COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP631 **Cir. Ct. No. 2014CV2791**

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

CHRISTOPHER KIENINGER AND DEWAYNE MEEK,

PLAINTIFFS-APPELLANTS,

V.

CROWN EQUIPMENT CORPORATION D/B/A CROWN LIFT TRUCKS, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Reversed and cause remanded for further proceedings*.

Before Lundsten, P.J., Sherman and Fitzpatrick JJ.

¶1 LUNDSTEN, P.J. Christopher Kieninger and Dewayne Meek, both former employees of Crown Equipment Corporation, appeal the circuit court's grant of summary judgment in favor of Crown on their Wisconsin wage law claim. Kieninger and Meek are representatives of a class of employees who work, or

have worked, for Crown. They argue that the circuit court erred by applying the legal standard from the federal Employee Commuting Flexibility Act (ECFA), a 1996 amendment to the federal Fair Labor Standards Act. They further argue that, under Wisconsin's wage law, *they* are entitled to summary judgment.

¶2 We agree with the employees that the circuit court erred by applying the federal standard from ECFA. Wisconsin's wage law lacks language analogous to ECFA, and Crown's argument for applying the ECFA standard is not persuasive. Therefore, we conclude that the circuit court erred in granting summary judgment to Crown based on the legal standard from ECFA.

¶3 However, we do not go so far as to conclude that the employees are entitled to summary judgment because, as we conclude in this opinion, the ECFA standard does not apply. We lack sufficient adversarial briefing on the correct Wisconsin standard and, additionally, we are uncertain whether under the correct standard there might be one or more genuine issues of material fact. Accordingly, we reverse summary judgment and remand to the circuit court for further proceedings. If the circuit court permits, those further proceedings might include additional summary judgment argument and submissions.

Background

¶4 The employees here worked for Crown as field service technicians who performed maintenance and repairs on forklifts at various job sites. To perform these duties, the employees require tools, parts, and other supplies transported in company-provided vans.

¶5 According to Crown, the employees are free to choose whether to commute in these company vans or in their own personal vehicles. More

specifically, Crown maintains that employees may choose one of the following two options: (1) drive the vans between their homes and their first and last job site each day, or (2) drive their own personal vehicles to a Crown branch location to pick up a van at the beginning of each day and, we infer, return that van to the same branch location at the end of each day. Also according to Crown, all employees sign forms acknowledging that they have these two options.

¶6 Crown's policies and practices for compensating employee travel have changed over time. However, there appears to be no dispute that since 2013 Crown's policy has been as follows. Employees who drive vans between their homes and their first and last job site are generally *not* compensated for the travel time between their homes and the first 45 minutes of travel time to their first job site or for any travel time between their last job site and their homes. Employees who drive their own personal vehicles between their homes and a Crown branch location each day are compensated for the travel time between the branch location and their first and last job sites.

¶7 The employees here alleged that they all drove company-provided vans between their homes and their first and last job sites. They further alleged that Crown's failure to compensate them for this travel time violated Wisconsin's wage law. The employees made no federal law claims. Crown denied any violation, and affirmatively alleged that such time was not compensable.

¶8 The employees and Crown both moved for summary judgment on the issue of Crown's liability to compensate the employees for this travel time under Wisconsin's wage law. The main dispute raised by the parties' summary judgment briefing was whether the legal standard from ECFA applies in a Wisconsin wage law claim. The circuit court agreed with Crown that the ECFA

standard applies and, using that standard, the court granted summary judgment in favor of Crown.

Discussion

¶9 Appellate courts review summary judgment de novo. ***State v. Harenda Enters., Inc.***, 2008 WI 16, ¶24, 307 Wis. 2d 604, 746 N.W.2d 25. Summary judgment is proper when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* WIS. STAT. § 802.08(2).[1]

¶10 On appeal, the parties' briefing raises the same main dispute as their circuit court briefing, namely, whether the ECFA standard applies in a Wisconsin wage law claim. This dispute presents a purely legal issue that requires us to interpret federal and state statutes and administrative code provisions. *See* ***State ex rel. Griffin v. Smith***, 2004 WI 36, ¶18, 270 Wis. 2d 235, 677 N.W.2d 259 ("The interpretation of an administrative rule or statute presents a question of law ....").

¶11 To be clear, the employees do *not* argue that Wisconsin's wage law has nothing in common with federal law on the topic. On the contrary, the employees appear to take the position that the applicable Wisconsin wage law provisions here should be interpreted consistent with pre-ECFA federal law because, prior to ECFA, the pertinent Wisconsin provisions tracked federal counterpart law. The employees argue, however, that ECFA currently has no

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

place in Wisconsin's wage law because Wisconsin has never adopted any provision analogous to ECFA. For the reasons that follow, we agree.

¶12 Generally speaking, both Wisconsin's wage law and the Fair Labor Standards Act regulations define work time by reference to whether an employee is performing the employee's "principal activity or activities." *See* ***Weissman v. Tyson Prepared Foods, Inc.***, 2013 WI App 109, ¶7, 350 Wis. 2d 380, 838 N.W.2d 502 (quoting WIS. ADMIN. CODE § DWD 272.12(1)(a)2.); 29 C.F.R. §§ 785.9(a) and 790.8(a) (2011).

¶13 ECFA, enacted by Congress in 1996, added the following pertinent language to the Fair Labor Standards Act:

> [T]he use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

See Employee Commuting Flexibility Act of 1996, Pub. L. No. 104-188, §§ 2101-02, 110 Stat. 1755, 1928 (1996); *see also* 29 U.S.C. § 254(a). The United States Department of Labor adopted regulations that track ECFA's language. *See* 29 C.F.R. §§ 785.9, 785.34, 785.50, and 790.3 (2011).

¶14 Crown does not dispute that Wisconsin has never adopted the above ECFA language in any state statute or administrative code provision. Crown nonetheless contends that this ECFA standard should apply in a Wisconsin wage law claim. Crown's supporting arguments are not persuasive.

¶15 The usual rule in Wisconsin is that we interpret statutory and administrative code provisions based on *the language in those provisions*, not on other language that might have been included but was not. *See, e.g.*, ***DOR v. River City Refuse Removal, Inc.***, 2007 WI 27, ¶26, 299 Wis. 2d 561, 729 N.W.2d 396 ("In interpreting statutes, we primarily focus on the statutory language."); ***Harenda***, 307 Wis. 2d 604, ¶25 ("Administrative code provisions are interpreted according to principles of statutory construction.").

¶16 Crown effectively admits that its position is not based on Wisconsin statutory or administrative code language. Rather, as we understand it, Crown argues that we should depart from our normal focus on statutory or administrative code language here because Wisconsin's employee commuting law is based on pre-ECFA federal law and Congress enacted ECFA with the intent only to "clarify" that pre-existing federal law. Crown argues that Congress, in 1996, intended ECFA as a correction to what Congress, in 1996, viewed as prior wrong or inconsistent court interpretations of federal law. Crown asserts that "ECFA shows how the [federal] commuting rules were supposed to be applied all along—before and after its enactment." Crown argues that federal case law supports the proposition that Congress intended ECFA to "clarify" federal law and to apply this clarification "retroactively."

¶17 In other words, Crown argues that we should interpret the applicable pre-1996 Wisconsin administrative code provisions consistent with what Congress in 1996 told us was Congress's pre-1996 intent.

¶18 Assuming without deciding that federal case law generally supports the proposition that Congress intended ECFA to only "clarify" federal law and to apply that clarification retroactively, Crown's argument goes nowhere with respect

to *Wisconsin's* wage law. As already explained, the Wisconsin Legislature, unlike Congress, did not enact a similar "clarification." Thus, we have no comparable legislative intent to clarify or otherwise change pre-existing Wisconsin wage law.

¶19 Moreover, whatever statutory interpretation rules might apply to federal legislation, Crown's argument that we interpret pre-existing Wisconsin administrative code language based on a subsequent expression of unenacted legislative "intent" conflicts with the Wisconsin approach to statutory and administrative code interpretation. As noted, the Wisconsin approach is tied to the statutory and administrative code language in effect during the relevant time; we do not look to unenacted legislative intent. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110 ("It is the enacted law, not the unenacted intent, that is binding on the public.").

¶20 For that matter, we question whether, under federal jurisprudence, it is proper to look to later congressional action to discern earlier congressional intent. *See* ***United States v. Estate of Romani***, 523 U.S. 517, 536 (1998) (Scalia, J., concurring in part) ("[T]he will of a later Congress that a law enacted by an earlier Congress should bear a particular meaning is of no effect whatever."). In ***Kalal***, our supreme court quoted with approval the following:

> "[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated." Antonin Scalia, *A Matter of Interpretation*, at 17 (Princeton University Press, 1997). "It is the *law* that governs, not the intent of the lawgiver…. Men may intend what they will; but it is only the laws that they enact which bind us." ***Id.***

Kalal, 271 Wis. 2d 633, ¶52 (footnote omitted).

¶21 To sum up, Crown does not convincingly explain why ECFA language—wording that was not adopted by the Wisconsin Legislature—should control over the language actually in place.

¶22 We turn our attention to a related, but different Crown argument. As we understand it, Crown relies on ***Madely v. RadioShack Corp.***, 2007 WI App 244, 306 Wis. 2d 312, 742 N.W.2d 559, for the proposition that Wisconsin's wage law regulations, whatever the vintage, must be interpreted consistent with current federal regulations. However, for reasons we now explain, Crown's reliance on ***Madely*** is misplaced.

¶23 In ***Madely***, this court interpreted a Wisconsin regulation providing that certain types of employees are exempt from overtime payments. *See* ***id.***, ¶¶1-2, 13. The court in ***Madely*** interpreted that Wisconsin exemption regulation consistent with federal law because the regulation expressly provided that the pertinent exemptions "'shall be interpreted in such a manner as to be consistent with the Federal Fair Labor Standards Act and the Code of Federal Regulations as amended.'" *See* ***id.***, ¶13 & n.6 (quoting WIS. ADMIN. CODE § DWD 274.04). Thus, the Wisconsin legislature expressly directed that the exemption provision at issue in ***Madely***, a provision that is not in play here, be interpreted consistent with counterpart federal law "as amended." *See* ***id.*** Crown points to no similar directive that applies here. And, as this court in ***Weissman*** explained, ***Madely*** does not stand for the general proposition "that all Wisconsin administrative regulations must be interpreted in lock step with the [Fair Labor Standards Act and the Code of Federal Regulations]." ***Weissman***, 350 Wis. 2d 380, ¶44.

¶24 The question remains whether summary judgment is proper even if, as we have now decided, the ECFA standard does not apply in a Wisconsin wage

law claim. Neither the circuit court nor Crown has addressed this topic, and we conclude that we lack sufficient adversarial briefing to address it. Based on the briefing before us, we are uncertain whether there might be one or more genuine issues of material fact. Accordingly, we reverse summary judgment and remand to the circuit court for further proceedings. If the circuit court permits, those further proceedings might include additional summary judgment argument and submissions.

Conclusion

¶25 For the reasons stated above, we reverse the circuit court's judgment and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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