COURT OF APPEALS
DECISION
DATED AND RELEASED

November 26, 1997

NOTICE

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

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

No. 95-2776

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

RICHARD J. NICHOLS,

PLAINTIFF-APPELLANT,

V.

PATRICK J. CONLIN, INDIVIDUALLY AND AS SHERIFF OF GREEN COUNTY, ROBERT HOESLY, CHAIRMAN, GREEN COUNTY BOARD OF SUPERVISORS, AND GREEN COUNTY, A WISCONSIN POLITICAL ENTITY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Green County: MARK J. FARNUM, Reserve Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Richard Nichols appeals from a summary judgment dismissing his complaint for unlawful termination of employment. The issue is whether summary judgment was appropriate to determine if Nichols, as

Green County's undersheriff, was entitled to a hearing to determine whether there was just cause for his termination. We conclude that Nichols was not entitled to a just cause hearing because: (1) he served at "the pleasure of the sheriff"; and (2) Green County had not established a civil service system to provide its undersheriff with procedural protections. Therefore, we affirm.

The incumbent sheriff appointed Nichols as undersheriff to serve at "the pleasure of the sheriff." After losing a contested recall election, the departing incumbent reappointed Nichols as undersheriff but excluded any reference to Nichols's tenure as relating to "the pleasure of the Sheriff."[1] The newly elected sheriff terminated Nichols.

Nichols sued the sheriff, Green County and the chair of its Board of Supervisors for unlawful termination and claimed he did not receive a just cause hearing. The trial court granted defendants' motions for summary judgment. The court ruled that Nichols, as an undersheriff, served at the pleasure of the sheriff and therefore was not entitled to a just cause hearing. Nichols appeals.

The issues in dispute on appeal involve the application of various statutes to undisputed facts, "which is a question of law appropriate for summary judgment."[2] ***Fore Way Express, Inc. v. Bast,*** 178 Wis.2d 693, 701, 505 N.W.2d 408, 412 (Ct. App. 1993) (citation omitted). Standard summary judgment

[1] The original document appointing Nichols as undersheriff included the statutory phrase "at the pleasure of the Sheriff." *See* § 59.21(4), STATS., 1993-94. The subsequent document re-appointing him did not include that phrase. Nichols contends that he was appointed pursuant to § 59.21(8), STATS., 1993-94, not § 59.21(4). As addressed herein, we disagree. Moreover, excluding that statutory phrase does not abrogate the applicability of § 59.21(4).

[2] Although the parties do not agree on all of the facts, their disagreements do not involve disputes of material fact.

methodology is described in ***In re Cherokee Park Plat***, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983); *see* § 802.08, STATS. When we review a summary judgment, we independently apply the same methodology as the trial court. *See* ***Johnson v. Minnesota Mut. Life Ins. Co.***, 151 Wis.2d 741, 744, 445 N.W.2d 736, 737 (Ct. App. 1989).

First, we examine Nichols's complaint to determine whether he has stated a cause of action. *See* ***Cherokee Park Plat***, 113 Wis.2d at 116, 334 N.W.2d at 582-83. Nichols has alleged a prima facie claim of unlawful termination under §§ 59.21(8)(b) and 59.07(20)(b), STATS., 1993-94.[3] Second, we examine the answer to determine whether defenses have been raised to defeat that claim. ***Id***. at 116, 334 N.W.2d at 583. Section 59.21(4) is an affirmative defense to the unlawful termination claim. We next examine the defendants' affidavits for evidentiary facts to determine the statutes' applicability and to decide whether defendants have made a prima facie case for summary judgment. *See* ***id.***

Section 59.21(4), STATS., provides: "A person appointed under-sheriff or deputy for a regular term or to fill a vacancy or otherwise shall hold office *during the pleasure of the sheriff*." (Emphasis supplied.) We construe statutory language according to its plain meaning. *See* ***Bindrim v. B. & J. Ins. Agency***, 190 Wis.2d 525, 534, 527 N.W.2d 320, 323 (1995). We review issues of statutory construction as questions of law. ***Id***. The plain language of § 59.21(4) provides that the duration of the appointment as undersheriff is entirely dependent upon "the pleasure of the sheriff." Consequently, an undersheriff is not entitled to

[3] All statutory references to chapter 59, STATS., are to the 1993-94 edition of the Wisconsin Statutes.

a just cause hearing because the sheriff need not have cause to terminate the appointment.

Nichols contends that he is entitled to: (1) the same procedural protections as a deputy because an undersheriff is a type of deputy sheriff; or, (2) reinstatement as a deputy. *See* § 59.21(8), STATS. We disagree.

First, § 59.21, STATS., consistently and repeatedly distinguishes between the positions of deputy and undersheriff.[4] In fact, § 59.21(1) provides a mechanism for those sheriffs' departments operating under a civil service system whereby a deputy who is appointed undersheriff may obtain a leave of absence as a deputy, during his or her tenure as undersheriff. Section 59.21(8)(b) also refers to the deputy and the undersheriff as two distinct positions. Section 59.21(8)(b) addresses the situation where the deputy is the accused and the undersheriff is one of the officials initiating the filing of the complaint or facilitating matters during the grievance procedure. Second, Nichols is not entitled to reinstatement as a deputy because he was never a deputy. Nichols was appointed as undersheriff by the incumbent and thus cannot be "reinstated" as a deputy—a wholly different position under the Wisconsin Statutes. We therefore reject Nichols's contentions.

Nichols contends that Green County has *de facto* established a civil service system that entitles him to a just cause hearing before suspension, demotion or dismissal. *See* § 59.07(20)(b), STATS. Nichols contends that this

[4] For example, § 59.21(1), STATS., authorizes the appointment of one undersheriff per county, whereas there is no limit on the number of deputy sheriffs per county. *See* § 59.21(1) and (2). Similarly, the undersheriff has certain powers which deputies do not have. *See, e.g.,* § 59.21(5) and (7).

protection extended to his position and that he was entitled to receive such a hearing before his termination. We reject Nichols's position.

Section 59.07(20)(b), STATS, authorizes the county board to create a civil service system governing the selection, tenure and status of its employees. However, the defendants have demonstrated—and the trial court found—that Green County has not established a civil service system. A county must affirmatively adopt a civil service system under § 59.07(20)(a). Green County's adoption of certain procedures, which are coincidentally included as statutory examples of methods, policies and conduct which may be regulated, does not constitute "establishing" a civil service system.

Nichols is not entitled to a just cause hearing for his termination as undersheriff according to the plain language of § 59.21(4), STATS., which permits termination at "the pleasure of the sheriff." Section 59.21(8) is inapplicable because it applies to deputies, not undersheriffs. Section 59.07(20), STATS., is inapplicable because we conclude, as a matter of law, that Green County did not adopt a civil service system.

By the Court.—Judgment affirmed.

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