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FEATURED CASE:

Employment: "Past Practices" Language in At-Will Agreement Requires Consideration of Pension Credits

***Barwin v. Village of Oak Park*, no. 21-2007 (7th Cir. Nov. 22, 2022).**

Reversing in part, the Seventh Circuit finds that the phrase "past practices" in at-will employment agreement with a Village manager who resigned under pressure required the lower court to consider whether the employee was entitled to purchase out of state pension credits.

Facts: The Village of Oak Park, Illinois (Village) hired Thomas Barwin (Barwin) as its village manager in 2006 on an at-will basis; the employment agreement (Agreement) contained no particular term of employment and no restrictions on the Village's ability to replace him at any time. Around 50 years old when hired, Barwin was concerned about his prospective retirement income. The parties agreed that he would participate in the Illinois Municipal Retirement Fund (Fund) and that each would make contributions to the Fund, but it would be eight years before his pension rights vested. As at an-will employee, Barwin had no guarantee that he would be employed for that length of time. He alleges that he raised this concern with Village President David Pope (Pope), who assured him that if he left his position with the Village before the eight-year threshold, he would be able to purchase reciprocal out-of-state pension credits for his prior work in Michigan that would satisfy the eight-year minimum. Any such request would require the approval of the Village Board of Trustees, and Pope advised Barwin that the Village had granted such a request by the previous Village manager, likewise recruited from out of state. Barwin determined that a total of at least five Village employees (including Barwin's predecessor) had made requests to purchase out-of-state pension credits, and all had been granted.

The final Agreement provided that Barwin and the Village would both make contributions to Fund but did not say anything about Barwin's right to purchase out-of-state pension credits. The Agreement also contained an integration clause expressly providing that it "sets forth and establishes the entire understanding between the Employer and the Employee relating to the employment of the Employee by the Employer. Any prior discussions or representations by or between the Employer and the Employee not specifically stated in this Agreement are rendered null and void by this Agreement...."

There was, however, another relevant provision of the Agreement, titled “Other Terms and Conditions of Employment.” It stated that “the Employee shall be entitled to the highest level of benefits that are enjoyed by other department heads or equivalent-level employees of the Employer as provided in the Oak Park Village Code, Personnel Rules and Regulations or *by practice.*”

In February 2012, the Village President and the other members of the Board of Trustees met in closed session, excluding Barwin, the Village legal counsel, and the Village Clerk. The collated ratings of Barwin's performance submitted by the Board members indicated continuing dissatisfaction in a number of areas. During the meeting, the subject of Barwin's eligibility for retirement came up. After reading Barwin’s self-assessment, one Trustee remarked, “It was like he was saying, give me the three years and then I'll be done.” Another Trustee responded, “If you've been here for twelve years, then you can do that ... but you can't do that when you've been here for five. You can't. Can't afford it.” When asked whether, in lieu of him reaching the eight-year vesting threshold, Barwin had obtained reciprocal credits for his prior Michigan service or was otherwise eligible for a Michigan pension, Pope professed ignorance.

The next day, Pope and a Trustee met privately with Barwin and presented him with a choice: resign as Village Manager or face an official Board vote to terminate him. For more than a year, from November 2010 to February 2012, no member of the Board had communicated a complaint or criticism to Barwin regarding his performance. After having served for five and a half years, Barwin opted to resign. The Village granted him severance pay equal to nine months of his salary pursuant to the Termination and Severance provisions of the Agreement and offered to grant him additional severance benefits in exchange for a waiver of all claims, but Barwin declined. He was still two and a half years shy of the eight-year vesting threshold for his Illinois pension. He asked Pope if he would be given permission to purchase out-of-state pension credits in order to bring himself up to the eight-year vesting minimum. Pope said he would take the request to the Village Board, but he did not do so. No vote was taken, and Barwin was unable to purchase the needed credits.

District Court Proceedings: Barwin, now a resident of Florida, filed suit based on diversity, alleging that the Village breached the implied covenant of good faith and fair dealing by interfering in his expectation that the Village would not fire him (or force him to resign) in order to prevent him from reaching the eight-year vesting threshold for pension benefits. The Village moved to dismiss. The district court acknowledged that although Barwin was an at-will employee, the Village was nonetheless constrained by the implied duty of good faith and fair dealing. But it found nothing in the Agreement that guaranteed Barwin a pension or required the Village to keep Barwin in its employ until such time as his pension vested. Although Illinois cases recognize that an employer may violate the duty of good faith and fair dealing by taking action with an “improper motive,” (for example by firing an employee so as to prevent him from receiving benefits already earned,) that was not the case here: “there is no contract language indicating that Barwin is entitled to his pension benefits two and half years before it vests.” In short, Barwin had not alleged a plausible claim for breach of the covenant of good faith and fair dealing.

In a second amended complaint, Barwin alleged that the Village breached the duty of good faith and fair dealing by interfering with his right to the “highest level of benefits” enjoyed by other department heads and comparable employees “by practice” – pointing to other Village employees who had been given the right to purchase credits. The court ultimately granted the Village's motion for summary judgment, finding that the Agreement did not grant Barwin a right to purchase additional credits, because the evidence did not show a Village practice of allowing senior employees to do so. The court agreed with the parties that the term “practice” should be understood to mean “repeated or customary action” or the “usual way of doing something” but it also inferred a reasonable span of time: over a course of multiple decades, some five Oak Park employees had been permitted to purchase out-of-state credits, but the last known date for such a purchase was 2001, five years before Barwin was hired and 11 years prior to his resignation. The court reasoned further that this

reading of “practice” was consistent with a principle of Illinois law holding that elected officials should not be bound by their predecessors' decisions as to the welfare of the political subdivision they govern.

On these facts, the court concluded that no factfinder could reasonably find that there was an established “practice” of allowing employees to purchase such credits.

Seventh Circuit Appeal:

Good faith duty to allow to allow pension vesting: The Seventh Circuit noted the duty of good faith and fair dealing implied in every Illinois contract, an obligation precluding an employer from making an “avowedly opportunistic” decision to discharge an at-will employee. But that obligation is not a source of rights independent of the parties' contract, nor does it supply a discharged employee with a separate cause of action against his former employer. Instead, the duty of good faith and fair dealing ‘functions as an interpretive aid,” ensuring that the employer, as “a party vested with contractual discretion [in this case, to discharge its employee for virtually any reason] to exercise [that discretion] reasonably, and not arbitrarily or capriciously, or in a manner inconsistent with the reasonable expectations of the parties.”
Thus, where a party acts with improper motive, whether to extricate itself from a contractual obligation to bring about a condition precedent or to deprive an employee of reasonably anticipated benefits, “that party is exercising contractual discretion in a manner inconsistent with the reasonable expectations of the parties and therefore is acting in bad faith.” (One such example would be an employer’s exercising discretion to fire an employee so as to evade payment of commissions earned but payable after the termination date).

The Circuit noted Barwin’s complaint highlighting the remark by a Trustee during the closed door meeting about his continued employment that the Village “Can't afford it.” Although the court did assume that “the Village Board indeed did decide to demand his resignation under threat of discharge in whole or in part to prevent his pension from vesting and thus to avoid the corresponding financial obligation,” it nevertheless agreed with the holding below that the complaint did not state a plausible claim for breach of the contractual duty of good faith and fair dealing:

> True enough, the agreement obligated both Barwin and the Village to make contributions to the municipal pension fund, a necessary but not sufficient condition on his eventual eligibility to receive a pension. From Barwin's perspective, that obligation only makes sense if the parties intended for him to serve as Village Manager until such time as his pension rights vested… But we do not think that provision of the contract can bear the weight Barwin places upon it. The parties agreed to make contributions to the [Fund] toward Barwin's eventual pension eligibility, but no more. It is by no means unusual for an employee to quit or be discharged before his pension rights vest, and that does not render worthless any prior pension contributions made on his behalf.

As the Circuit stated, it would be no different had the employment agreement specified a pay increase for each additional year that Barwin worked for the Village: at some point, the Village might have concluded that it was in its interest to let Barwin go and replace him with a more modestly compensated employee. “This is the nature, and some might say the point, of at-will employment: the employer is free to discharge the employee even on a rationale that a reasonable observer might find unfair.” On that basis, the Village remained free, with the vesting threshold more than two years off, to discharge him even if solely to prevent him from reaching that threshold.

Good faith duty to allow purchase of out-of-state pension credits: The Circuit next evaluated Barwin’s out-of-state pension credits argument, stating that it would affirm the district court's summary-judgment decision “so long as no reasonable finder of fact could conclude that there was a

practice of allowing senior Oak Park employees to purchase out-of-state pension credits." The Agreement phrase "by practice" presented two inter-related questions: (1) was there a practice of allowing senior employees to purchase out-of-state pension credits, and if so (2) "was the practice sufficiently current, such that it would have been recognized as one as continuing or precedential, so to speak, at the time of Barwin's hiring and during his tenure as a Village employee."

The district court had not been convinced that a total of five requests, made over a period of decades, was sufficient to constitute a practice, *i.e.*, a customary or usual way of doing something. That court also reasoned that the "are enjoyed" language of Agreement referred to benefits that are *currently* enjoyed by employees, and that the five-year time gap between the last time a request to purchase pension credits had been granted in 2001 and Barwin's hiring, and the passage of 11 years between that last prior purchase and Barwin's forced resignation in 2012, was too great to establish a right that was enjoyed by employees at the time of his hiring and/or ouster.

The Circuit saw things differently. Although the Agreement did not define "practice," it noted "the question comes up regularly in labor arbitration," where workplace practices or "the law of the shop" can shed light on the meaning of ambiguous terms in a collective bargaining agreement and, in appropriate cases, supplement the written agreement with implied but nonetheless binding terms. Although Barwin was not a union member and his employment was not subject to a collective bargaining agreement, the Circuit tok guidance from labor arbitration cases "as to the criteria that inform whether a particular practice can be recognized." Viewed through that lens, the decades-long duration and sporadic nature of the prior out-of-state purchases did not disqualify those events from being a "practice." What was more relevant was the certitude that, when requested, the purchases had been allowed: "[A] limited number of instances may nonetheless be deemed sufficient to establish a practice when the relevant situation to which the purported practice applies occurs only on occasion." (discussing the provision of "days of mourning" after the death of a U.S. President). As one arbitrator had found, "[A] practice can be established if, when one circumstance occurs, it is consistently treated in a certain way. The occurrence need not be daily or weekly, or even yearly. But when it happens, a given response to that occurrence always follows."

The Circuit applied this logic to the Village. It was a mid-sized municipality with just under 52,000 residents as of the 2010 census, and had a total workforce of roughly 350 municipal employees. Of that total, only a small number would be department heads, and a much smaller number would be out of state hires seeking to purchase pension credits. From that perspective, the fact that only five such requests had been made in the prior two decades was not fatal to Barwin's claim: all five were granted their requests by the Village and no such request had been denied. "In sum, the relevant instances applied to a relatively small group of Village employees, occurred only occasionally, and were all resolved the same way. We cannot say as a matter of law this was insufficient to constitute a practice for purposes [the Agreement."

The district court and the Village had placed emphasis on the current tense of the "are enjoyed" language of the Agreement. The Circuit agreed that those words reasonably suggested that the parties intended to exclude practices that the Village had abandoned or modified and only included those still in effect at the time Barwin was hired and during his tenure. But short of being abandoned, the aging of a practice did not invalidate it: "[D]oes the fact that the issue happens not to come up during the plaintiff's multi-year tenure as an employee preclude the factfinder from concluding that a previously-recognized practice had not been abandoned and remained in effect? We think the answer to these questions is 'No.'"

Admission of extrinsic statements despite integration clause: The Circuit felt it necessary to discuss Pope's representation to Barwin regarding his predecessor's purchase of out-of-state pension credits. The district court believed it was foreclosed from considering any such statements due to the Agreement's integration clause. The Circuit agreed that the clause could not be used to

form an commitment that Barwin would be permitted to purchase pension credits. But Pope's statement could still be considered to evaluate the existence of a prior practice. "[W]e do not understand this clause to preclude consideration of Pope's additional statements to Barwin as evidence of the very sort of "practice" that [the Agreement} explicitly incorporates." Looking again to labor law, parol evidence is routinely admitted to establish the existence and nature of past practices in a particular workplace. Here, Pope's statements to Barwin during discussion of his potential employment by the Village were admissible not only to show a past practice concerning the purchase of credits, but also because those comments could be construed as bringing that practice "up-to-date" as of the time of Barwin's hiring: when Barwin specifically inquired about the point, Pope described what the Village's practice was.

Preclusive effect of prior Board vote: Finally, the Circuit reviewed the lower court's conclusion that allowing Barwin to purchase credits would be inconsistent with Illinois precedent (the so-called *Grassini* principle) that it is "contrary to the effective administration of a political subdivision to allow elected officials to tie the hands of their successors with respect to decisions regarding the welfare of the subdivision." The Village was arguing that the votes of prior Village Boards of Trustees to approve the purchase of out-of-state pension credits could not bind later Boards to vote the same way, and to the extent that the Agreement did so, it violated the *Grassini* principle.

> We disagree. The Village entered into an agreement with Barwin that expressly granted him the highest level of benefits that "are enjoyed" by other senior employees "by practice," which as discussed necessarily looks to what has been done customarily in the past, whether by the Board or other Village officials. Recognizing that practice in the agreement did not tie the Village's hands in perpetuity. We presume that if the Village wanted to disclaim any past practice and announce that it would no longer be followed going forward, it could have done so at any time. . . .

Reversed in part and remanded: In sum, the Seventh Circuit affirmed the district court's dismissal of Barwin's claim that the Village breached its duty of good faith and fair dealing when it forced him to resign in order to prevent his pension rights from vesting. However, it reversed and remanded that court's grant of summary judgment in favor of the Village on the claim that the Village breached the duty of good faith and fair dealing by refusing to approve his request, at the time of his resignation, to purchase out-of-state pension credits.

Barwin v. Village of Oak Park

SHORT SUMMARIES:

First Circuit – Qualified Immunity – Cold Weather Arrests

This is a case involving what I consider to be an idiot. A drunken idiot. The police receive a call involving a domestic dispute between father and son at house flagged for having firearms. When the police arrive they find father and son brawling on the kitchen floor. Separating them, and removing father outside, the police determine that father had provoked a fight by threatening his wife, the son's mother. The son, like the father, had been drinking heavily. The son defended his mother and the fight ensued. It was Maine; it was winter; "baby, it was cold outside". The father was wearing only socks on his feet. He sued because he claimed to have suffered frostbite as a result of being kept outside in the cold for such a long period. Sounds like it might be a winner. Now we get to the rest of the story, backed up by body cameras – not only was the father combative with the son, but also with the police, letting them know in no uncertain terms that if they tased him it would be the worst

days of their lives – but more to the crux of the case, the police offered the father shoes several times throughout the event which he spurned.
Now, I usually like the decisions of the First Circuit (other than the typeface) and in this case the court noted that under QI it could choose between two prongs, one: whether the officers violated the constitution; and the other: whether a reasonable officer would know that the law clearly mandated a specific course that the officer didn't follow. I think the decision in this case could have avoided QI and a host of unnecessary discussion, by simply finding any harm was of the Plaintiff's own choosing, not the fault of the police. Just saying.

Punsky s. City of Portland

7th Circuit – Brady - Wrongful Conviction

In a suit asserting that the Plaintiff had been wrongly convicted, the Plaintiff claimed that a ballistics report was withheld that was exculpatory to the defense. After about ten years in jail the Plaintiff won a post conviction claim based on a Brady violation. On retrial the Plaintiff was acquitted and this civil rights suit began. The lower court granted summary judgment for the city and police. On appeal the 7th Circuit panel affirmed and helpfully described the differences between use of Brady in the criminal and civil context. The court first noted that unlike in the criminal context where a prosecutor's failure to disclose exculpatory material requires vacation of the guilty finding, in the civil context a prosecutor is absolutely immune (unless acting in a non-prosecutorial function). As to the police the court identified three elements necessary for liability (when Qualified Immunity doesn't apply) and also noted the burden on the Plaintiff is greater than simply showing that exculpatory evidence was not disclosed. Critical to the decision in this case, the Plaintiff in pursuing the complaint stated that the prosecutor had the exculpatory evidence in advance of trial and failed to disclose it. (The prosecutor denied having the evidence until after the trial and testified to disclosing it promptly.) Because of the judicial admission that the prosecutor had the exculpatory evidence in advance of trial, the officers could not have violated Brady as their duty was to turn Brady material over to the prosecutor which the Plaintiff mistakenly included in the claim. Summary Judgment affirmed! It's really quite a good description of duty under Brady and the difference between the result of not doing so between the criminal and civil proceedings.

Moran v. Calumet City

10th Circuit- Parratt Abstention- Wrongful Conviction

Bad facts make bad law – or, at least in this case- law that expands local government Section 1983 liability. Long story short, the Plaintiff was wrongfully convicted of murder. There seems to be no doubt about that fact. The complaint asserts that the sheriff and prosecutor conspired to withhold evidence and to get the person who actually did commit the crime to recant a confession so they could convict the Plaintiff. (Bear in mind this is the complaint, not facts proved at trial.) The issues before the court included the question of which laws were clearly established in 1999 such that the Defendants might be entitled to or unprotected by Qualified Immunity. Another question before the lower court involved substantive due process which the court concluded was not covered by Parratt Abstention. The Tenth Circuit affirmed on that issue (as well as most of the other QI questions.): "Today, we resolve that question and join other circuits in holding that Parratt abstention does not apply to § 1983 substantive due process claims."

Bledsoe v. Carreno

11th Circuit – Illegal Detention – Traffic Stops

In this case, a deputy sheriff pulls a guy over for weaving while driving – not the type of weaving that produces a quality piece of cloth, but moving sideways within a lane of traffic. Once stopped, the deputy notices an open beer can and offers to issue a warning. At about the time the deputy finishes writing up the warning, but while it's left on the deputy's dashboard, the deputy asks the driver to leave the vehicle so the deputy's dog can use its uncanny but canine powers of smell to hunt for drugs. There's a bit of a dispute about probable cause and the driver is charged with obstruction, the dog does its sniffing and no drugs emit the telltale odors necessary for the dog to alert. Long story short, obstruction charge dropped. Driver complains that deputy pulls him over subsequently to harass him and so, files this 1983 complaint. Lower court grants deputy and Sheriff SJ, but on appeal the 11th Circuit finds that the detention to sniff creates a triable issue as does the state law claim for illegal detention. On the positive side regarding the probable cause to stop the driver in the first place, the deputy's body cam supported the deputy's claim that the driver was weaving and undermined the driver's lies that he was not.
Teaching point: We cannot overstress the need to discuss probable cause with law enforcement officers. In this instance the Plaintiff found a former deputy supervisor who testified that the deputy in question was not properly disciplined for making stops without probable cause, but fortunately this testimony was stricken for discover violations. Nevertheless, if true, the testimony further supports the need to ensure offers and management take necessary steps to understand probable cause.

Baxter v. Roberts