COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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Nos. 96-2515 and 97-0145

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

No. 96-2515

KAREN WIPPERFURTH AND BERNADETTE KEUL,

PLAINTIFFS-RESPONDENTS,

V.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM; THE UNIVERSITY OF WISCONSIN SYSTEM; KATHARINE LYALL, INDIVIDUALLY AND AS PRESIDENT OF THE UNIVERSITY SYSTEM;

DEFENDANTS,

GEORGE BROOKS, INDIVIDUALLY AND AS ASSISTANT VICE-PRESIDENT OF THE UNIVERSITY SYSTEM;

DEFENDANT-APPELLANT,

UNIVERSITY OF WISCONSIN-MADISON;

DEFENDANT,

DAVID WARD, INDIVIDUALLY AND AS CHANCELLOR OF THE UNIVERSITY OF WISCONSIN-MADISON; LAURENCE MARTON, INDIVIDUALLY AND AS DEAN OF THE UNIVERSITY OF WISCONSIN-MADISON MEDICAL

SCHOOL;

DEFENDANTS-APPELLANTS,

STATE OF WISCONSIN DEPARTMENT OF EMPLOYMENT RELATIONS; AND JOSEPH PELLITTERI, INDIVIDUALLY AND AS DEPUTY SECRETARY OF THE STATE OF WISCONSIN DEPARTMENT OF EMPLOYMENT RELATIONS;

DEFENDANTS,

PHILIP M. FARRELL,

APPELLANT.

No. 97-0145

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UNIVERSITY OF WISCONSIN-MADISON;

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THE UNIVERSITY OF WISCONSIN-MADISON; LAURENCE MARTON, INDIVIDUALLY AND AS DEAN OF THE UNIVERSITY OF WISCONSIN-MADISON MEDICAL SCHOOL;

DEFENDANTS-APPELLANTS,

STATE OF WISCONSIN DEPARTMENT OF EMPLOYMENT RELATIONS;

DEFENDANT,

JOSEPH PELLITTERI, INDIVIDUALLY AND AS DEPUTY SECRETARY OF THE STATE OF WISCONSIN DEPARTMENT OF EMPLOYMENT RELATIONS;

DEFENDANT-APPELLANT,

PHILIP M. FARRELL, CURRENT DEAN OF THE UNIVERSITY OF WISCONSIN MEDICAL SCHOOL,

APPELLANT.

APPEAL from judgments of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Roggensack and Deininger, JJ.

DEININGER, J. Five defendants, officials of the University of Wisconsin (UW) and the Department of Employment Relations (DER), appeal two judgments entered in favor of plaintiffs, Karen Wipperfurth and Bernadette Keul. The trial court granted plaintiffs' motions for summary judgment on their claim of equitable estoppel and on their constitutional equal protection claim. The judgments "fully and retroactively" restored plaintiffs to academic staff appointments in the UW Medical School, which defendants had ordered non-

renewed. The judgments also enjoined defendants from "terminating, eliminating or non-renewing" plaintiffs' positions "on any ground that was raised or could have been raised with regard to" the action. Plaintiffs were also awarded $114,000 in attorney fees and costs against several of the defendants.

We conclude that there are no issues of material fact in dispute, and that plaintiffs are not entitled, as a matter of law, to relief on either claim. The trial court thus erred in granting plaintiffs' motions for summary judgment and in denying defendants'. Accordingly, we reverse both judgments and the award of attorney fees and costs.

BACKGROUND

Employees in the State of Wisconsin civil service are "divided into the unclassified service and the classified service." Section 230.08(1), STATS. The "classified service" includes all positions not designated as "unclassified." Section 230.08(3). Among those positions designated as unclassified are "academic staff" in the UW system. Section 230.08(2)(d). "'Academic staff' means professional and administrative personnel with duties, and subject to types of appointments, that are primarily associated with higher education institutions or their administration …." Section 36.05(1), STATS.

Appointments to academic staff positions are made by the Board of Regents of the UW system, or by officials designated by the board under policies and procedures it has established. Section 36.15(2), STATS. Appointments may be for fixed or indefinite terms, § 36.15(1)(a), and they include certain "procedural guarantees," including a protection that an employee appointed for a fixed term "may be dismissed prior to the end of the appointment term only for just cause and only after due notice and hearing." Section 36.15(3).

Under § 36.09(1)(i), STATS., the president of the UW system and an administrator in the DER must recommend to the Board of Regents and the DER secretary "general policies governing the designation of positions to be exempt from the classified service as academic staff." Effective August 9, 1989, the legislature restricted the UW system's authority to convert existing classified service positions to academic staff in the following manner: "No position in the classified service may be designated as an academic staff position under the general policies unless the secretary of employment relations approves the designation." Section 36.09(1)(i).

Both plaintiffs worked in classified positions at the UW Medical School since the mid-1970's. In 1989, Wipperfurth was a Program Assistant 3 in the Pharmacology Department and Keul held a similar position in the Biostatistics Department. At that time, all "support staff" positions in both departments were classified. In late 1989, each department sought and received approval from cognizant UW officials to create "new" academic staff positions, designated as an "Administrative Program Specialist" and an "Administrative Program Manager II," respectively. The two academic staff positions were filled by recruitments limited to the campus area which yielded pools of seven and ten applicants, respectively. Plaintiffs were selected for the positions in their respective departments, and each received salary increases approaching fifty percent, from approximately $22,000 per year to approximately $32,000. Plaintiffs' former classified positions in their respective departments were not filled, and there was thus no net gain in the number of support staff employed in either department.

Both academic staff appointments were initially set to expire at the end of the fiscal year. Subsequently, however, the appointments were converted to two-year, fixed term appointments with "rolling horizon" terms, described by

§ 1.03 of the University of Wisconsin-Madison Policies and Procedures Governing Academic Staff Appointments (UW-Madison ASA) as follows:

> "Rolling Horizon Appointment" is a form of academic staff appointment for more than one year: the length of term is specified in the letter of appointment. The appointment is expected to be extended annually unless the employee is notified to the contrary. Renewal is automatic unless the department/unit sends written notice to the employee and the Academic Personnel Office. *Like all fixed term appointments, rolling horizon appointments are subject to all provisions of the academic staff policies and procedures*.

(Emphasis supplied.)

On June 30, 1993, an associate dean of the Medical School informed plaintiffs that their academic staff positions would be non-renewed as of July 1, 1994, and that they would revert to their former classified positions on that date. Their salaries were to be reduced to what they last earned as classified employees, plus intervening increases to which they would have been entitled. As a result, each plaintiff's annual earnings would decrease by some $14,000 to $20,000. The non-renewal decision came as the result of an investigation into possible improper personnel practices at the Medical School. Defendant Brooks, a UW system assistant vice-president, had conducted the investigation at the request of defendant Pellitteri, who is Deputy Secretary of the DER. (Defendant Ward is the chancellor of the UW-Madison campus where the Medical School is located; defendant Marton is a former dean of the Medical School, and Farrell is the "current" dean.)

Brooks' investigation determined that, between 1981 and 1992, nine departments at the Medical School converted classified support staff positions into academic staff administrative positions. Of these, three had occurred prior to the

August 1989 effective date of the statutory prohibition against conversions without DER approval. Of the remaining six conversions, four were deemed to represent valid, newly created or restructured positions that were properly recruited and filled. Brooks concluded, however, that plaintiffs' positions represented unauthorized conversions of classified positions to academic staff; that there was "little, if any, evident job change"; and that the plaintiffs, who were incumbent classified employees, had been appointed to the positions after only a limited recruitment. He recommended that plaintiffs' positions be non-renewed and Pellitteri agreed.

Plaintiffs originally alleged numerous causes of action against a number of individuals and state entities. They sought both money damages and injunctive relief to prevent the non-renewals. The trial court temporarily enjoined the non-renewal actions on condition of a bond from plaintiffs to cover salary differentials. The court also granted defense dismissal motions on all claims against all parties, except the following: claims for injunctive relief against Ward, Brooks, and Marton, based on an equitable estoppel theory; and against Pellitteri for an alleged equal protection violation.

The parties filed cross-motions for summary judgment on the equitable estoppel claim, and the trial court granted plaintiffs' motion and denied defendants'. The court ordered plaintiffs fully restored to their academic staff positions and enjoined Ward, Brooks and Marton (as well as Farrell, the current Medical School Dean, although he was not a defendant) from terminating or non-renewing the plaintiffs' positions on any grounds relating to the subject matter of the suit.

Concluding that there was a factual dispute regarding whether the plaintiffs' academic staff positions were illegally converted from the classified service or were legitimate new positions, the trial court denied Pellitteri's summary judgment motion for dismissal of the equal protection claim against him. Subsequently, however, after what the trial court deemed to be a concession by plaintiffs that the positions were illegally converted, the court granted plaintiffs' summary judgment motion on their equal protection claim against Pellitteri and ordered relief similar to that in the first judgment. Finally, the court awarded plaintiffs their attorney fees and costs, totaling some $114,000, against Ward, Brooks, Farrell and Pellitteri. Ward, Brooks, Marton and Farrell appeal the summary judgment on the equitable estoppel claim; Pellitteri appeals the equal protection judgment; and Ward, Brooks, Farrell and Pellitteri appeal the award of attorney fees and costs. After submission of the appeals, we ordered them consolidated on our own motion.

ANALYSIS

a. Standard of Review

We review the granting and denial of motions for summary judgment de novo, applying the same methodology and standards as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). If there are no disputed issues of material fact, summary judgment is proper where the moving party is entitled to judgment as a matter of law. ***Id***. When both parties move for summary judgment and neither argues that factual disputes bar the other's motion, the "'practical effect is that the facts are stipulated and only issues of law are before us.'" ***Lucas v. Godfrey***, 161 Wis.2d 51, 57, 467 N.W.2d 180, 183 (Ct. App. 1991) (quoted source omitted).

b. The Equitable Estoppel Claim

This court has summarized the elements of equitable estoppel, and the considerations which apply when the doctrine is invoked against government entities and officers, as follows:

> The elements of estoppel are (1) action or nonaction, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his detriment. ***DOR v. Moebius Printing Co***., 89 Wis.2d 610, 634, 279 N.W.2d 213, 224 (1979).
>
> Estoppel may be applied against the state when the elements of estoppel are clearly present and it would be unconscionable to allow the state to revise an earlier position. ***DOR v. Family Hosp., Inc.***, 105 Wis.2d 250, 254, 313 N.W.2d 828, 830 (1982). We determine on a case-by-case basis whether justice requires the application of estoppel. ***Id***. Estoppel is not applied as freely against governmental agencies as it is against private persons. ***Id.*** at 258, 313 N.W.2d at 832.

Sanfelippo v. DOR, 170 Wis.2d 381, 390-91, 490 N.W.2d 530, 534 (Ct. App. 1992).

Plaintiffs seek to estop the defendants, in their official capacities as officers and employees of the UW and the DER, from non-renewing plaintiffs' academic staff positions. We must therefore "determine whether justice requires the application of the doctrine of estoppel" against these state officials, ***DOR v. Moebius Printing Co.***, 89 Wis.2d 610, 641, 279 N.W.2d 213, 226 (1979). We conclude that it does not.

The trial court determined that on the undisputed material facts, plaintiffs "were injured to their detriment" by reasonably relying on the "actions by defendants (or their delegatees)" in "allowing the positions to be created … failing to take action immediately with regard to the allegedly illegally created

positions, and … allowing plaintiffs to remain in these positions for three and four years." The court concluded that "defendants' conduct produces a clearly inequitable result" and noted that there had been no argument in the trial court that "the public's interest would be unduly harmed by the imposition of estoppel in this case." We conclude, however, that the undisputed material facts show that it was unreasonable for plaintiffs to rely on the indefinite or perpetual renewal of their academic staff positions. We further conclude that defendants "cannot be estopped from asserting the public policy of this state, as it is expressed by the Legislature," ***Grams v. Melrose-Mindoro Joint Sch. Dist. No. 1***, 78 Wis.2d 569, 576, 254 N.W.2d 730, 734 (1977).

"One of the elements of equitable estoppel is that the reliance on the words or conduct of the other must be reasonable." ***City of Kenosha v. Jensen***, 184 Wis.2d 91, 99, 516 N.W.2d 4, 8 (Ct. App. 1994) (citation omitted). WIS. ADMIN. CODE § UWS 10.03 provides that fixed term appointments to academic staff positions "shall be for a fixed term to be specified in the letter of appointment, *are renewable solely at the option of the employing institution, and carry no expectation of reemployment beyond their stated term, regardless of how many times renewed.*" (Emphasis supplied.) Section 3.04(1) of the UW-Madison ASA, while providing that fixed term appointments will "normally" be renewed if the "appointee renders satisfactory service and funds are available and the directions or needs of the program do not change," reemphasizes the administrative code provision that fixed term appointments "carry no assurance of continuous reemployment." The U.S. Supreme Court has described a similarly situated UW employee's circumstances under a fixed term appointment as follows:

> Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it ….

Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (footnote omitted).

Thus, to the extent plaintiffs relied on the anticipated indefinite or perpetual renewals of their fixed term appointments in taking on financial obligations and foregoing other career opportunities, as they aver, their reliance was unreasonable. Their initial appointment letters specified that their appointments were to expire on June 30, 1990. Keul was informed that her "appointment will be reviewed at least annually for merit and renewal decisions, based upon program needs, available funding, and satisfactory performance." Wipperfurth's appointment letter contained similar language, and both letters recited that copies of the pertinent administrative code and UW-Madison ASA provisions, quoted from above, were available to both plaintiffs.

At some point following their initial terms, plaintiffs' appointments were placed on a "rolling horizon" basis. As we discussed above, "rolling horizon" appointments are fixed term appointments, subject to applicable personnel rules and policies, including the possibility of non-renewal on proper notice. WIS. ADMIN. CODE § UWS 10.05(1)(a) requires that written notice of non-renewal be given at least six months before the end of an appointment term for fixed term appointments that have continued for more than two years. Thus, even though by 1993 plaintiffs could reasonably rely on somewhat longer terms of employment, they were still subject to non-renewal on timely notice. They could not reasonably rely on never receiving such a notice.

Plaintiffs argue, however, that while they could be non-renewed for "a legitimate reason," it was reasonable for them to rely on continued employment, free from an "arbitrary and capricious" ground for non-renewal. (UW-Madison ASA § 3.04(1) provides that "[f]ixed term appointees shall not be subject to arbitrary and capricious non-renewal.") They argue that they are thus entitled to estop defendants from non-renewing their positions "on an alleged technical irregularity" years after the creation of the positions. Part of this argument relies on plaintiffs' claim that the non-renewal of their positions violated equal protection, a matter which we discuss below. Their main point, however, is that "[d]efendants needed a legitimate reason to non-renew plaintiffs, and they have none."

In deciding whether plaintiffs' non-renewals were arbitrary and capricious, it is not necessary that we determine whether plaintiffs' academic staff appointments were "illegal conversions" from classified service positions. For purposes of at least some of their arguments, plaintiffs have conceded the point, although they maintain at other times that the positions were permissible "new" academic staff positions. Regardless, after defendant Brooks' investigation and review in 1993 of the history and requirements of the positions in question, he issued a thirty-five page report detailing his findings and recommendations, including a recommendation that the two positions in question be non-renewed. In an affidavit, Brooks describes his decision-making process as follows:

> In making my recommendations for action with respect to each of the positions reviewed, I considered the extent of the authority of Madison campus and U.W.-System at the time the appointment was made, as reflected by the statutes, rules and policies in effect at the time; the number and types of positions within the subject department at the time the appointment was made and at the time my review was conducted; the nature and extent of the recruitment for the position at issue; and the nature of

> the duties performed by the persons holding the department administrator position at the time the appointment was made and at the time my review was conducted.

The non-renewal letters plaintiffs received informed them that the non-renewal of their academic staff positions was "[a]s a result of an investigation into prior personnel practices of the Medical School by Mr. George Brooks" and that the non-renewals reflected "that the process by which this academic position was established and filled has been found to have been inappropriate under UW System Policy."

An action is taken arbitrarily and capriciously when the action "is unreasonable or does not have a rational basis." ***Olson v. Rothwell***, 28 Wis.2d 233, 239, 137 N.W.2d 86, 89 (1965) (citation omitted). "Arbitrary action is the result of an unconsidered, willful and irrational choice of conduct and not the result of the 'winnowing and sifting' process." ***Id***. This court has further explained the arbitrary and capricious standard in ***J.F. Ahern Co. v. Wisconsin State Building Commission***, 114 Wis.2d 69, 96, 336 N.W.2d 679, 692 (Ct. App. 1983), where we stated:

> When applying the arbitrary and capricious standard, we determine whether the agency's action had a rational basis, not whether the agency acted on the basis of factual findings. Rational choices can be made in a process which considers opinions and predictions based on experience.

We conclude that Brooks did not act arbitrarily or capriciously in recommending that plaintiffs' positions be non-renewed, nor did the remaining defendants when they accepted and implemented that recommendation. The decision was based on a factual investigation and the discretionary application of personnel rules and policies by officials of the UW and the DER who are authorized to make personnel decisions. Nothing in the rules and policies

governing fixed term academic staff appointments cited to this court provides plaintiffs with immunity from non-renewal for the reasons articulated by the defendants.

The defendants did not attempt to retroactively penalize plaintiffs for accepting the positions, nor did they seek reimbursement from plaintiffs for the increased salaries received while plaintiffs held the academic staff positions. The precedents which hold that governmental entities may be estopped from extracting forfeitures or collecting back taxes when parties have reasonably relied on the past pronouncements of cognizant officials are thus inapposite. *See* ***State v. City of Green Bay***, 96 Wis.2d 195, 210-11, 291 N.W.2d 508, 515-16 (1980); ***DOR v. Family Hosp., Inc.,*** 105 Wis.2d 250, 257-59, 313 N.W.2d 828, 831-32 (1982); ***Moebius Printing Co.***, 89 Wis.2d at 639-40, 279 N.W.2d at 226.

Plaintiffs were informed on June 30, 1993, that after July 1, 1994, their academic staff positions would not be renewed and they would be reinstated to their former positions in the classified service. Plaintiffs are attempting to thwart the prospective enforcement of state rules and policies governing the designation of employee classifications. Nothing that defendants said or did, or failed to say or do, when the appointments were first made or thereafter, can form the basis for a reasonable reliance that a future review of the positions would not result in their non-renewal. *See* ***Eastman v. City of Madison***, 117 Wis.2d 106, 117, 342 N.W.2d 764, 769-70 (Ct. App. 1983) (employees could not reasonably rely on representations of superiors that residency ordinance would not be enforced; change in enforcement of the ordinance does not estop city from vacating positions).

In summary, the undisputed facts of record show that plaintiffs accepted fixed term academic staff appointments for which there was no assurance or expectation of indefinite renewal. Regardless of whether the creation of the positions in 1989 was "illegal," defendants did not act arbitrarily or capriciously when they notified plaintiffs of the non-renewal of the positions effective in 1994. Under the terms of their appointments, and the applicable personnel rules and policies, plaintiffs could not reasonably rely on indefinite or perpetual renewals, immune from scrutiny and policy review by UW and DER personnel administrators. Justice does not require, therefore, that they be allowed to estop defendants from non-renewing the positions. We reverse the summary judgment in favor of plaintiffs on their equitable estoppel claim and direct that, on remand, judgment be entered dismissing that claim.[1]

c. Equal Protection

"The aim of the 'equal protection of the laws' clause[2] is to assure that every person within the state's jurisdiction will be protected against intentional and arbitrary discrimination, whether arising out of the terms of a statute or the manner in which the statute is executed by officers of the state." ***State ex rel. Murphy v. Voss***, 34 Wis.2d 501, 510, 149 N.W.2d 595, 599 (1967) (citation omitted). Persons who are similarly situated must be accorded similar treatment under the guarantees of equal protection in the United States and

[1] Given our disposition on the merits of the equitable estoppel claim, we need not address defendants' argument that the claim should be dismissed for plaintiffs' failure to comply with the notice of injury statute, § 893.82(3), STATS.

[2] The Fourteenth Amendment of the U.S. Constitution provides, in relevant part, as follows: "No State shall … deny to any person within its jurisdiction the equal protection of the laws."

Wisconsin constitutions. ***State v. Avila***, 192 Wis.2d 870, 879-80, 532 N.W.2d 423, 426 (1995). Equal protection doesn't require, however, that "all persons be dealt with identically," but only that similarly situated persons not be "classified in an irrational or arbitrary manner." ***Id.***, (citation omitted). In deciding whether the classifications are irrational or arbitrary, a court must determine whether any rational basis exists which justifies the classification. ***Id.***

Plaintiffs' equal protection complaint is that at least four other academic staff appointments at the Medical College were not subjected to non-renewal in 1994, even though those positions were also created after the August 1989 effective date of the DER approval requirement set forth in § 36.09(1)(i), STATS. For purposes of this argument, here and in the trial court, plaintiffs concede that their appointments were "illegal conversions" from the classified service. Their point is that the same is true of at least four other academic staff administrators whose positions were not subject to non-renewal in 1994, and hence the non-renewal of only their appointments violates equal protection.

The question, then, becomes whether defendant Pellitteri acted improperly by enforcing the personnel statutes, rules and policies governing academic staff designations against plaintiffs. The burden to show an equal protection violation is on plaintiffs, who must demonstrate that they were the object of differential treatment for improper or unlawful reasons. *See* ***State v. Cook***, 141 Wis.2d 42, 46-47, 413 N.W.2d 647, 649-50 (Ct. App. 1987) (where fundamental interest not involved, challenger of discretionary action has burden to disprove existence of rational basis for action by showing intentional discrimination). As we have discussed above, Pellitteri's decision to non-renew plaintiffs' fixed term academic staff appointments was not "arbitrary and capricious" because the record demonstrates a rational basis for the action taken.

Plaintiffs have thus not met their burden. On the undisputed material facts, they are not entitled to summary judgment on their equal protection claim.

Moreover, we conclude from the record that Pellitteri is entitled to judgment as a matter of law. Where, as here, an equal protection claim is grounded on a selective enforcement rationale, plaintiffs must establish a prima facie case that the action taken against them was "selective, persistent and intentionally discriminatory." *See* ***State v. Barman***, 183 Wis.2d 180, 187, 515 N.W.2d 493, 497 (Ct. App. 1994). At most, the record demonstrates that Brooks and Pellitteri deemed certain academic staff appointments to be worthy of renewal by virtue of their present job duties and the qualifications of the present incumbents, even if those positions were initially created without proper authorization. After applying the same criteria to plaintiffs' positions, however, Brooks and Pellitteri came to the opposite conclusion. Plaintiffs cannot maintain an equal protection claim on such a showing:

> [E]vidence that a municipality has enforced an ordinance in one instance and not in others would not in itself establish a violation of the equal protection clause. There must be a showing of an intentional, systematic and arbitrary discrimination.

Village of Menomonee Falls v. Michelson, 104 Wis.2d 137, 145, 311 N.W.2d 658, 662 (Ct. App. 1981) (citations omitted).

In order to conclude that a government official has unlawfully discriminated between persons in making discretionary decisions, more is needed than simply a showing that different decisions were made. *See* ***Nick v. State Highway Comm'n***, 21 Wis.2d 489, 496, 124 N.W.2d 574, 577 (1963) ("[m]ere inconsistency" does not rise to level of equal protection violation). The reasons given by Brooks for his recommendation to Pellitteri that only the plaintiffs'

appointments, and not those of other academic staff administrators at the Medical College, be non-renewed were noted above. The reasons relate to legitimate governmental concerns regarding the state's personnel policies under relevant statutes and rules. Plaintiffs point to no "wholly unrelated reasons," nor to any unlawful or discriminatory basis for the actions taken by Brooks and Pellitteri, and the record discloses none. Absent any allegation or evidence of "intentional discrimination" by Pellitteri against them, plaintiffs' equal protection claim must fail. *See* ***Eastman***, 117 Wis.2d at 116-17, 342 N.W.2d at 769.

While the Equal Protection Clause provides a "last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives," plaintiffs have the burden to prove that Pellitteri's action was taken "for reasons wholly unrelated to any legitimate state objective." ***Esmail v. Macrane***, 53 F.3d 176, 180 (7th Cir. 1995) (citation omitted). They cannot do so on this record. We conclude that the undisputed material facts, viewed most favorably toward plaintiffs, establish that Pellitteri, on Brooks' recommendation, directed the non-renewal of plaintiffs' appointments for reasons related to legitimate state objectives. The summary judgment against Pellitteri on the equal protection claim is reversed, and we direct that on remand judgment be entered dismissing this claim. Since plaintiffs have not prevailed against any defendant, we also vacate the judgment awarding plaintiffs' attorney fees and costs.

By the Court.—Judgments reversed and cause remanded with directions.

Not recommended for publication in the official reports.