COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 5, 1995

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. 95-1809-FT

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

DOROTHY A. LOWE,

Plaintiff-Appellant,

v.

CITY OF APPLETON, a Wisconsin Municipality, RICHARD T. DE BROUX, individually and in his capacity as Mayor of the City of Appleton, and DAVID F. BILL, individually and in his capacity as Director of Administrative Services/Director of Personnel of the City of Appleton,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Dorothy Lowe appeals a judgment entered on a jury verdict that dismissed her 42 U.S.C. § 1983 complaint against the City of

Appleton, Richard De Broux and David Bill.[1] Lowe asks this court to reverse the judgment and remand the case for a new trial on grounds that the jury's verdict is inconsistent and perverse. Lowe also impliedly argues that a defective special verdict form gave rise to the inconsistent answers. Because we conclude that the verdict is not inconsistent or perverse and that Lowe waived any errors in the special verdict form by failing to object on the record before the special verdict was submitted to the jury, we affirm.

Lowe held the position of secretary to the mayor of Appleton from June 1976 to April 1992. In October 1981, about five years after Lowe began her employment, the Appleton common council adopted certain personnel policies that applied to city employees, like Lowe, who were not covered by collective agreements. The policies were not the result of any negotiations between employees and the City. In 1987 the personnel policies were revised. Included in the revised version was the following provision:

> 1.06 STATUS. The contents of this manual are presented as a matter of information only. While the City of Appleton believes wholeheartedly in the plans, policies and procedures described herein, they are not contracts of employment. The City reserves the right to modify, revoke, suspend, terminate, or change any or all of such plans, policies, or procedures in whole or in part, at any time, with or without notice. The language used in this handbook is not intended to create, nor is it to be construed to constitute, a contract between the City and any one or all of its employees. Employees of the City of Appleton are employees at will. No person other than the Director of Personnel has authority to make any agreement for employment for any specified period of time or to make any agreement contrary to the foregoing.

In April 1992, Richard De Broux was elected mayor, and he terminated Lowe's employment so that he could bring in his own secretary.

[1] This is an expedited appeal under RULE 809.17, STATS.

This 42 U.S.C. § 1983 suit followed.[2] The respondents moved for summary judgment and the trial court granted it, concluding that Lowe's employment was at-will and, therefore, discharging her for no cause did not violate her right to due process. Lowe appealed and, in an unpublished decision released April 12, 1994, we reversed the summary judgment because there were disputed issues of material fact. *See* ***Lowe v. City of Appleton***, No. 93-2464, unpublished slip op. at 10 (Wis. Ct. App. April 12, 1994). Specifically, we remanded the matter for a determination of whether the parties intended to bind each other by the manual, creating an employment contract. ***Id***. at 10-11. If they did, we held, it must also be determined whether the contract altered their at-will employment relationship and the parties' intent on that issue. ***Id***. at 11.

On remand, the special verdict form submitted to the jury contained five questions. The first question asked, "Did the plaintiff, Dorothy Lowe, have a property interest in her job with the City of Appleton, that is, did she have a contract of employment with the City of Appleton?" The second question stated, "Did such a contract alter the at-will status of Dorothy Lowe's employment with the City of Appleton?" The jury answered the first question yes, the second question no, and did not answer the remaining questions because the verdict form directed the jury to answer additional questions only if all previous answers were "yes."

Lowe moved the trial court to change the jury's answers and, alternatively, for a new trial, contending the jury's answers are inconsistent and perverse. The trial court denied the motion and granted the respondents' motion for judgment on the verdict, concluding that the answers "are not mutually exclusive, nor inconsistent."

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[2] 42 U.S.C.A. § 1983 (West 1981) states in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or 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.

On appeal, Lowe argues that she is entitled to a new trial because the jury's answers are inconsistent and perverse. Additionally, she challenges the trial court's special verdict form, stating, "[I]t was the Trial Court's insertion of Question No. 2, a question neither party proposed, that created the possibility of inconsistent answers." We begin with Lowe's objection to the questions in the special verdict.

While Lowe does not explicitly argue that the special verdict form was defective, she criticizes the questions and suggests they gave rise to inconsistent jury answers. We conclude that Lowe has waived any errors with respect to the form of the special verdict, due to her failure to object to the proposed verdict and to state the grounds for objection with particularity on the record. Section 805.13(3), STATS., provides in relevant part: "Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the [instruction and verdict] conference constitutes a waiver of any error in the proposed instructions or verdict." Lowe does not claim to have satisfied the requirements of § 805.13(3), although she points out that she submitted special verdict questions the trial court chose not to adopt. Additionally, she has not provided this court with a complete record of the proceedings, including the verdict conference, so we cannot ascertain whether an objection was made on the record. For these reasons, we conclude that Lowe has waived any errors in the special verdict form.

Lowe may, however, maintain her argument that the jury's answers to the special verdict questions are inconsistent and perverse. First, we examine whether the jury's answers are inconsistent. An inconsistent verdict is one in which the jury answers are logically repugnant to one another. ***Becker v. State Farm Mut. Auto Ins. Co.***, 141 Wis.2d 804, 821, 416 N.W.2d 906, 913 (Ct. App. 1987).

Lowe argues that it is inherently inconsistent that Lowe could have a property interest in her job, as the jury found in its answer to special verdict question number one, and maintain an at-will status, as the jury found in its answer to question two. Lowe explains: "A property interest in one's job under the Wisconsin Law, as this Court's analysis makes clear, alters 'the at-will relationship,'" citing our decision on the first appeal.

Lowe misinterprets the language of our earlier decision. We did not hold that an at-will relationship is altered whenever there is a contract between an employer and an employee. Instead, we explained that if there is an employment contract, it must be examined to determine what its terms provide. ***Lowe***, slip op. at 8. The terms may alter the at-will relationship. Or, as we noted in our first opinion, the contract could provide terms unrelated to the at-will relationship, such as provisions on fringe benefits. ***Id***. at 7-8.

The trial court acknowledged our reasoning when it decided to deny Lowe's motion for a new trial and, instead, granted judgment on the verdict. The trial court explained:

> The evidence in this case, upon which the plaintiff relied to establish a contract, consisted solely of the policy handbook, which was made and distributed to Mrs. Lowe as well as to other City employees. It was distributed by the City and made by the City. The jury could logically and consistently have found, as they did, that there was, indeed, a contract created between Mrs. Lowe and the City of Appleton. That contract was created by the policy handbook with regard to several items. The jury could have logically found that some of those items included vacation time, sick leave, funeral leave, insurance benefits, or other matters. And still logically, they could conclude that the policy handbook language did not alter the at-will status of Dorothy Lowe's position. These two findings are not mutually exclusive, nor inconsistent.

Implicit in the trial court's decision to deny Lowe's motion for a new trial and to grant judgment on the verdict was the trial court's review of the evidence presented at trial. Lowe has not provided this court with a copy of the trial transcript, so we must assume every fact essential to sustain the trial court's decision is supported by the record. *See* ***Suburban State Bank v. Squires***, 145 Wis.2d 445, 451, 427 N.W.2d 393, 395 (Ct. App. 1988). Therefore, we must assume the evidence before the jury indicated that Lowe and the City had a

contract that governed specific areas (*e.g.*, insurance benefits), but did not alter the at-will relationship.

In sum, we must assume the evidence supports the jury's verdict and the trial court's decision. Additionally, we have concluded that the jury's verdict is not inherently inconsistent because it is possible for an employee to have an employment contract that governs specific areas and, at the same time, be an at-will employee.

Next, we consider Lowe's argument that the jury's answers are perverse. For a verdict to be perverse, there must be something to warrant a finding that considerations which were ulterior to a reasonably fair application of the jury's judgment to the evidence, under the court's instructions, controlled or materially influenced the jury. ***Becker***, 141 Wis.2d at 820, 416 N.W.2d at 913. A verdict is perverse when the jury clearly refuses to follow the direction or instruction of the trial court upon a point of law, or where the verdict reflects highly emotion, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair. ***Id***.

We agree with the respondents that Lowe "has pointed to nothing which even remotely suggests that the jury was acting pursuant to highly emotional, inflammatory or immaterial considerations or out of any sense of pre-judgment." *See* ***id.*** Therefore, we reject Lowe's argument that the jury's verdict was perverse. Because we have concluded that the jury's verdict was neither inconsistent nor perverse and that she has waived any errors in the special verdict form, we conclude that Lowe is not entitled to a new trial.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.