COURT OF APPEALS
DECISION
DATED AND RELEASED

June 15, 1995

No. 94-1250

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

CATHERINE G. HENRY, M.D.,

Plaintiff-Appellant,

v.

RIVERWOOD CLINIC, S.C.,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

EICH, C.J. Catherine Henry, a physician, appeals from a summary judgment dismissing her action challenging the termination of her employment at the Riverwood Clinic in Wisconsin Rapids.

The issues are: (1) whether Riverwood breached its employment contract with Henry when it failed to invoke the contract's "resolution of

conflicts" provision prior to terminating her employment; (2) whether the trial court erred when it concluded that Riverwood's board of directors properly terminated Henry's employment under the "good cause" provision of her employment contract; and (3) whether the court erred when it denied Henry's motion to amend her complaint to allege a claim against Riverwood under the Wisconsin Fair Dealership Law. We affirm the judgment.

Henry joined Riverwood's staff in 1984 as a part-time pediatrician. She eventually became a shareholder and a member of the clinic's board of directors. In 1989, Henry's husband, William, also a member of the Riverwood staff, began questioning the hours worked by other staff physicians. His complaints in this regard culminated in a memo on the work-hour issue which caused open hostility between himself and other doctors. In the wake of these and other antagonisms, he resigned from the clinic effective July 1989. Conflicts between William Henry and Riverwood continued after his resignation, including disputes over money allegedly owed him and his claim of possible ethical violations committed by Riverwood physicians.

In late 1989, the clinic's executive committee discovered that Catherine Henry had changed her work hours from part time to full time without authorization; that she contacted the Wisconsin State Medical Society on behalf of her husband with regard to his ongoing conflicts with Riverwood; and that she referred possible clinic patients to him.

The executive committee discussed these matters with the clinic director and legal counsel and determined that good cause existed to terminate the written "Professional Employment Contract" between Henry and the clinic.[1] Accordingly, on November 16, 1989, the committee notified Henry that her employment at the clinic was being terminated.

A special meeting of the board of directors was called for the purpose of ratifying the executive committee's action. Henry attended the

[1] As will be discussed in greater detail below, the employment contract provided generally for termination on ninety days' notice by either party and gave the clinic the right to terminate Henry's employment "immediately and with no notice but only for a good cause."

meeting, and the board voted to terminate her employment contract and explained the reasons therefor: her unilateral move from part-time to full-time work at the clinic; her contacts with the medical society with respect to her husband's complaints against the clinic; and the patient referrals to her husband.

Henry then sued Riverwood, claiming that the clinic had breached the employment contract by firing her without good cause. She filed a motion for summary judgment on her claim and also moved to amend her complaint to state a claim under the Wisconsin Fair Dealership Law, ch. 135, STATS. Riverwood also moved for summary judgment to dismiss the action.

The trial court, noting that the language of the employment contract authorized the board of directors to "make the final determination as to termination for good cause," concluded that the board's decision would stand if it had a basis in fact and was neither arbitrary, capricious nor improperly motivated. The court also concluded that the Fair Dealership Law did not apply to Henry's relationship with the clinic and denied her motion to amend the complaint.

I. Henry's Summary Judgment Motion: Breach of Contract

Summary judgment is properly granted when there is no genuine issue of material fact and the moving party has established his or her entitlement to judgment as a matter of law. ***Bantz v. Montgomery Estates, Inc.***, 163 Wis.2d 973, 978, 473 N.W.2d 506, 508 (Ct. App. 1991). *See also* ***Germanotta v. National Indem. Co.***, 119 Wis.2d 293, 296, 349 N.W.2d 733, 735 (Ct. App. 1984). We review a grant of summary judgment de novo, employing the same methodology as the trial court. ***Old Tuckaway Assocs. Ltd. Partnership v. City of Greenfield***, 180 Wis.2d 254, 278, 509 N.W.2d 323, 332 (Ct. App. 1993).

As noted, Henry asks us to reverse the grant of summary judgment to Riverwood, arguing that: (1) the clinic breached the employment contract by failing to follow the resolution-of-conflicts provision in the contract, which she claims is a necessary precondition for termination of the employment

relationship; and (2) the court erred in deferring to Riverwood's determination of "good cause" under the contract.

A. The Resolution-of-Conflicts Provision

With regard to termination of employment, Henry's contract provides that Riverwood "shall have the right to terminate the employment relationship immediately and with no notice but only for a good cause." In a paragraph separate from the good-cause provision, the contract provides as follows:

> ARTICLE 7. RESOLUTION OF CONFLICTS
>
> The following procedure will be initiated by the Employer in attempt to resolve conflicts that may arise:
>
> (A) Conflict between two individuals.
>
> ....
>
> (B) Conflict between an individual and the clinic objectives.
>
> A. The problem will be defined by the executive committee.
>
> B. The individual involved will meet with the committee to define and discuss the problem.
>
> C. If resolution cannot be reached, the matter will be brought up before a Director's meeting for appropriate response.

The trial court concluded that because the contract did not specify that the conflict-resolution provision took precedence over the procedure for

termination, the clinic had the option of proceeding under either provision and acted appropriately in applying the good-cause provision.

Henry first challenges the trial court's conclusion that the clinic had the option to proceed under either the good-cause or the resolution-of-conflicts provision. She claims that such an interpretation is erroneous as a matter of law because the contract is ambiguous and "must, therefore, be strictly construed against Riverwood." And, citing the rule of contract construction that when there is an apparent conflict between contractual provisions, the court should strive to construe the contract as a whole and give meaning to all of its clauses, *see* ***Jones v. Jenkins***, 88 Wis.2d 712, 722-23, 277 N.W.2d 815, 819 (1979), she argues that the whole of the contract can be given effect only if we construe it such that the board of directors could terminate her contract without notice and for good cause *only after* complying with the resolution-of-conflicts provision. We disagree.[2]

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[2] First, we agree with Riverwood that the cases Henry cites in support of her argument, ***Ferraro v. Koelsch***, 124 Wis.2d 154, 368 N.W.2d 666 (1985), and ***Clay v. Horton Mfg. Co.***, 172 Wis.2d 349, 493 N.W.2d 379 (Ct. App. 1992), are inapposite. The supreme court held in ***Ferraro*** that a provision in an employee handbook could impose procedural restrictions on what would otherwise be an "employment-at-will" relationship. ***Ferraro***, 124 Wis.2d at 157-58, 368 N.W.2d at 668. However, there was no dispute in that case that the procedural requirements set forth in the employment handbook applied to issues of termination. Here, we conclude that the board of directors was not required to invoke the resolution-of-conflicts provision with regard to Henry's termination. And all we held in ***Clay*** was that whether the parties intended an employee handbook to alter the terms of layoff was a question of fact outside the scope of summary judgment. ***Clay***, 172 Wis.2d at 351, 493 N.W.2d at 380. We see neither case as compelling the result Henry seeks on this appeal.

Henry also argues that extrinsic evidence relating to the parties' intent confirms that the contract required the clinic to follow the conflict-resolution procedure prior to seeking termination. Citing ***Zweck v. DP Way Corp.***, 70 Wis.2d 426, 435, 234 N.W.2d 921, 926 (1975), and ***Martinson v. Brooks Equip. Leasing, Inc.***, 36 Wis.2d 209, 219, 152 N.W.2d 849, 854 (1967), for the proposition that "in determining the parties' intent, the practical construction of the contract by the parties through [their] performance[s] is highly probative of that intent and courts will normally adopt the interpretation which the parties by their actions have themselves adopted," she contends that because Riverwood followed the resolution-of-conflicts procedure in William Henry's case prior to his resignation, the clinic's "prior practical construction" of the contract prohibits it from foregoing the procedure in her case. She also points to evidence that a Riverwood physician, in commenting on William Henry's status, stated his belief that because the

When construing a contract, we look first to the language of the document to ascertain the intent of the parties. ***Bank of Barron v. Gieseke***, 169 Wis.2d 437, 455, 485 N.W.2d 426, 432 (Ct. App. 1992). And where the language is unambiguous, we construe the contract as it stands, even if the parties themselves have placed a different construction on it. ***Id.***; ***Schmitz v. Grudzinski***, 141 Wis.2d 867, 871, 416 N.W.2d 639, 641 (Ct. App. 1987). A court may not use the mechanism of construction to revise an unambiguous contract in order to relieve a party from disadvantageous terms to which he or she has agreed. ***Old Tuckaway,*** 180 Wis.2d at 280-81, 509 N.W.2d at 333. Contractual language is ambiguous only when it is fairly and reasonably susceptible to more than one construction. ***Yee v. Guiffre***, 176 Wis.2d 189, 193, 499 N.W.2d 926, 927 (Ct. App. 1993).

Henry's employment contract is unambiguous: It plainly grants Riverwood "the right to terminate the employment relationship *immediately and with no notice* but only for a good cause." (Emphasis added.) There is no language in the contract suggesting that the conflict-resolution section of the document applies in any way to a decision to terminate an employee's contract. By its plain terms, it deals with "conflicts that may arise ... between two individuals" or "between an individual and the clinic objectives." In either case--with some minor variations--the "issue" or "problem" is brought before the clinic's executive committee, and the committee, after meeting with the parties involved, attempts to resolve the particular conflict. In either situation, if the executive committee is unable to resolve the conflict, the matter is referred to the board of directors for appropriate "action" or "response."

Beyond that, it is apparent that any decision to terminate a staff member's employment will necessarily involve a "conflict" of one sort or another. Thus, were we to adopt Henry's construction that all such decisions necessarily invoke the conflict-resolution provision of the contract, we would be

(..continued)

good-cause provision relates only to issues of medical competency, the clinic must be considered bound to resort to the conflict-resolution procedure in order to terminate for any other cause.

We agree with the trial court that neither the procedure used in William Henry's case nor a single statement from one doctor is determinative of the clinic's or Henry's rights under the otherwise plain terms of the agreement giving the executive committee the right to terminate an employee immediately and with no notice if it has good cause to do so.

effectively nullifying the "no notice" language in the contract clause expressly dealing with terminations. And that in itself would violate the rule advocated by Henry in this case: that we must construe contracts to give reasonable meaning to each provision of the document and avoid a construction that renders portions of the contract meaningless. ***Wilke v. First Fed. Sav. & Loan Ass'n***, 108 Wis.2d 650, 657, 323 N.W.2d 179, 182 (Ct. App. 1982).

Goldmann Trust v. Goldmann, 26 Wis.2d 141, 131 N.W.2d 902 (1965), involved a partnership agreement containing a provision that the hiring and firing of permanent employees were to be done by mutual written consent of the partners. ***Id***. at 143, 131 N.W.2d at 904. The agreement also contained a provision for the arbitration of "all disputes ... whatsoever" but that provision--like the conflict-resolution provision in Henry's contract--was silent concerning its applicability to employee terminations. When one of the ***Goldmann*** partners attempted to fire a permanent employee without the written consent of the others, he requested arbitration of the matter. ***Id***. at 144-45, 131 N.W.2d at 905. The other partners sued to restrain arbitration, arguing that the specific "mutual written consent" provision for terminating permanent employees rendered termination matters nonarbitrable. The supreme court agreed and noted, "If every dispute concerning any partnership matter is already subject to arbitration, there would have been no reason for including the written-consent language." ***Id***. at 147, 131 N.W.2d at 906.[3]

The same is true here.

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[3] The ***Goldmann*** court went on to state: "That the partners actually intended that certain types of decisions could be made only by written mutual consent, while anticipating arbitration where there was disagreement about other decisions affecting the partnership business, gives effect to both the mutual written-consent and arbitration provisions of the contract." ***Goldmann Trust v. Goldmann***, 26 Wis.2d 141, 147, 131 N.W.2d 902, 906 (1965). Finally, citing the rule of construction that "where there is an apparent conflict between a general and a specific provision, the latter controls," the court noted that the "particular provisions insisting upon written mutual consent should control over the general requirement of mutual consent." ***Id.*** at 148, 131 N.W.2d at 907.

B. The Good-Cause Provision

Henry next argues that the trial court erred in "deferring" to the board of directors' determination that good cause existed for her termination. Construction of a contract is a question of law, which we review de novo. ***Gunka v. Consolidated Papers, Inc.***, 179 Wis.2d 525, 531, 508 N.W.2d 426, 428 (Ct. App. 1993).

The termination provision of Henry's contract provides as follows:

> [T]he Employee shall be employed on an automatically renewed year-to-year basis [and] either party shall have the right to terminate the employment relationship on ninety (90) days notice in writing, except that *the Employer shall have the right to terminate the employment relationship immediately and with no notice but only for a good cause*.
>
> The Board of Directors by an affirmative vote of 3/4 or more of those present at a special meeting of the Board *shall make the final determination as to termination for good cause*.

(Emphasis added.) The contract did not define "good cause."

Noting that the contract gave the board the "final determination" of good cause, the trial court concluded,

> Good cause is defined for purposes of this decision as what three-fourths of the Board of Directors say it is so long as the decision does not appear to be arbitrary, capricious, so long as it is not based upon an improper motive, that it has a basis in fact and is not otherwise inconsistent with legal principles, public policy or outside the contract.

Henry argues that this "deferential" standard of review of the board's good-cause determination renders the board the "sole and final arbiter" of the matter and thus rendered the contract illusory. We agree with Henry that there is a difference between having the "final say" on whether someone should be fired for cause and having the sole and unreviewable right to determine what constitutes good cause for termination. But while language such as that highlighted above does not insulate the board's action from judicial review, it does invoke a deferential standard of review of the employer's determination.

Where, as here, the issue is whether a certain set of actions undertaken by an employee constitutes good cause to terminate employment, the court will defer to the employer's determination on the issue. CHARLES G. BAKALY JR. & JOEL M. GROSSMAN, THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS § 9.6, at 166 (2d ed. 1993). Such deference is owed because the finder-of-fact should not be permitted to determine the matter anew, thus "substitut[ing] its judgment for the employer's." ***Toussaint v. Blue Cross & Blue Shield***, 292 N.W.2d 880, 896 (Mich. 1980). Thus, "whether particular conduct constitutes cause for discharge is generally determined by the employer, and not by the court." BAKALY & GROSSMAN at 166.

In a similar vein, judicial definitions of good cause generally focus not on the employee's behavior but on the motivation of the employer and whether it acted in good faith in terminating the employee for good cause. BAKALY & GROSSMAN at 157-58. In such a case, "[t]ermination for good cause ... means that the employer ... acted out of an honest belief that the employee's continued employment was not in the employer's best interest." ***Id.*** at 158.

We were presented with a similar situation in ***Hale v. Stoughton Hosp. Ass'n, Inc.***, 126 Wis.2d 267, 376 N.W.2d 89 (Ct. App. 1985). In that case, a hospital fired its administrator pursuant to a bylaw that provided that an officer could be removed "whenever in [the board's] judgment the best interests of the hospital would be served thereby." ***Id.*** at 270, 376 N.W.2d at 91. Discussing the nature and scope of our review of the employer's decision, we said:

> The bylaw requires an honest belief that termination is in the best interests of the hospital. The board's belief may not be feigned or a pretext for action that they believe is not in the hospital's best interest.

> Nothing more is required. The board is the sole judge of the hospital's best interests and the court or jury may not inquire into the reasonableness of their decision or whether the board's reasons exist in fact.... We will not inquire into the board's decision-making process to determine whether its decision is correct. Inquiry is limited to whether the board really believed Hale's termination was in the hospital's best interests.

Id. at 276, 376 N.W.2d at 94.

While we are in this case faced with a good-cause issue rather than a best-interest standard, we see little difference between the two in terms of the scope of our review of the employer's decision to terminate. The trial court properly applied a "deferential" standard of review to Riverwood's determination that there was good cause for Henry's termination: that the determination will be upheld if it comports with the law and the facts of the case, and is not arbitrary, capricious, or based upon an improper motive.[4]

We thus consider Henry's argument that dismissal was nonetheless improper because Riverwood's reasons for terminating her

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[4] Henry argues that a "long line of cases" has established that whether good cause for termination exists is an issue for the jury, unless there is undisputed evidence of moral turpitude, behavior manifestly injurious to the employer's business, or substantial and inexcusable insubordination. ***Millar v. Joint Sch. Dist.***, 2 Wis.2d 303, 314, 86 N.W.2d 455, 460-61 (1957); ***Thomas v. Beaver Dam Mfg. Co.***, 157 Wis. 427, 429, 147 N.W. 364, 365 (1914); ***Loos v. Geo. Walter Brewing Co.***, 145 Wis. 1, 5, 129 N.W. 645, 646 (1911); ***Schumaker v. Heinemann***, 99 Wis. 251, 255, 74 N.W. 785, 786 (1898). We read these cases as holding that the existence of good cause is a jury question only where there is no provision in the employment contract specifying the grounds upon which discharge is justifiable. Where, as here, there is a contract of employment that specifies the grounds upon which an employer can terminate an employee, then the employer "acting in good faith and within the terms of its contract, ha[s] a right to determine for itself whether any of the stipulated grounds for discharging" the employee exists. ***Thomas***, 157 Wis. at 429, 147 N.W. at 365. *See* ***Hale v. Stoughton Hosp. Ass'n, Inc.***, 126 Wis.2d 267, 277-78, 376 N.W.2d 89, 94 (Ct. App. 1985). The deferential standard of review applied by the trial court in Henry's case is appropriate to ensure that Riverwood has met the requirements of good faith and acted in conformity with the terms of the contract.

employment do not meet the good-cause standard and because genuine issues of material fact preclude summary judgment on the issue.

As we have noted above, the Riverwood board determined that the following reasons stated good cause for firing Henry: her unilateral switch from part- to full-time hours in violation of her employment contract; the "disloyalty" to Riverwood exhibited by her contacting the Wisconsin State Medical Society on her husband's behalf during his formal disputes with the clinic; and her referral of Riverwood patients to her husband's private medical practice.

Henry's employment contract provides that "[t]he scheduling of hours ... of employment shall be made by the [clinic] President ... in accordance with the general policy as may be adopted from time to time by the Board of Directors." The record shows that Henry worked part time at Riverwood from February 1984 to August 1989. Following her husband's resignation from the clinic, Henry discussed increasing her work hours with two pediatricians at Riverwood, one of whom told her that such a change "was to be approved by the executive committee." Henry did not seek approval for the change from the clinic president and commenced working more hours in September 1989. The executive committee first became aware that Henry had increased her hours on or about October 30, 1989, and met with her on November 7, 1989, to discuss the issue.[5]

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[5] Henry argues that increasing her hours should not be considered relevant to a determination of good cause to fire her because she claims to have been assured when she joined the clinic staff that she would be able to become a full-time employee at some point in the future and that her schedule could remain "very flexible." We are not persuaded, for even if such statements were made, they did not relieve her from complying with the unambiguous terms of her contract regarding scheduling decisions.

We note, too, that parol evidence such as that asserted by Henry in support of her argument is properly considered only where the written contract is shown to be "only a partial integration" of the parties' agreements, and that is especially true where the contract contains "a written provision which expressly negatives collateral or antecedent understandings ...." ***In re Spring Valley Meats, Inc. v. Bohen***, 94 Wis.2d 600, 607-08, 288 N.W.2d 852, 855-56 (1980). Henry's contract with the clinic expressly provides that it constitutes the parties' "entire agreement" and "super[c]edes any other similar agreement ...."

As to Henry's claimed "disloyalty" to the clinic, the evidence establishes that her husband, following his dismissal, continued to press his monetary complaints and his claim of ethical violations by clinic staff; that Henry consulted with other doctors at the clinic regarding her husband's claims; and, when no favorable response was forthcoming, she contacted the state medical society seeking assistance to resolve the problem.

And while Henry claims that her actions cannot be considered as contributing to "good cause" for termination because her inquiry to the society was directed solely toward securing the medical society's mediation services, she was a member and director of Riverwood and thus had fiduciary obligations to the clinic and its staff. As the clinic also points out, letters exchanged between the Henrys and the society reveal that Henry was, among other things, actively pursuing her husband's claims of "potential anti-competitive conduct" on the clinic's part.

Finally, as we have noted above, Riverwood found good cause to terminate Henry on the basis of her "self-dealing" when, following her husband's departure from the clinic, she referred to him patients whose cases otherwise would have been routinely handled by clinic physicians.[6]

"Good cause" has been defined in Wisconsin as behavior that is "manifestly injurious to the employer's business." ***Schumaker v. Heinemann***, 99 Wis. 251, 255, 74 N.W. 785, 786 (1898). Henry's actions in altering her work hours, taking an active role in her husband's monetary and other claims against the clinic and referring clinic patients to her husband's private practice may reasonably be considered "injurious" to the clinic's business. And while we recognize that not every breach of a contract will constitute good cause for termination, ***id.***, we cannot say on this record that Riverwood acted arbitrarily or capriciously in determining that there was good cause to terminate Henry's employment with the clinic, or that its decision lacked a basis in fact or law.

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[6] In one instance, Henry saw a young patient who had suffered a wound to his arm. After an examination, she referred him to her husband and subsequently waived her fee for the boy's office visit when her husband insisted on charging the patient for his services. The clinic board also looked into two other cases in which Henry had either "referred" or "suggested" patients seek treatment from her husband. Henry does not deny the referrals.

Citing a statement in ***Harman v. La Crosse Tribune***, 117 Wis.2d 448, 457, 344 N.W.2d 536, 541 (Ct. App.), *appeal dismissed and cert. denied*, 469 U.S. 803 (1984), that "[a]s a general rule, a person's intent cannot be determined on a motion for summary judgment," Henry argues that summary judgment is inappropriate here because the clinic's intent in firing her is at issue. She asserts, for example, that the reasons put forth by the board for firing her were "pretextual, orchestrated and based on improper motive" and that the board was retaliating against her for her husband's threatened lawsuit against the clinic. She points to the fact that when she met with the executive committee on November 7, 1989, a committee member expressly stated that it was not the committee's intention to fire her. She asserts that while the committee was aware of her contacts with the state medical society, no one mentioned her correspondence with the society at the meeting. She also asserts that although the committee also was aware that she had referred a patient to her husband two months earlier, it took no action on the matter until the meeting at which it voted to terminate her employment.[7] Finally, she refers us to a memo from Riverwood's administrator stating that her termination was justified because her continued status as a clinic shareholder "would severely compromise [the clinic's] ability to defend [its] interests against Dr. William Henry's allegations and threatened lawsuit."

Even taking Henry's assertions at face value, we are not persuaded that any issue of material fact exists with respect to the clinic's reasons for firing her. They suggest only that Henry's active participation in advancing her husband's monetary and other claims against the clinic caused the committee to conclude that her continued employment was contrary to the clinic's best interests and potentially injurious to its business. We see no material factual dispute in the clinic's reasons or motivation to terminate her employment. *See* ***N.N. v. Moraine Mut. Ins. Co.***, 153 Wis.2d 84, 96, 450 N.W.2d 445, 450 (1991) (even where intent is at issue, where the facts and inferences "lead to only one valid conclusion," summary judgment is appropriate). *See also* BAKALY &

[7] Henry also claims that the clinic's reasons for firing her were pretextual because other doctors had referred patients outside the clinic during her tenure. She cites to nothing in the record to support her contention, however. We have often repeated that we generally do not consider arguments based on factual assertions that are unsupported by references to the record. ***Dieck v. Unified Sch. Dist.***, 157 Wis.2d 134, 148 n.9, 458 N.W.2d 565, 571 (Ct. App. 1990), *aff'd*, 165 Wis.2d 458, 477 N.W.2d 613 (1991). And because the board based its good-cause determination on several factors, we do not see that this assertion raises an issue of fact material to the resolution of this appeal.

GROSSMAN at 166 (summary judgment is appropriate where the employee's actions are not in dispute).

II. Fair Dealership Law

In the trial court, Henry advanced the rather novel argument that her employment as a clinic physician comes within the terms of the Wisconsin Fair Dealership Law, a law enacted to "promote the compelling interest of the public in fair business relations between dealers and grantors [of dealerships]," and to "protect dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships." Section 135.025(2)(a) and (b), STATS.[8] The law provides for recovery of both damages and attorney fees if the plaintiff is able to establish a violation, and Henry claims entitlement to both damages and fees under its provisions. Section 135.06, STATS.

"Dealership" is defined in § 135.02(3), STATS., as

> a contract or agreement, either expressed or implied, whether oral or written, between 2 or more persons, by which a person is granted the right to sell or distribute goods or services, or use a trade name, trademark, service mark, logotype, advertising or other commercial symbol, in which there is a community of interest in the business of offering, selling or distributing goods or services at wholesale, retail, by lease, agreement or otherwise.

While Henry's situation at the clinic arguably meets the elements of "contract" and "right to use a trade name" in the definition, it is well established that the act does not apply to conventional employer-employee relationships. ***Bush v. National Sch. Studios, Inc.***, 139 Wis.2d 635, 652, 407 N.W.2d 883, 891 (1987). Riverwood argues persuasively that because Henry

[8] A "dealer" is "a person who is a grantee of a dealership situated in this state." Section 135.02(2), STATS.

took the position earlier in this case that she was a Riverwood employee, she should be "judicially estopped" from claiming otherwise on appeal.

The doctrine of judicial estoppel precludes a party from asserting a position in a legal proceeding that is inconsistent with a position previously asserted. ***Coconate v. Schwanz***, 165 Wis.2d 226, 231, 477 N.W.2d 74, 75 (Ct. App. 1991); *see also* ***Pollack v. Calimag***, 157 Wis.2d 222, 234, 458 N.W.2d 591, 597 (Ct. App. 1990). Prior to bringing this action, Henry commenced an employment discrimination proceeding against the clinic before the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations. In order to bring herself under the umbrella of the Wisconsin Fair Employment Act, she had to, and did, allege that she was an employee of Riverwood.

Even if she were not estopped from arguing that she is not a conventional employee in her attempt to invoke the provisions of the Fair Dealership Law on this appeal, our own de novo review of the facts and law[9] satisfies us that the law does not apply to Henry. Because the law is primarily concerned with the person "who makes a financial investment [in a dealership] that may become unrecoverable if he [or she] is terminated" by the grantor, ***Moore v. Tandy Corp.***, 819 F.2d 820, 824 (7th Cir. 1987), the "overriding principle" governing the existence of a "dealership" is "whether the [dealer's] status is dependent upon the relationship with the grantor for [his or her] economic livelihood." ***Bush***, 139 Wis.2d at 651, 407 N.W.2d at 890. In ***Bush***, for example, the court's determination that Bush was a dealer was based largely on the fact that he had "made a substantial financial investment in the ... business" which would be lost upon termination of the dealership. ***Id.*** at 655-57, 407 N.W.2d at 892-93.[10]

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[9] The application of the Fair Dealership Law to the undisputed facts of the case is a question of law which we review independently. ***Bush v. National Sch. Studios, Inc.***, 139 Wis.2d 635, 645-46, 407 N.W.2d 883, 888 (1987).

[10] Henry suggests that she had a considerable investment of "goodwill" in the clinic's operations and that this should satisfy the "investment" requirement. As the court stated in ***Moore v. Tandy Corp.***, 819 F.2d 820, 824 (7th Cir. 1987), however:

> [T]o the extent that [the employee's] efforts created goodwill for [the employer], [the employer] may have been appropriating the fruits of [the employee's]

There is no evidence in this case that Henry was in any similar position. Not only was she economically independent of the clinic for her livelihood--as a licensed physician she could, as the trial court noted, join another clinic or set up her own practice--but the $3,000 investment she was required to make upon joining the Riverwood staff would, under the terms of the contract, be purchased back by the clinic for its appreciated value upon termination of the employment relationship.

The Fair Dealership Law simply does not reach one in Henry's position. As Riverwood suggests in its brief, if Henry's employment contract with Riverwood renders her a "dealer" within the meaning of the law, "so then is every physician at every clinic, every lawyer at every law firm, every accountant at every accounting firm, and virtually every professional employee associated with an employer, whether as an owner or as a nonowner." We are unwilling to read such a result into the law.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

(..continued)

> efforts by terminating him and merely returning his deposit. But these things would be as true if he had been a salaried manager or a sales representative on commission.

The same is true here. While Henry may well incur some harm from her termination, that does not make her a dealer under the Fair Dealership Law.