COURT OF APPEALS DECISION DATED AND FILED

January 11, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP3019

Cir. Ct. No. 2000CV1200

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

CAROL GONZALES, PATRICIA M. ANDERSON, CONNIE L. COCHRAN, DUANE L. CORSO, SHANE C. GERBER, ROGER L. JERNIGAN, KAREN R. JOHNSON, DIRK D. MACDONALD, SHARON M. MARTIN, RICHARD D. MICH, MARION K. MIELKE, SUSAN L. PFARR, KATHY A. REYNA, OSCAR D. SALAS, DEANNA SCHNEEBERGER, SANDRA M. SKINNER, CLAUDETTE M. SMITH, TRICIA STEELE AND JILL M. VERNEZZE,

PLAINTIFFS-APPELLANTS,

V.

KENOSHA COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim

¶1 PER CURIAM. Carol Gonzales, Patricia M. Anderson, Connie L. Cochran, Duane L. Corso, Shane C. Gerber, Roger L. Jernigan, Karen R. Johnson, Dirk D. MacDonald, Sharon M. Martin, Richard D. Mich, Marion K. Mielke, Susan L. Pfarr, Kathy A. Reyna, Oscar D. Salas, Deanna Schneeberger, Sandra M. Skinner, Claudette M. Smith, Tricia Steele, and Jill M. Vernezze appeal from the judgment entered against them. The appellants argue that the circuit erred when it denied their motion to amend their complaint and granted summary judgment to Kenosha County. Because we conclude that the circuit court did not err, we affirm.

¶2 The appellants are employees of the Kenosha County Jail. The underlying claim arose from the collective bargaining agreement the County had with Local 990, AFSCME. The underlying issue was whether the County was required to pay the appellants for an extra day off. Under the collective bargaining agreement, the appellants worked six days on and two days off. Once every month, the appellants got an additional day off. The agreement referred to this as a "Kelly Day." [1]

¶3 After they filed a grievance with the County under the collective bargaining agreement, the appellants presented claims to the Department of Workforce Development. The claims before the Department of Workforce Development were resolved by a settlement to the appellants of about $95,000.00. In December 2000, the appellants then filed suit against Kenosha County in the

[1] The collective bargaining agreement defines this practice as: "All full-time employees shall work a "six-two" ("6/2") work week, consisting of six (6) consecutive days of work followed by two (20) (sic) days off. To compensate for the longer-than-normal work week, each employee on the "six-two" work schedule shall earn one (1) paid "Kelly Day" every four (4) calendar weeks."

circuit court alleging that the County had violated WIS. STAT. § 109.11(2) (2003-04).[2] The County filed a motion for summary judgment that the court denied in October 2001. The appellants then filed an amended complaint that added additional plaintiffs. After discovery, the parties negotiated to determine if the initial settlement had been calculated properly. This resulted in the County paying an additional $7255.66 to the appellants. The only remaining issues in the suit were the amount of the penalty and attorney's fees under § 109.11(2).

¶4 In order to determine whether the appellants were entitled to the statutory penalty, the court asked the parties to address whether the County had been required, as a matter of law, to pay the appellants for the Kelly Day. The court asked this question because if the County had not been legally obligated to make the payments, the appellants would not be entitled to the statutory penalties. At issue also was whether a penalty would be assessed against the total settlement the appellants had received, or just the smaller settlement that resulted from the suit filed in the circuit court.

¶5 During this time, this court issued its opinion in ***Hubbard v. Messer***, 2003 WI App 15, 259 Wis. 2d 654, 656 N.W.2d 475. The Wisconsin Supreme Court later affirmed this decision. ***Hubbard v. Messer***, 2003 WI 145, 267 Wis. 2d 92, 673 N.W.2d 676. This opinion upheld this court's ruling that a statutory award of penalties is limited to the maximum amount of wages still due at the time the action was commenced. ***Id.***, ¶42. After this decision was issued, the plaintiffs agreed to dismiss the case. Some of the plaintiffs (now the appellants), objected to

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the dismissal and retained a different attorney to represent them. The County moved to dismiss.

¶6 In June 2004, the new attorney moved to amend the complaint by adding additional plaintiffs and stating claims for conspiracy and fraud. The County objected to the motion to amend, but the appellants did not respond to the motion to dismiss. In September 2004, the circuit court denied the motion to amend the complaint and granted summary judgment to the County.

¶7 The issues presented in this appeal are whether the circuit court properly denied the appellants' motion to amend their complaint, and whether the court properly granted summary judgment to the County. While this case has a lengthy and complicated procedural history, the first issue is relatively discrete. The circuit court denied the motion to amend the complaint finding that the appellants did not adequately explain why they waited so long to assert the claims for fraud and conspiracy. The appellants started this action at the administrative level in 2000, and did not raise these issues until 2004, after the Supreme Court decided ***Hubbard***. The motion to amend was made three and one-half years after they began the action, two and one-half years after the appellants filed the first amended complaint, and one and one-half years after the County moved to dismiss. Further, the County had paid the wages to the appellants under their mutual understanding of the collective bargaining agreement for fourteen years without the appellants objecting. The circuit court further stated that the attempt to amend the complaint appeared to be an attempt to avoid the supreme court's decision in ***Hubbard***.

¶8 We review such an order for an erroneous exercise of discretion.

> "A trial court's decision to grant leave to amend a complaint is discretionary." We will not reverse a trial court's discretionary decision unless the record discloses that the court failed to exercise its discretion, that the facts do not support the decision, or that the court applied the wrong legal standard. The trial court "in exercising its discretion must balance the interests of the party benefiting by the amendment and those of the objecting party.

Piaskoski & Assocs. v. Ricciardi, 2004 WI App 152, ¶30, 275 Wis. 2d 650, 686 N.W.2d 675 (citations omitted). Although leave to amend is to be freely given, this does not mean the trial court erroneously exercises its discretion every time it denies such a request. This case has been pending for most of this century. The appellants settled on the administrative level, and then filed suit in the circuit court. That suit also was settled on the issue of wages without the appellants asserting fraud or conspiracy. On these facts, we cannot conclude that the circuit court erred when it denied the appellants' request to amend their complaint.

¶9 The next issue is whether the circuit court erred when it granted summary judgment to the County. This issue requires that we determine whether the County owed any wages to the appellants. The initial grievance presented the question of whether the employees were entitled to be paid for the Kelly Day and the extra day worked. Although there was disagreement among County officials as to whether the union's interpretation of the contract was correct, the County's Director of Administration decided to settle the grievance. The County now contends that it was not obligated to pay these amounts. If the County was not so obligated, then the appellants are not entitled to the statutory penalties.

¶10 The County argues, and we agree, that under past practices, the County was not obligated to make these payments. To be binding on both parties,

a past practice need not be in writing but it must be "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties…." ***Local 1756 AFSCME v. Waupaca County Highway Dept.***, WERC Dec. No. 24764-A at 24 (July 1, 1988) (McLaughlin, Arb.) (citation omitted). The provision at issue was included in the initial collective bargaining agreement and has been repeated in five successor agreements. The union did not dispute nor negotiate over this practice during the time it was in effect. The practice was that the employee would be paid for the extra day worked but would not be paid for the Kelly Day. This practice was unequivocal, clearly enunciated and acted on, and readily ascertainable over a fixed period of time. Consequently, we conclude that the County was not obligated to pay the workers, and that the County did not violate WIS. STAT. ch. 109. The circuit court, therefore, properly granted summary judgment to the County. For these reasons, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.