both with regard to summary judgment and the construction of the American Family Agent agreement. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994) (summary judgment); ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis. 2d 105, 115, 479 N.W.2d 557 (Ct. App. 1991) (contract construction). "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).

[1] Termination authority rested with Richard Steffen, Regional Vice President of Sales, not Tim Hetzel. Steffen made the ultimate decision to terminate Cahoon.

¶7 On appeal, Cahoon argues about whether he was an "at will" employee under the agreement. We are not required to address an appellate argument in the manner which a party has framed the issue. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). The issue is not whether Cahoon was an "at will" employee. The issue is whether Cahoon's termination was appropriate under the terms of the agreement.

¶8 Cahoon argues that the agreement afforded him six months of notice before he could be terminated. While the agreement provides for six months of notice, that notice provision does not apply to Cahoon in this case. The provision upon which Cahoon relies, sec. 6.h.2., states that for two years after the agreement's effective date, American Family had to give Cahoon written notice of undesirable performance that would lead to termination and could not terminate Cahoon for six months after such notice. However, as applied to this case, sec. 6.h.2. goes on to state: "In no case shall notice of undesirable performance be required prior to termination if the performance in questions involves a violation of Sec. 4.i. or any other dishonest, disloyal or unlawful conduct…." Section 4.i. requires the agent to maintain a good reputation in the community.

¶9 Section 6.h.2. clearly distinguishes between (1) the requirement of six months notice of undesirable performance which could lead to termination if not corrected and (2) no requirement of notice if the undesirable performance violates the agent's sec. 4.i. obligation to maintain a good reputation in the community or involves "dishonest, disloyal or unlawful conduct." There is no dispute in the summary judgment record that Cahoon engaged in unlawful,

criminal conduct against a member of his office staff,[2] and that persons outside American Family were aware of his conduct because the disturbances were overheard on more than one occasion. Cahoon was not entitled to six months of notice under the agreement.[3]

¶10 Cahoon next argues that American Family breached the implied duty of good faith and fair dealing under the agreement because it did not conduct a fair and impartial investigation before terminating him.[4] A party alleging breach of the duty of good faith must show that the other party "actually denied the benefit of the bargain originally intended by the parties." ***Zenith Ins. Co. v. Employers Ins. of Wausau***, 141 F.3d 300, 308 (7th Cir. 1998) (citation omitted). The bargain is set out in the agreement Cahoon signed. Cahoon received the process contemplated by the agreement: termination without notice for unlawful conduct and for conduct that violated sec. 4.i., and access to the sec. 6.i. termination review procedure.

[2] After he was terminated, Cahoon reached a plea agreement and was convicted of two counts of disorderly conduct arising out of the disturbance in his American Family agency office.

[3] Cahoon relies upon an unpublished decision of this court, ***Dan Samp Agency, Inc. v. American Family Mutual Insurance Co.***, No. 2005AP1918, unpublished slip op. (WI App Aug. 30, 2007), to dispute whether the disturbance occurred in his capacity as an American Family agent. ***Samp*** is distinguishable. In ***Samp***, the court held that the insurance agent did not engage in unlawful conduct. ***Id.***, ¶2. In contrast, it is undisputed that Cahoon engaged in unlawful conduct vis-à-vis his customer service representative while acting as an American Family agent (the conduct occurred in the agency office during business hours). It is also undisputed that members of the community were aware of this conduct, which diminished Cahoon's reputation in the community. ***Samp*** does not apply.

[4] Cahoon also argues that he did not receive due process from American Family. The concept of due process does not apply without state action. ***Journal Sentinel, Inc. v. Schultz***, 2001 WI App 260, ¶15, 248 Wis. 2d 791, 638 N.W.2d 76.

¶11 Cahoon next argues that American Family breached its duty of good faith and fair dealing during the termination review. Section 6.i. sets out the termination review procedure. The agent's review request goes to a sales vice president, who considers all information submitted by the agent and the company. The procedure vests the following in the sales vice president: the "Sales Vice President may make any investigation deemed pertinent…. It shall be within the sole prerogative of the reviewing Sales Vice President to decide whether to hold any formal meetings, the parties to be present…" The agent must offer reasons he or she should not be terminated.

¶12 A February 3, 2011 letter from Cahoon's counsel requested a copy of the termination review procedure. A February 8 (or 9)[5] letter from American Family's assistant general counsel, David Endres, to Cahoon's counsel advised that Endres was gathering documents for the sales vice president's review, and Cahoon was welcome to submit any documents for that review by February 18. Endres further stated that if Cahoon did not submit any documents, the sales vice president would review the company's documents and Cahoon's letter invoking the termination review procedure.

¶13 On February 16, Cahoon's counsel wrote to Endres and advised that Cahoon disputed the basis for termination without elaboration. Counsel asked for documentation verifying Cahoon's conduct before he could respond further. It does not appear that Cahoon either submitted documents by February 18 or stated his dispute in detail by that date. The reviewing sales vice president advised on February 25 that he had completed his review of Cahoon's termination by

[5] It appears that the February 8 letter was actually dated February 9.

reviewing letters dated February 3, 8 and 16 from Cahoon's counsel and the company's documentation.

¶14 We see no breach of any duty of good faith or fair dealing in relation to the termination review procedure. The termination review procedure does not specify a timeline or offer detail about how the review occurs. The procedure offers the agent the opportunity to dispute the termination via a statement of reasons and documents. Cahoon did neither. A duty of good faith cannot create more procedure than already exists in the agreement. ***Wisconsin Natural Gas Co. v. Gabe's Constr. Co.***, 220 Wis. 2d 14, 21-22, 582 N.W.2d 118 (Ct. App. 1998); ***Appling v. State Farm Mut. Auto. Ins. Co.***, 340 F.3d 769, 779 (9th Cir. 2003) (duty of good faith "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement") (citation omitted).

¶15 Cahoon criticizes the termination review on another ground: the record provided to Steffen, the sales vice president, far exceeded the materials before Steffen at the time Steffen made the termination decision. Cahoon relies upon ***Dan Samp Agency, Inc. v. American Family Mutual Insurance Co.***, No. 2005AP1918, unpublished slip op. (WI App Aug. 30, 2007), to argue that the review process cannot consider information that was not before the American Family decision maker who terminated the agent. ***Samp*** is distinguishable. In ***Samp***, American Family wrongly attempted to buttress its termination decision with other instances of allegedly undesirable performance that were first offered during the termination review process. ***Id.***, ¶¶29-30. In contrast, the substance of Cahoon's unlawful conduct was known at the time he was terminated, and that information did not change. While Steffen's subordinates initially believed that Cahoon had been "cuffed and stuffed" during an arrest at his office and that he had

a .08 blood alcohol content, that information was later determined to be inaccurate.[6] This inaccurate information is of no consequence because Steffen stated in his deposition that he did not have this inaccurate information when he made the decision to terminate Cahoon. It is undisputed on the record that American Family did not rely upon after-acquired information to terminate Cahoon because the facts supporting termination did not change.

¶16 Finally, Cahoon argues that his book of business was at stake, and he had a property interest deserving of due process protections. The parties' rights are governed by their contract; we do not rewrite contracts. ***Wagner v. Estate of Sobczak***, 2011 WI App 159, ¶10, 338 Wis. 2d 92, 808 N.W.2d 167. In the event of termination, the parties' contract provides for the disposition of Cahoon's book of business and post-termination "extended earnings" and other financial benefits.

¶17 There were no disputed issues of material fact on the question of whether American Family breached its agreement with Cahoon when it terminated him as an American Family agent. Therefore, the circuit court did not err in granting summary judgment and dismissing Cahoon's complaint.

By the Court.—Judgment affirmed.

[6] In his deposition, Hetzel's superior, Ryniak, testified that he recommended termination to Steffen based on the incident report and the pending charges. Steffen and Ryniak conferred several times about the Cahoon situation, and Steffen decided to terminate Cahoon based on information Ryniak provided to him. Steffen disavowed knowledge of the inaccurate information that Cahoon claims formed a basis for terminating him. Moreover, Hetzel informed Cahoon that he was being terminated for the incident report and failing to uphold a positive image in the community. Cahoon told others that his termination was based on the January 25 incident in his office.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).