

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-2735

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

LAWRENCE S. BUNDY AND MARGARET ANNE BUNDY,

PLAINTIFFS-APPELLANTS,

V.

UNIVERSITY OF WISCONSIN-EAU CLAIRE, LARRY G. SCHNACK, SISSY BOUCHARD, PEGGY KLEIN, DEBRA KING, DOUG NEITZEL, JEFFREY LUTZ, ART LYONS, JEANINE ROSSOW, JEANINE THULL, KAREN WELCH, MEMBERS OF THE ACADEMIC STAFF, COMPLAINT, GRIEVANCE AND REVIEW COMMITTEE, AND STATE OF WISCONSIN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: RODERICK A. CAMERON, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

CANE, P.J. Lawrence Bundy appeals a summary judgment dismissing his suit against the University of Wisconsin-Eau Claire (UWEC) and the chancellor, Larry G. Schnack.¹ Bundy contends summary judgment is not appropriate because material fact questions exist which preclude summary judgment on his promissory estoppel, misrepresentation, and § 100.18(1), STATS., (fraudulent representation) claims. Margaret Bundy also contends dismissal of her claims was improper. Because we conclude that no genuine issue of material fact exists and that Schnack is entitled to judgment as a matter of law on the promissory estoppel claim and § 100.18(1) claim, we affirm in part the summary judgment. We conclude, however, there is an issue of material fact regarding the misrepresentation claims and therefore reverse the summary judgment on those claims. We also reverse and remand Margaret's claim.

Bundy claims Schnack made promises to him regarding his employment status at UWEC on two occasions; first, at his initial hiring in 1979 and again on May 12, 1994, after Bundy had received a "notice of intent not to renew" his appointment.² Bundy claims that in 1979, Schnack told him that his

¹ The summons and complaint were filed in December 1995. Defendants removed the matter to federal court, where they obtained a summary judgment in August 1996 regarding the federal claims. The case was remanded to the state court for resolution of the state claims. Bundy appealed the federal court summary judgment, which was affirmed by the seventh circuit in April 1997. Defendants then moved for summary judgment in state court, which was granted by the Honorable Roderick A. Cameron in April 1997. This case is an appeal from the state court summary judgment. Bundy concedes that, due to the federal court decision, no further claims lie against defendants Bouchard, Klein, King, Neitzel, Lutz, Lyons, Rossow, Thull and Welch.

² In 1979, Bundy accepted a limited appointment in student academic services as registrar and coordinator for student academic services from August 1979 until June 1980. Bundy continued serving limited term appointments until 1992. From 1992-93, Bundy continued to serve in a similar capacity, but did not receive a particular designation. Bundy accepted a fixed-term appointment to academic staff for 1993-94, dividing his time between lecture and grant work. Bundy's fixed-term contract for 1994-95 gave notice of the UWEC's intent not to renew beyond the end of academic year 1995.

limited appointment to student academic services, along with his concurrent probationary appointment as a member of Academic Staff, was "as good as" a tenured position. At that time, Schnack was Assistant Vice Chancellor. Bundy also claims that in May 1994 he personally met with Schnack, who told him: (1) the notice of nonrenewal was "just a formality;" (2) Schnack would "find a place for [Bundy] at the university;" and (3) "Don't worry about it. I have no intention of getting rid of you at this university. There will always be a place for you here at the University of Wisconsin-Eau Claire." In 1994, Schnack was chancellor of UWEC, a position he had held since 1985.

Bundy sued UWEC under various theories, four of which he addresses on appeal: (1) promissory estoppel; (2) intentional, strict responsibility, and negligent misrepresentation; (3) fraud under § 100.18, STATS.; and (4) Margaret Bundy's claim for damages.

SUMMARY JUDGMENT

The purpose of summary judgment is to determine whether the parties' legal dispute can be resolved without a trial. *U.S. Oil Co. v. Midwest Auto Care Servs.*, 150 Wis.2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). When reviewing the grant of a motion for summary judgment, we follow the same methodology as the trial court. Section 802.08(2), STATS.; *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). First, we examine the pleadings to determine whether a proper claim for relief has been stated. *Id.* at 317, 401 N.W.2d at 821.

"If the moving party has made a prima facie case for summary judgment, the court examines the affidavit submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to

any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and therefore a trial is necessary." *Preloznik v. City of Madison*, 113 Wis.2d 112, 116, 334 N.W.2d 580, 582-83 (Ct. App. 1983). "Summary judgment must be entered if the pleadings, depositions, answers to interrogatories, and admissions on file and affidavits, if any, show that there are no material issues of fact and that the moving party is entitled to judgment as a matter of law." Section 802.08(2), STATS. However, if the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it is improper to grant summary judgment. *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis.2d 555, 567, 278 N.W.2d 857, 862 (1979).

PROMISSORY ESTOPPEL

UWEC asserts that any promise Schnack may have made to Bundy by way of his 1994 statements was in fact fulfilled because a promise of permanent employment creates a contract for employment at will. See *Forrer v. Sears, Roebuck & Co.*, 36 Wis.2d 388, 392, 153 N.W.2d 587, 589 (1967). Bundy contends summary judgment is not proper on his promissory estoppel claim because questions of fact exist regarding whether his reliance on Schnack's 1994 statements, which reaffirmed the 1979 representations, was reasonable and whether Schnack could reasonably expect his statements to induce reliance. We agree with UWEC that Schnack's alleged statements would create a relationship of employment at will. We therefore need not address the issue of reasonable reliance because, based on our conclusion that the promise was one of a contract for employment at will, there exists no promise for this court to enforce.

The doctrine of promissory estoppel was first adopted in *Hoffman v. Red Owl Stores*, 26 Wis.2d 683, 696, 133 N.W.2d 267, 274 (1965). Three

questions must be answered affirmatively to support an action for promissory estoppel. *Forrer*, 36 Wis.2d at 392, 153 N.W.2d at 589.

- (1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?
- (2) Did the promise induce such action or forbearance?
- (3) Can injustice be avoided only by enforcement of the promise?

Id. (citing *Hoffman*, 26 Wis.2d at 698, 133 N.W.2d at 275. The first two elements of promissory estoppel are questions of fact; the third element is a policy question to be decided by the court in its discretion. *U.S. Oil*, 150 Wis.2d at 89, 440 N.W.2d at 828.

In *Forrer*, the court determined that the employment relationship established as a result of the defendant's inducements and the plaintiff's conduct was properly denominated as permanent employment.³ *Id.* The accepted and usual definition of what is meant by permanent employment was set forth in *Forrer*: "[T]he assumption will be that, even though the parties speak in terms of permanent employment, the parties have in mind merely the ordinary business

³ In *Forrer*, an employee brought an action for promissory estoppel against his employer, Sears. *Forrer v. Sears, Roebuck & Co.*, 36 Wis.2d 388, 390, 153 N.W.2d 587, 588 (1967). Forrer had worked at Sears for 18 years. *Id.* He left employment at Sears in 1963 due to ill health and began operating a farm. *Id.* He returned to work in November 1964 as a part-time manager. *Id.* In December 1964, the general manager promised him permanent employment as a manager in consideration of giving up his farming operations and working full time for Sears. *Id.* The court determined that, at most, Sears promised Forrer employment terminable at will, a promise carried out when Forrer was hired as a full-time manager. *Id.* at 394, 153 N.W.2d at 590. The court concluded that justice did not require the application of promissory estoppel, because the promise of the defendant was kept, and the court was therefore not required to enforce it. *Id.* at 392, 153 N.W.2d at 589.

contract for a continuing employment, terminable at the will of either party." *Id.* at 393, 153 N.W.2d at 589 (quoting 56 C.J.S. MASTER AND SERVANT § 8 at 78).

In general, a contract for permanent employment, for life employment, or for other terms purporting permanent employment, amounts to an indefinite general hiring terminable at the will of either party where the employee furnishes no consideration additional to the services incident to the employment. *Id.* at 393, 153 N.W.2d at 589. This rule exhibits a strong presumption in favor of a contract terminable at will unless the terms of the contract or other circumstances clearly manifest the parties' intent to bind each other. *Id.* at 393, 153 N.W.2d at 589-90.

An exception to the above-stated rule exists, however, where the employee has given additional consideration of benefit to the employer beyond the services of employment. In that case, a contract for permanent employment is valid and enforceable and not against public policy. *Id.* at 394, 153 N.W.2d at 590. A permanent employment contract is terminable at will unless there is additional consideration in the form of an economic or financial benefit to the employer. *Id.* A mere detriment to the employee is not enough. *Id.*

Bundy submits that he has given additional consideration in exchange for Schnack's promise of continuing employment by surrendering his probationary appointment status, which he asserts entitled him to at least two years' standing in the probationary appointment position. He suggests that the surrender of the probationary appointment represents a "considerable benefit" to UWEC. We are not persuaded. Bundy presents no evidence to meet the standard of showing an economic or financial benefit to UWEC. His assertion that he gave up a probationary appointment is vague; he does not elaborate on how UWEC has

received an economic or financial benefit as a result of this action. If anything, the assertion merely shows that Bundy suffered a detriment by not pursuing avenues to object to or reinstate the probationary appointment, which is not sufficient to show additional consideration beyond the rendering of services in fulfillment of the employment at will.

We conclude that Schnack's 1979 and 1994 statements to Bundy regarding his employment status at UWEC created a relationship of employment at will. Any promise that was made was fulfilled, and thus promissory estoppel cannot be invoked to enforce the promise. We also conclude that Bundy has not set forth facts to support his claim that Schnack's statements to him created a valid contract for permanent employment because he fails to show that he gave additional consideration in the form of economic or financial benefit to UWEC.

SECTION 100.18(1), STATS.—FRAUDULENT REPRESENTATIONS

Bundy contends that he has a claim against UWEC under § 100.18(1), STATS., for fraudulent representations because the statute prohibits untrue, deceptive or misleading statements relative to employment or services. He argues that § 100.18(1) applies to Schnack's misleading statements that sought to induce him to enter into a contract for employment.⁴ We are not persuaded.

⁴ It is unclear whether the 1979 or 1994 statements form the basis of Bundy's § 100.18(1), STATS., claims. He merely states in his appellate brief, "misleading *statements* by defendant Schnack to plaintiff Bundy to seek to induce him to enter into a contract for employment with UWEC can give rise to a claim under § 100.18(1), STATS." (Emphasis added.) Because we determine § 100.18(1) is not applicable to Bundy's situation under either the 1979 or 1994 scenario, we need not determine with specificity which statements form the basis of Bundy's claim.

Section 100.18(1), STATS., appearing in a chapter entitled "Marketing, Trade Practices," provides:

No person, firm, corporation or association, or agent or employe thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employe thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

Bundy suggests that § 100.18(1), STATS., applies to Schnack's statements because the statute does not contain a limitation of application to formal sales promotion. He argues that his case comes within the ambit of § 100.18(1) because the statute is not limited to media advertising, that the public may include one person, and that the application of the statute is broad. Bundy, however, ignores the context in which these principles apply; that is, to protect consumers from unfair marketing practices. He cites *Grube v. Daun*, 173 Wis.2d 30, 57, 496 N.W.2d 106, 116 (Ct. App. 1992), for the proposition that media advertising need not be involved. *Grube*, nevertheless, deals with the application

of § 100.18(1) to protect the public from all untrue, deceptive or misleading representations made in sales promotions, including *face-to-face* sales where no media advertising is involved. *Id.* Bundy's assertion that "the public" may mean one person is true; however, the court in *State v. Automatic Merchandisers*, 64 Wis.2d 659, 221 N.W.2d 683 (1974), examined the meaning of "public" in the context of § 100.18(1). It determined the use of the term "public" in § 100.18(1), prohibiting the making of any deceptive or misleading representation to the public *in connection with the sale of a product*, does not mean that the statement must be made to a large audience, as in some situations, one person may constitute the public. *Id.* at 664, 221 N.W.2d at 686.

A review of § 100.18(1), STATS., cases confirms the scope of its applicability; the reported cases have in common a consumer protection issue.⁵ *See* WIS. STAT. ANN. § 100.18(1), 79-86 (West 1997). No case deals with a plaintiff's claim of fraudulent statements allegedly made to induce entry into an employment contract. Bundy has presented no case law, legislative history or other authority that demonstrates that this consumer protection statute includes the type of statements made by Schnack to Bundy concerning Bundy's employment

⁵ *See Grube v. Daun*, 173 Wis.2d 30, 57, 496 N.W.2d 106, 116 (Ct. App. 1992) (intent of § 100.18(1), STATS., is to protect public from all untrue, deceptive or misleading representations made in sales promotions, including those made in face-to-face sales where no media advertising is involved and statute applies to real estate sales as well as sale of consumer goods); *State v. American TV & Appliance*, 146 Wis.2d 292, 297-98, 430 N.W.2d 709, 711 (1988) (a claim that radio advertisement for clearance-priced washer-dryer sets was untrue, deceptive or misleading contrary to § 100.18(1)); *Tim Torres Enters. v. Linscott*, 142 Wis.2d 56, 59-60, 416 N.W.2d 670, 671 (Ct. App. 1987) (involving a claim that flyers and signs violated § 100.18(1)); *Zeller v. Northrup King Co.*, 125 Wis.2d 31, 38, 370 N.W.2d 809, 813-14 (Ct. App. 1985) (aim of § 100.18(1) is to protect public from untrue, deceptive or misleading representations made in sales promotions); *Bonn v. Haubrich*, 123 Wis.2d 168, 172-73, 366 N.W.2d 503, 505 (Ct. App. 1985) (§ 100.18(1) applies whether media advertising is involved or not); and *State v. Automatic Merchandisers*, 64 Wis.2d 659, 662, 221 N.W.2d 683, 685 (1974) (§ 100.18(1) applies to oral representations made in private conversations to prospective purchasers of products).

status at UWEC. Summary judgment, therefore, is appropriate on Bundy's § 100.18(1) fraudulent representation claim.

MISREPRESENTATION

Bundy contends summary judgment is not appropriate on his misrepresentation claims because a genuine issues of material fact exist regarding whether (1) Schnack had an intent not to fulfill his 1994 promises at the time he made them to Bundy⁶ and (2) his reliance on Schnack's statements was reasonable. UWEC argues that any statement Schnack may have made was a promise of future action, which cannot form the basis of a misrepresentation claim. It also argues that even if Schnack made statements of fact, Bundy's reliance was unreasonable, and his claims must therefore fail. We agree with Bundy that a genuine issues of material fact exist whether Schnack's alleged statements can form the basis of a misrepresentation claim and whether his reliance was reasonable.

A plaintiff must establish the following three elements in a misrepresentation case: the defendant made a representation of fact; the representation of fact was untrue; and the plaintiff believed the representation to

⁶ In his misrepresentation claims, Bundy refers to Schnack's 1979 statement that his position was "as good as tenure" in support of his contention that his reliance on the 1994 statements was reasonable, providing a basis for the third essential element of a misrepresentation claim. He does not specifically claim that the 1979 statement was a misrepresentation.

be true and relied on it to his or her detriment. *Gauerke v. Rozga*, 112 Wis.2d 271, 277 n.3, 332 N.W.2d 804, 807 n.3 (1983).⁷

"Unfulfilled promises or representations of things to be done in the future are *not* statements of fact." *U.S. Oil*, 150 Wis.2d at 87, 440 N.W.2d at 827 (emphasis added.). "Statements of fact must relate to present or preexisting facts, not something to occur in the future." *Id.* However, an exception to the "preexisting fact" rule exists where the promisor, at the time the promise was made, had a present intention not to perform the promise.⁸ *Id.* The promise is an implied representation of present intent to perform, and the misstatement of present intention is a misrepresentation of a material fact. *Id.* The exception also applies if the promisor is aware of present facts incompatible with the promise or opinion. *Hartwig v. Bitter*, 29 Wis.2d 653, 658-59, 139 N.W.2d 644, 647-48 (1966).

⁷ Bundy makes specific claims of intentional, strict responsibility and negligent misrepresentation. Each claim requires proof of elements in addition to those required for a misrepresentation claim. For intentional misrepresentation, defendant must know that the statements are untrue or make them recklessly without caring whether the statements are true or not and make the statements with intent to deceive. For strict responsibility misrepresentation, plaintiff must show that the misrepresentation was made on the defendant's personal knowledge or under circumstances in which he or she necessarily ought to have known the truth or untruth of the statement and the defendant must have an economic interest in the transaction. See *Gauerke v. Rozga*, 112 Wis.2d 271, 277 n.3, 332 N.W.2d 804, 807 n.3 (1983). For negligent misrepresentation, plaintiff must show that the defendant acted negligently and that one of the exceptions to immunity for negligent acts of state employees does not apply; that is, where the conduct is malicious, willful or intentional; where the injury results from the negligent performance of a ministerial duty; or where the officer or employee has an absolute, certain and imperative duty to act and fails to do so. See *Walker v. University of Wisconsin Hosps.*, 198 Wis.2d 237, 249, 542 N.W.2d 207, 212 (Ct. App. 1995)

⁸ The promise is an implied representation of present intent to perform, and the misstatement of present intention is a misrepresentation of a material fact. *U.S. Oil Co. v. Midwest Auto Care Servs.*, 150 Wis.2d 80, 87, 440 N.W.2d 825, 927 (Ct. App. 1989).

Here, Bundy contends Schnack told him that the letter indicating the UWEC's intent not to renew was "just a formality;" that Schnack would "find a place for [Bundy] at the university;" that Schnack had "no intention of getting rid of [Bundy];" and there would always be a place for him at UWEC. Bundy argues that based on Schnack's duties and responsibilities at the University as its chancellor and his familiarity with the types of faculty appointments, a jury could reasonably infer that Schnack was aware of facts incompatible with his representations of continued employment at the time he told Bundy that the notice of intent not to renew was just a formality.

Schnack's affidavit, attached as an exhibit to Bundy's brief in opposition to the motion for summary judgment, explains the details of the employment structure for administrative and academic positions in the UWEC system. Bundy argues that a reasonable jury could infer from Schnack's role at the UWEC that he was aware of the university's plans to terminate Bundy's employment and that Schnack's statement that there would always be a place for Bundy at UWEC was inconsistent with Schnack's knowledge regarding Bundy's employment status.

Bundy also asserts that he relied to his detriment on Schnack's statements. He contends based on Schnack's statements, he did not timely challenge the nonrenewal letter and thus lost his opportunity to have his objections heard. He also states that he did not seek alternate employment, which resulted in missed employment opportunities.

Bundy maintains his reliance on Schnack's 1994 statements was reasonable because the two had a sixteen-year relationship as colleagues and friends; Bundy was aware of situations where Schnack had apparently exercised

his authority to secure indefinite status for others; and Bundy had worked directly for Schnack in the past. Based on these factors, Bundy believed Schnack's statements and expected Schnack would follow through on them. UWEC challenges the reasonableness of Bundy's reliance. It argues that Bundy possessed information directly contradicting Schnack's statements and also had personal knowledge that nonrenewal letters were not "just a formality." Resolution of this issue is not appropriate at the summary judgment stage because a genuine issue of material fact exists whether Bundy's reliance was reasonable.

We conclude that Bundy has presented evidence from which a reasonable jury could infer that Schnack either had a present intent not to perform his alleged promises to Bundy of continued employment or that Schnack offered his opinion when he was aware of facts incompatible with his opinion. We conclude that there exists a genuine issue of material fact regarding whether Schnack's alleged 1994 statements fall within an exception to the "preexisting fact rule" as required to establish proof of Bundy's misrepresentation claims. Furthermore, Bundy has also presented evidence from which a reasonable jury could infer that his reliance on Schnack's statements was reasonable. We conclude he has raised a question of material fact relating to the reasonableness of his reliance on Schnack's alleged misrepresentations. These claims, therefore, are not appropriate for resolution at the summary judgment stage. The trial court's grant of summary judgment on the misrepresentation claims is reversed. Because the issue of intent bears on the first basic element of all three of Bundy's misrepresentation claims, we remand for further proceedings on the misrepresentation claims.

MARGARET BUNDY'S CLAIMS

Margaret Bundy claims she has also suffered damages because she relied to her detriment on Schnack's 1994 statements to her husband. The trial court dismissed Margaret's claim based on its summary judgment determinations on Bundy's claims. UWEC concedes Margaret may be entitled to prove her own damages, but only if UWEC is liable on Bundy's remaining claim of misrepresentation. See *In re Estate of Kohls*, 57 Wis.2d 141, 147, 203 N.W.2d 666, 669 (1973), *Schwartz v. Milwaukee*, 54 Wis.2d 286, 293, 195 N.W.2d 480, 484 (1972).

Because we conclude that summary judgment was not appropriate on Bundy's misrepresentation claim, we reverse the trial court's dismissal of Margaret's claim and remand for consideration along with Bundy's misrepresentation claims.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded. No costs on appeal.

Not recommended for publication in the official reports.

