COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0410

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

DONALD GRAEBEL,

PLAINTIFF-APPELLANT,

V.

AMERICAN DYNATEC CORP.,

DEFENDANT-RESPONDENT.

APPEAL from judgments of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge

CANE, C.J. Donald Graebel appeals from a judgment dismissing Graebel's original complaint for failure to state a claim upon which relief may be granted. Graebel additionally appeals from a judgment granting American Dynatec's motion for summary judgment on Graebel's amended complaint. Graebel, arguing that the circuit court erred by dismissing his wrongful discharge

claim, contends that his discharge violated the public policy favoring the right to free speech embodied in the Wisconsin Constitution. Specifically, Graebel asserts that the public policy exception to Wisconsin's at-will employment doctrine should be expanded to include the exercise of one's right to free speech. Graebel argues that the circuit court further erred by granting American Dynatec's summary judgment motion, contending that his interpretation of an employee handbook policy created an issue of material fact. We disagree with Graebel's contentions and affirm the circuit court's judgments.

I. BACKGROUND

American Dynatec terminated Graebel's employment the day after a newspaper article in the *Wausau Daily Herald* memorialized Graebel's racially-biased attitudes and opinions regarding the effect of the increased Asian immigration in Marathon County.[1] A company memorandum describing Graebel's termination noted that Graebel was told the following:

> Don, you have the right [to] express your views [publicly] —that is your right. However, it is not your right to [impugn] this organization by association with your views. You have caused this organization to have a major public relations problem. Therefore, you are terminated forthwith. Collect your belongings and leave.

Graebel filed a claim for wrongful discharge, alleging, in pertinent part, that his termination "for speaking from the confines of his home on a matter

[1] Among the opinions attributed to Graebel in the newspaper article were the following:

> Hmongs seem to have more self-respect and take pride in supporting themselves more than the Laotians. … It's like niggers—they all look the same to me. But the Hmongs and the Laotians don't like each other—just like the Krauts and the Polacks.

of public concern unrelated to his employment constitutes a wrongful discharge in violation of the State Constitution and the common laws of the State." Graebel included in his amended complaint a claim for breach of an implied contract, alleging that American Dynatec's employee handbook and subsequent policies transformed Graebel's status from an at-will employee to that of a contractual employee, who could only be terminated for cause. The circuit court granted American Dynatec's motion to dismiss Graebel's original complaint for failure to state a claim and subsequently granted American Dynatec's motion for summary judgment on Graebel's amended complaint. This appeal of both rulings followed.

II. ANALYSIS

Graebel's appeal presents two issues: (1) whether American Dynatec's employee handbook and subsequently added policies transformed Graebel's employment status from at-will to contractual; and (2) whether the public policy exception to the at-will employment doctrine should be expanded to include cases where, as here, one is terminated for exercising his or her free speech rights.

Whether summary judgment was appropriately granted presents a question of law that we review independently of the circuit court. *See* ***Fortier v. Flambeau Plastics Co.***, 164 Wis.2d 639, 651-52, 476 N.W.2d 593, 597 (Ct. App. 1991). When reviewing summary judgments, we utilize the same analysis as the circuit court and must apply the standards set forth in § 802.08(2), STATS. *See* ***Schultz v. Industrial Coils, Inc.***, 125 Wis.2d 520, 521, 373 N.W.2d 74, 74-75 (Ct. App. 1985); *see also* ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis.2d 722, 733, 351 N.W.2d 156, 162 (1984). In general, "summary judgment is proper where there are no genuine issues of material fact and the moving party is

entitled to judgment as a matter of law." ***Kenefick v. Hitchcock***, 187 Wis.2d 218, 224, 522 N.W.2d 261, 263 (Ct. App. 1994); *see also* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Further, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." ***Kenefick***, 187 Wis.2d at 224, 522 N.W.2d at 263 (emphasis added). "A factual issue is 'genuine' if the evidence is such that reasonable jurors could return a verdict for the nonmoving party." ***Id***.

EMPLOYEE HANDBOOK

Graebel asserts that the granting of American Dynatec's summary judgment motion was premature, as there is arguably a disputed issue of material fact. Specifically, Graebel contends that a factual dispute exists as to whether a "Resignation/Termination" policy modified Graebel's employment-at-will status to that of a contractual employee.

In general, employment is "terminable at will by either party without cause." ***Olson v. 3M Co.***, 188 Wis.2d 25, 53, 523 N.W.2d 578, 589 (Ct. App. 1994). In other words, "[u]nder the employee-at-will doctrine, an employer may discharge an employee-at-will 'for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong.'" ***Kempfer v. Automated Finishing, Inc.***, 211 Wis.2d 100, 108, 564 N.W.2d 692, 696 (1997) (quoting ***Brockmeyer v. Dun & Bradstreet***, 113 Wis.2d 561, 567, 335 N.W.2d 834, 837 (1983)). Under certain circumstances, however, "[a]n employee handbook may modify an at-will employment relationship." ***Olson***, 188 Wis.2d at 53, 523 N.W.2d at 589. The handbook must provide more than mere guidance and orientation; consequently, "the at-will relationship is altered only if the handbook

contains express provisions from which it reasonably could be inferred that the parties *intended* to bind each other to a different relationship." ***Id***. at 54, 523 N.W.2d at 589 (emphasis added). We look to the parties' intent and where there is a dispute as to that intent, "a fact issue is presented and summary judgment is inappropriate." ***Clay v. Horton Mfg. Co.***, 172 Wis.2d 349, 354, 493 N.W.2d 379, 381-82 (Ct. App. 1992).

Graebel asserts that his belief that American Dynatec intended to create a contractual relationship with him when it issued a Resignation/Termination policy created a factual dispute thereby precluding summary judgment. Graebel's failure to understand American Dynatec's intent, however, is not tantamount to a dispute over its intent as American Dynatec's intent not to contract with its employees via its employee handbook and any policies amended thereto is clear.

In ***Ferraro v. Koelsch***, 124 Wis.2d 154, 368 N.W.2d 666 (1985), a case relied upon by Graebel, the court held that an expressed intent to substitute an at-will employment relationship for a contractual relationship, terminable only for cause, was found where the employee handbook denoted: (1) employee acknowledgment and acceptance of the handbook's policies and rules as a condition of continued employment; (2) discharge only for just cause; (3) a progressive disciplinary procedure based on the number and seriousness of rule violations; (4) a layoff procedure based on seniority; (5) distinctions between probationary and non-probationary employees; and (6) an expectation that employees would provide a two-week notice before leaving their employment. *See* ***id***. at 159-61, 368 N.W.2d at 669-70. Here, Graebel contends that the Resignation/Termination Policy satisfied the ***Ferraro*** criteria for establishing a contract. American Dynatec's Resignation/Termination Policy was implemented

subsequent to Graebel's receipt of the employee handbook. The employee handbook stated, however, that "[f]rom time to time the company may make changes in these policies as need arises, and may make individual exceptions to these policies if circumstances warrant. American Dynatec Corp. reserves the right to do this." Further, the handbook emphasized:

> We do not enter into employment contracts with our employees. We believe that this organization can achieve excellence only when both parties—company and employee—are satisfied with the employment relationship. Either party can terminate the relationship at any time if they become dissatisfied.
>
> This booklet has been written to assist you in understanding the company's policies and procedures and explains the benefits which you will receive as a company employee.

We have recognized that an employer's attempts to avoid contracting with its employees via specific disclaimers in its handbook are not conclusive to the inquiry into the existence of an implied employment contract. Where there exists an intent by both parties to be bound by the terms of an employee handbook, "those terms would govern the employment relationship and not the general at-will provisions of Wisconsin law." ***Clay***, 172 Wis.2d at 355-56, 493 N.W.2d at 382.

Here, however, it is clear that American Dynatec did not intend to contract—the existence of the disclaimer serves only to emphasize that fact. The Resignation/Termination policy merely updated American Dynatec's employee handbook and the right to do so was plainly stated in the introduction to the handbook. The Resignation/Termination Policy provides, in pertinent part:

> Employees are requested to give at least two weeks notice prior to voluntary termination …

> …. Matters which may result in termination or disciplinary action include the following: … Should you commit one of these infractions, you will be subject to the following actions ….
>
> A few actions will result in immediate termination, at the discretion of the President.

In ***Bantz v. Montgomery Estates, Inc.***, 163 Wis.2d 973, 473 N.W.2d 506 (Ct. App. 1991), the court considered an employer's reserved right to amend its handbook as one factor in determining that the handbook did not create an employment contract. Concluding that the employer in Bantz intended to maintain an at-will employment relationship with its employee, the court noted that: "[T]he employee handbook in effect at the time of Bantz's discharge expressly disclaims the existence of a contract; the [employer] reserved the right to amend the handbook at any time without notice; and the progressive disciplinary procedures were stated in permissive, not mandatory, terms." ***Id***. at 981, 473 N.W.2d at 509.

Similarly, American Dynatec reserved the right to amend its handbook with policies such as the one regarding Resignation/Termination. Additionally, the disciplinary procedures found in American Dynatec's Resignation/Termination policy are, in fact, stated in permissive as opposed to mandatory terms. Further, and contrary to ***Ferraro***, there was no "expectation" that employees would provide two weeks notice before terminating employment; rather, American Dynatec employees were requested to do so. Finally, there is no indication of any intent by American Dynatec to terminate only "for cause," especially where its employee handbook specifically states that either party can terminate the relationship at any time if they become dissatisfied. Under these facts, where American Dynatec's intent not to contract is clear, Graebel's alleged failure to understand his employer's intent does not constitute dispute of a "genuine" issue of material fact necessary to reverse the circuit court's grant of

summary judgment. We therefore affirm the judgment granting American Dynatec's motion for summary judgment.

PUBLIC POLICY EXCEPTION

Having established that Graebel was, in fact, an at-will employee, our inquiry turns to whether Graebel's termination falls within the public policy exception to the at-will employment doctrine. Specifically, we must determine whether the public policy exception should be expanded to include cases where, as here, one is terminated for exercising his or her free speech rights. Graebel appeals from a judgment dismissing his complaint for failure to state a claim. "Dismissal for failure to state a claim is a question of law which we determine de novo." ***Hausman v. St. Croix Care Ctr.***, 214 Wis.2d 655, 662, 571 N.W.2d 393, 396 (1997).

Wisconsin first recognized the public policy exception to the at-will employment doctrine in ***Brockmeyer***. The ***Brockmeyer*** court held that "an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law." ***Id***. at 573, 335 N.W.2d at 840. In ***Bushko v. Miller Brewing Co.***, 134 Wis.2d 136, 396 N.W.2d 167 (1986), the court clarified that in order to maintain a claim under the public policy exception, the discharge must result from an employee's "*refusing a command* to violate a public policy as established by a statutory or constitutional provision." ***Id***. at 141, 396 N.W.2d at 170 (emphasis added). The ***Bushko*** court stated:

> An employee who refuses a command to violate public policy is acting consistent with public policy. However, if the employee of his own volition acts consistently with public policy, he does no more than obey the law. Such

> consistent action, without an employer's command to do otherwise, is merely "praiseworthy" conduct.

Id. at 142, 396 N.W.2d at 170. Additionally, the ***Bushko*** court recognized that the public policy exception had effectively been extended "to include the spirit, as well as the clear language of a statutory provision." ***Id***. at 143, 396 N.W.2d at 170 (citing ***Wandry v. Bull's Eye Credit Union***, 129 Wis.2d 37, 384 N.W.2d 325 (1986)). This narrow exception to the at-will employment doctrine was later extended to include fundamental and well-defined public policies based on administrative rules. ***Winkelman v. Beloit Mem'l Hosp.***, 168 Wis.2d 12, 22-23, 483 N.W.2d 211, 215 (1992). Another extension came in ***Hausman***, where the court recognized: "Where the law imposes an affirmative obligation upon an employee to prevent abuse or neglect of nursing home residents and the employee fulfills that obligation by reporting the abuse, an employer's termination of employment for fulfillment of the legal obligation exposes the employer to a wrongful termination action." ***Id***. at 669, 571 N.W.2d at 398.

To summarize, the public policy exception to the at-will employment doctrine is a very narrow exception indeed—covering an employee's refusal to obey his or her employer's command to violate public policy as established by: (1) statutory or constitutional provision; (2) the spirit of a statutory provision; or (3) administrative rules. The exception further covers employees such as those in ***Hausman***, who are guided by an affirmative obligation to prevent abuse or neglect of nursing home residents and report employer conduct that is inconsistent with their obligation.

Despite the very narrow exceptions recognized in Wisconsin, Graebel, relying on language in ***Schultz***, argues that a termination grounded solely upon one's exercise of free expression contravenes public policy, thereby falling

within the public policy exception to the at-will employment doctrine. In ***Schultz***, an employee was terminated after strongly criticizing his employer in a letter to the editor of a local newspaper. As in the instant case, the employee in ***Schultz*** alleged "that his discharge was wrongful because … it was grounded solely upon his exercise of free expression and thus directly contravened the 'express public policy of Wisconsin.'" ***Schultz***, 125 Wis.2d at 521, 373 N.W.2d at 75. The ***Schultz*** court, affirming judgment for the employer, recognized that "an employer need not tolerate actions which undermine authority or discipline, or are otherwise disruptive of office routine or employment relations, in the name of a limited free speech interest." ***Id***. at 526, 373 N.W.2d at 77. The ***Schultz*** court further noted that "[n]o employer should be subject to suit merely because a discharged employee's conduct was praiseworthy or because the public may have derived some benefit from it." ***Id***. (quoting ***Brockmeyer***, 113 Wis.2d at 573-74, 335 N.W.2d at 840). Graebel, nevertheless, emphasizes the following language in ***Schultz***: "[W]e do not hold that interference with an employee's right to freedom of speech or expression may never form the basis for a cause of action." ***Id***. at 526, 373 N.W.2d at 77.

There is no disputing the importance of one's free speech rights. Article I, § 3, of the Wisconsin Constitution provides: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press." Nevertheless, and despite Graebel's arguments to the contrary, the Wisconsin Supreme Court has specifically refused to expand the public policy exception to claims such as Graebel's. In ***Bushko***, a case decided by the Wisconsin Supreme Court a year after ***Schultz***, the court stated the following:

> The court of appeals held that "freedom of speech" is a public policy that may support a wrongful discharge action. We refuse to extend the ***Brockmeyer*** cause of action for a wrongful discharge to include an employee's complaint that he was discharged as a result of oral or written complaints made concerning some matter that is related to a public policy …. Although we recognize a wrongful discharge claim when an employer's actions violate a clearly mandated public policy, *the public policy exception may not be used to extend constitutional free speech protection to private employment*.

Bushko, 134 Wis.2d at 145-46, 396 N.W.2d at 172 (emphasis added). Given the supreme court's unambiguous refusal to expand the public policy exception to wrongful discharge actions based on freedom of speech, we hold that Graebel failed to state a claim upon which relief could be granted. Therefore, dismissal of his claim is affirmed.

By the Court.—Judgments affirmed.

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