Insight

IN-DEPTH DISCUSSION

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Wisconsin Court Overturns $2.2 Million Jury Verdict in Favor of Former Doctor, Finding His Employment-at-Will Agreement Was Not Superseded by a Subsequent Policy

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The Wisconsin Court of Appeals recently reaffirmed long-standing precedent holding that employment-at-will agreements may not be modified by a policy or procedure unless it contains an express provision demonstrating that the parties intended to be bound by something other than the established at-will relationship.

On this basis, the court reversed a jury verdict awarding over $2.2 million to a former doctor on his breach-of-contract claim and entered summary judgment to the employer.

The court's decision in *Bukstein v. Dean Health Systems, Inc.,* No. 2016AP920, is a victory for Wisconsin employers, and aligns with the state's strong presumption in favor of employment at-will.

Background

The plaintiff in this case entered into a written employment agreement with the clinic (the "Employment Agreement") containing an at-will provision that gave the clinic the right to terminate the doctor's employment at any time and without cause as long as it satisfied two conditions: (1) it provided him with 90 days' written notice; and (2) at least three-fourths of the members of the clinic's Board of Directors voted to terminate the doctor's employment "without cause."

After the parties executed the Employment Agreement, the clinic disseminated a separate two-page Physician Practice and Performance Management Policy (the "Management Policy") setting forth guidelines for investigating allegations against physicians that could lead to disciplinary action, including termination of employment. The Management Policy gave the clinic broad discretion regarding investigations. For example, it stated

that "concerns regarding physicians may be forwarded by employees to their supervisors to [the clinic's] Office of Medical Affairs," which has discretion under the policy to determine if an investigation is warranted. Additionally, after conducting an investigation, the clinic had the ability to "take any other action [that it] deems appropriate."

Pursuant to the Management Policy, the clinic's Office of Medical Affairs ("OMA") convened a Professional Practice Committee ("PPC") after three of the doctor's patients reported that his groin touched them during the course of examination or treatment. The PPC reviewed the information obtained by the OMA, conducted its own investigation, and concluded that the doctor engaged in inappropriate and unprofessional contact with patients and recommended termination of his employment. More than three-fourths of the members of the clinic's Board of Directors voted to terminate the doctor's employment without cause and the clinic provided the requisite 90-days' notice pursuant to the at-will provision in the Employment Agreement.

The doctor sued the clinic for breach of contract and breach of the duty of good faith and fair dealing in Dane County Circuit Court. He alleged that: the Management Policy either modified his Employment Agreement or qualified as an additional stand-alone agreement between the parties; the clinic breached the new agreement by failing to follow its terms in connection with his termination; and the clinic breached its duty of good faith and fair dealing based on the modified employment agreement.

After the circuit court denied the clinic's motion for summary judgment (finding that the Management Policy constituted a contract between the parties), a jury entered a verdict in the doctor's favor awarding him $2.2 million in damages. The clinic appealed, and the Wisconsin Court of Appeals reversed and granted summary judgment to the clinic.

The Wisconsin Court of Appeals' Analysis

The court began its analysis by reiterating what Wisconsin courts have coined the "only when" rule, which provides that a policy or document modifies an at-will employment relationship only when it contains express provisions from which it can be reasonably inferred that the parties intended to bind each other to a different employment relationship. In cases analyzing the "only when" rule, the court explained, it "has concluded that the mere existence of an employer-issued policy that provides guidelines for employees or that set forth employer policies and procedures is not sufficient to alter an at-will relationship."

Turning its attention to the Management Policy at issue in *Bukstein*, the court first recounted a previous case – *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (Wis. 1985) – where the Wisconsin Supreme Court ruled an employee handbook abrogated an employment at-will agreement because, under the handbook, employees agreed to abide by conduct rules in exchange for termination only for just cause, among other things. Unlike in *Ferraro*, the court explained, the Management Policy contained language making clear that it provided merely one way to proceed, as opposed to requiring termination for just cause.

The court then recalled other cases analyzing the "only when" rule where it rejected arguments that an at-will employment relationship was modified by a progressive discipline policy and a code of ethics policy providing employees with the opportunity to respond to alleged ethics violations. See *Holloway v. K-Mart Corp.,* 113 Wis. 2d 143, 334 N.W.2d 570 (Wis. Ct. App. 1983) and *Wolf v. F&M Banks*, 193 Wis. 2d 439, 534 N.W.2d 877 (Wis. Ct. App. 1995). The facts at issue in *Bukstein*, the court explained, more closely resembled Holloway and Wolf where there was no language in the separate policy that could support a reasonable inference that the parties intended to change their at-will relationship. Key to the court's conclusion was that:

1. unlike the Employment Agreement, neither party signed the Management Policy;
2. the Management Policy was expressly designated a "management policy" and failed to make any reference – either explicit or implicit – to the at-will provision in the employment agreement; and

3. the Management Policy generally used permissive language merely authorizing the clinic to take certain steps in connection with investigations and potential disciplinary actions, without obligating the clinic to take those steps.

On this basis, the court concluded that the "only when" rule was not satisfied on the undisputed facts and the basic at-will employment agreement remained in place when the doctor was terminated, allowing the clinic to "discharge [the doctor] at any time, with or without case, and not be liable for breach of contract."

The court also rejected the doctor's breach of duty of good faith and fair dealing claim, citing the Wisconsin Supreme Court's longstanding refusal to impose a duty to terminate in good faith into employment contracts.[1] The court stated that the doctor failed to present anything requiring the court to challenge the court's unambiguous past precedent.

Implications for Wisconsin Employers

While the Court of Appeals' decision in Bukstein did not modify the "only when" rule, it serves as a reminder to employers to ensure that any handbooks, manuals, policies, or procedures contain language making clear that they do not alter the employment at-will relationship. Additionally, any such documents should include permissive as opposed to obligatory language with respect to the employer's potential course of action, which the court found persuasive in *Bukstein*.

1 *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (Wis. 1983).