COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP496 **Cir. Ct. No. 2012CV12978**

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

GERALD P. RIEDER , FOR HIMSELF AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED PERSONS, MICHAEL J. SCHUH , FOR HIMSELF AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED PERSONS AND MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION, FOR ITSELF AND ON BEHALF OF ITS MEMBERS,

PLAINTIFFS-APPELLANTS,

V.

MILWAUKEE COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 KESSLER, J. At issue in this appeal is whether two Milwaukee County retirees and the Milwaukee Deputy Sheriffs' Association have vested rights in the highest level of health insurance benefits established during their employment with Milwaukee County (the County). The retirees argue that they were entitled to full payment of their health insurance benefits, including premiums, co-payments, deductibles and Medicare payments, among other benefits. The County argues that pursuant to county ordinances and the retirees' collective bargaining agreements, the retirees are only entitled to county payment of their monthly insurance premiums. The circuit court granted summary judgment for the County. We affirm.

BACKGROUND

¶2 Gerald Rieder and Michael Schuh are retired employees of Milwaukee County. Both are also former members of the Milwaukee Deputy Sheriffs' Association (MDSA), the sole collective bargaining agent for law enforcement employees of the Milwaukee County Sheriff's Department holding the rank of Deputy Sheriff and Deputy Sheriff Sergeant. As employees of the County, Rieder, Schuh and other members of the MDSA entered into benefit contracts with the Milwaukee County Employees Retirement System (MCERS). MCERS provides retirement, disability, and death benefits to Milwaukee County employees.

¶3 Both Rieder and Schuh were hired before 1994. At that time, health insurance benefits for active County employees and retirees were controlled by Chapter 17 of the Milwaukee County Code of General Ordinances. When Rieder and Schuh entered their benefit contracts with the MCERS, the relevant portion of the ordinance provided that employees hired before 1994 who retire with fifteen or

more years of service may continue to participate in the same health insurance program the County provides to active employees, with no cost to the retiree for monthly insurance premiums. The health insurance program at the time, pursuant to the collective bargaining agreements (CBAs) in place during the early part of the parties' employment, provided for fully-paid health insurance coverage. The relevant portion of the CBAs provided:

> The County shall pay the full cost of employes' Blue Cross and Blue Shield and major medical insurance coverage, including such premiums for employes and their dependents retiring after more than 15 years of credible pension service with the County in accordance with section 17.14(7)(i) of the County General Ordinance.

¶4 It is undisputed that health insurance for County employees hired before 1994 was nearly cost-free.[1] The CBAs and ordinances were amended multiple times between Rieder and Schuh's hire and their retirement. Rieder retired in 1995. At that time, Section 17.14 of the Milwaukee County Code of General Ordinances provided that "the County shall pay the *full monthly cost* of providing [health insurance] coverage to retired members of the County Retirement System." (Emphasis added.) Rieder did not have a separate agreement with the County at the time of his retirement. Schuh retired in 2009. The relevant portions of Section 17.14 were the same as they were at the time of Rieder's retirement. The CBA with the County at the time of Schuh's retirement provided that retirees "shall be allowed to continue in the County Group Health Benefit Program and the County shall pay *the full monthly cost* of providing such coverage, in accordance with Chapter 17 of the General Ordinances." (Emphasis

[1] It is unclear from the record when exactly Rieder and Schuh were hired by the County; however, it is undisputed that both were hired prior to 1994.

added.) Accordingly, retirees were required to share in the cost of non-monthly insurance expenses, but did not have to pay a monthly premium.

¶5 In January 2012, the County adopted a budget that implemented increases in co-pays, co-insurance, deductibles, and other out-of-pocket insurance expenses, applicable to all active and retired employees. Section 17.14(7) of the ordinances was amended to provide:

> (m) … The county shall pay the full monthly cost of providing county group health coverage under section 17.14 to the following individuals:
>
> > (1) Upon retirement … who were hired prior to January 1, 1994….
> >
> > …
> >
> > (4) Employees who were represented as of December 31, 2011 by the Deputy Sheriffs Association, and who were hired prior to July 1, 1995….
> >
> > …
> >
> > (ff) Effective January 1, 2012, employees who are members of the Milwaukee Deputy Sheriff's Association … shall be subject to the provision of 17.14(7), with the exception of subsection (d) which shall be in accordance with the provisions of the collective bargaining agreement.

¶6 The changes still did not require retirees hired before 1994 to make any monthly premium payments. In essence, the ordinance provided that otherwise eligible retirees could participate in the same health plan as active County employees, but without paying a premium for that participation.

¶7 Rieder, Schuh and the MDSA retirees filed suit against the County, alleging that under Chapter 17 of the county ordinances, the laws underlying MCERS, and their CBAs, every MDSA retiree had a vested right in the health

insurance benefits set forth in their CBAs when they entered the Milwaukee County retirement system, i.e., when they were hired by the County. Plainly stated, they alleged that they were entitled to the full cost of insurance benefits—including all out-of-pocket expenses—that were in place when they first entered the Milwaukee County system. They argued that the County was precluded from increasing their insurance costs under the 2012 budget because the contracts in place at the time of their hire guaranteed that the County would cover full insurance costs, not just monthly premiums.

¶8 The plaintiffs and the County each moved for summary judgment. In a thorough, well-reasoned oral decision, the circuit court granted summary judgment to the County. The circuit court found that the MDSA retirees did not have a vested right to the highest level of health insurance benefits contractually established at any time during their active employment with the County. Rather, the circuit court held that according to the county ordinances and the relevant CBAs, the only vested retiree health insurance benefit available to the MDSA retirees was the premium-free participation plan available to active Milwaukee County employees. This appeal follows.

DISCUSSION

¶9 On appeal, Rieder, Schuh and the MDSA retirees argue that: (1) the MDSA retirees have vested rights to the highest level of health insurance benefits that were established during their years of service (i.e., cost-free health insurance); (2) at a minimum, the MDSA retirees have vested rights in the health insurance benefits that came to be contractually established during the years of their retirement; and (3) the circuit court's conclusions render the retirees' benefit contracts illusory. We address each issue.

Standard of Review.

¶10 "We review the circuit court's grant of summary judgment in the present case independently, applying the same methodology that is used by the circuit court." *See* ***Loth v. City of Milwaukee***, 2008 WI 129, ¶9, 315 Wis. 2d 35, 758 N.W.2d 766. "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***Id.*** There is no genuine issue of material fact in the instant case.

A. Health Insurance Benefits to Retirees Did Not Vest Before Actual Retirement.

¶11 The plaintiffs contend that the MDSA retirees gained vested rights in the highest level of health insurance benefits that came to be contractually established on the dates they commenced their employment with Milwaukee County. The Wisconsin Supreme Court recently rejected this exact contention in its recent decision, ***Schwegel v. Milwaukee County***, 2015 WI 12, 360 Wis. 2d 654, 859 N.W.2d 78. We must do the same.

¶12 Rieder, Schuh and the MDSA retirees argue that the CBAs and ordinances in place at the time of their hire—when they became a part of the Milwaukee County System—entitle them to fully-paid health insurance costs, not limited to monthly premiums. The plaintiffs contend that the laws underlying the MCERS establish protected health insurance benefits that vested when the MDSA retirees became members of the MCERS system.

¶13 The Wisconsin Supreme Court, in ***Schwegel***, provided the history of the laws underlying MCERS and County-paid health insurance. The history is helpful in understanding the plaintiffs' claims:

Chapter 201 of the Laws of 1937 is the starting point from which MCERS was developed. It provided for the establishment of pension and death benefits for county employees in counties with populations of 500,000 or more…. In 1938, in accord with the Laws of 1937, Chapter 201, Milwaukee County created MCERS, which was then controlled by the State.

Laws promulgated in 1945, specifically Chapter 138 of the Laws of 1945, again addressed the State-controlled MCERS. Chapter 138 described retirement annuities and death benefits as being "benefit contracts." Those laws provided in relevant part:

> (2) CONTRACTS TO ASSURE BENEFITS. The benefits of members ... and of beneficiaries of deceased members ... shall be assured by benefit contracts as herein provided:
>
> (a) ... [E]ach member and beneficiary having such a benefit contract shall have a vested right to such annuities and other benefits and they shall not be diminished or impaired by subsequent legislation or by any other means without his consent.

Ch. 138, Laws of 1945.

….

In Chapter 405 of the Laws of 1965, the legislature granted Milwaukee County specific home rule authority over MCERS. It provided in relevant part:

> (2) ... Each county ... is hereby empowered, by county ordinance, to make any changes in such retirement system which hereafter may be deemed necessary or desirable for the continued operation of such retirement system, but no such change shall operate to diminish or impair the annuities, benefits or other rights of any person who is a member of such retirement system prior to the effective date of any such change.

§ 2, ch. 405, Laws of 1965.

….

[I]t was not until 1967 that Milwaukee County first began including retired employees in its health insurance

> program. MCGO § 17.14(7) (1967).[2] Milwaukee County explained that its 1967 ordinance was, "To repeal and recreate section 17.14(7) of the General Ordinances of Milwaukee County, as amended ... relating to the Blue Cross–Medicare Programs so as to make such programs fully paid for both employes and persons on the retirement rolls."
>
> ….
>
> Terms on which Milwaukee County has provided health insurance to its employees and retired employees have been modified many, many times since 1967….
>
> The 1996 amendment to MCGO § 17.14(7)(h) provides: "The provisions of this subsection are considered a part of an employee's vested benefit contract as more fully set forth in 201.24(5.[10])." MCGO § 201.24(5.10) (1996) provides:
>
> > Members who retire with sufficient pension service credit as noted in chapter 17 of the Code, or the appropriate labor agreement, shall be provided with paid health insurance as noted in chapter 17 of the Code, however such benefit shall not be funded via the pension fund.

Schwegel, 360 Wis. 2d 654, ¶¶24-27, 32, 34-35 (some formatting altered; multiple ellipses and brackets in original; footnote omitted).

¶14 Like the plaintiffs in ***Schwegel***, Rieder, Schuh and the MDSA retirees rely on the history of the laws underlying MCERS, specifically the 1996 amendment to the Milwaukee Code of General Ordinances § 17.14(7)(h). They argue that under the 1996 amendment "[t]he MDSA Retirees obtained vested benefits at the highest level of benefits that came to be contractually established during the MDSA retiree's years of service, whether those years of service occurred before the amendment or after." Thus, they argue that we are required to look at the agreements in place when Rieder and Schuh first became members of

[2] "MCGO" refers to the Milwaukee County General Ordinances.

the Milwaukee County system—agreements which required the County to pay the full cost of employees' and retirees' health insurance coverage.

¶15 ***Schwegel*** addressed essentially the same arguments and rejected them. In that case, multiple plaintiffs claimed a vested contract right to reimbursement of Medicare Part B premiums upon retirement, even though they had not yet retired. ***Schwegel***, 360 Wis. 2d 654, ¶2. The court stated that "[t]he eligibility for the benefit vests as a contract right when the employee meets all the conditions the employer established to confer the benefit." ***Id.***, ¶41. Chapter 17 of the ordinances required County employees seeking Medicare Part B reimbursements to meet three criteria: (1) the employee reach retirement age; (2) the employee provide 15 or more years of credited county service; and (3) the employee retire before the dates established by Milwaukee County. ***Id.***, ¶52. The court held that the reimbursement right did not vest until the criteria were met. ***Id.*** Because the plaintiffs had not yet retired, their rights did not vest. ***Id.*** The court also held that Chapter 17 of the ordinances controlled the issue of health insurance benefits because such benefits historically have been on a "separate track[]" from the pension and death benefits controlled by MCERS. ***Id.***, ¶37. Therefore, the court concluded, the plaintiffs' reliance on the history of the laws underlying MCERS was inappropriate.

¶16 Applying the principals of ***Schwegel*** here, as we must, we conclude that the health insurance benefits at issue did not vest when Rieder, Schuh and other MDSA retirees were hired by the County. As explained by the supreme court, Chapter 17 of the Milwaukee County ordinances requires actual retirement for health insurance benefits to vest. Neither Chapter 17, nor the relevant CBA, required the County to pay for full health insurance costs when the retirees retired. The circuit court properly granted summary judgment to the County on this issue.

Benefits In Place At The Time of the Deputies' Retirement.

¶17 Alternatively, Rieder, Schuh and the MDSA retirees contend "[a]t a minimum [they] have vested rights and benefit contracts to the health insurance benefits that came to be contractually established during the year of their retirement." We conclude that when they retired, Chapter 17 and the CBA only required the County to provide retirees with the same health insurance plan as active County employees. This only obligated the County to pay the full monthly costs, i.e. monthly premiums, of the retirees' health insurance plans that were available to active County employees.

¶18 Rieder retired in 1995. The relevant portion of Chapter 17 of the County ordinances provided: "the County shall pay the *full monthly cost* of providing [health insurance] coverage to retired members of the County Retirement System." (Emphasis added.) Schuh retired in 2009. The ordinance was substantively the same. The circuit court found that Rieder did not have a separate agreement with the County at the time of his retirement; thus, the court found only the ordinance instructive in determining Rieder's benefits. Schuh did have a CBA at the time of his retirement. The agreement provided:

> (6) Employees hired prior to July 1, 1995, upon retirement shall be allowed to continue in the County Group Health Benefit Program and the County shall pay *the full monthly cost* of providing such coverage, in accordance with Chapter 17 of the General Ordinances of the County of Milwaukee, § 17.14 and any other applicable ordinance or section. To be eligible for this benefit, an employee must have fifteen (15) years or more of creditable service as a county employee.

(Emphasis added.)

¶19 The plain language of the ordinance and the relevant CBA only obligate the County to provide retirees with the same health care plan provided to active County employees. This only requires the County to provide "premium-free" health insurance. Nothing in the ordinance, or in the relevant CBA, prohibited the County's adoption of non-monthly costs, such as deductibles, co-payments, prescription drug plans, and the like. Indeed, CBAs dating back to 1989 show that the County and eligible retirees have shared the costs of retirement health insurance. From 1989 on, eligible retirees actually have been paying deductibles, co-pays, prescription costs, and other health care expenses. We conclude that there is no evidence that the 2012 budget failed to align the retirees' health care benefits with those of active employees, while still covering the retirees' monthly premiums.

Illusory Contract.

¶20 Finally, Rieder, Schuh and the MDSA retirees argue that upholding the circuit court would render their contracts with the County "illusory." They argue that doing so would allow the County to increase "the MDSA Retirees' deductibles, co-pays, and other out-of-pocket expenses to a point that any benefit they actually receive from having their premiums paid is rendered meaningless and without benefit." While we appreciate this concern, we disagree.

¶21 "Illusory contracts are not contracts because the illusory language makes performance optional with the promisor no matter what may happen, or no matter what course of conduct in other respects the promisor may pursue [;] it does not justify the promisee in understanding that a commitment has been made." ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶56 n.6, 291 Wis. 2d 393, 717 N.W.2d 58 (citation and quotation marks omitted; brackets in

Metropolitan Ventures). The ordinances and CBA do not grant the County an unlimited right to refuse to pay any benefit and eliminate all protections for the retirees. "[S]o long as the terms of the health insurance plan provided to retired employees remain the same as those provided to active employees, the County cannot shift the costs of health insurance coverage to retirees without limit, for doing so would substantially impede its ability to recruit and maintain active employees." ***Hussey v. Milwaukee Cnty.***, 740 F.3d 1139, 1146 (7th Cir. 2014). A promise of premium-free health insurance does not become illusory merely because the County may reduce some coverage benefits because the costs of other benefits increases.

¶22 For the foregoing reasons, we affirm the circuit court.

By the Court.—Judgment affirmed.

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