COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP450 **Cir. Ct. No. 2011CV16915**

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

JACQUELINE BRISTER,

PLAINTIFF-APPELLANT,

V.

WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Jacqueline Brister appeals an order issued by the circuit court following cross-motions for summary judgment filed by Brister and the Wisconsin Department of Children and Families (DCF). The circuit court granted DCF's motion, which requested that the circuit court dismiss the case in

its entirety. On appeal, Brister seeks a declaration that she is not barred by WIS. STAT. § 48.685(5)(br)5. (2011-12) from employment as a caregiver in a state-regulated childcare facility.[1] Alternatively, Brister challenges the constitutionality of § 48.685 on a number of bases. Because we conclude that Brister's appeal is moot, we do not reach the merits of her specific arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be reached).

BACKGROUND

¶2 The underlying facts are not in dispute. For purposes of this appeal, we need only to restate those set forth in the circuit court's decision:

> Ms. Brister's job as a van driver at Penfield Children's Center ("Penfield") was terminated on September 20, 2011 after DCF conducted a routine compliance visit to Penfield. During the compliance check, a DCF representative informed Penfield of a possible violation of Wis. Admin Code § DCF 251.04(5)(a)3[.], for failure to fully investigate Ms. Brister's background check results. Subsequently, Penfield terminated Brister after deciding that her conviction for "public assistance fraud" in 1981 barred her from working as a caregiver pursuant to Wis. Stat. § 48.685(5)(br)[]5[]. No records exist for the 1981 conviction. DCF was not involved in Penfield's decision to terminate Ms. Brister's employment other than to put Penfield on notice of a potential problem with Brister's status.
>
> On December 16, 2011, DCF sent a letter to Ms. Brister's attorneys stating that it would not object to Ms. Brister's employment as a caregiver if Penfield or any other employer determined that insufficient information existed to establish that Brister's past conviction was a barring offense under Wis. Stat. § 48.685(5)(br)[]5[].

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 Following her termination, Brister sought a judgment declaring that WIS. STAT. § 48.685(5)(br)5. did not apply to her or, alternatively, that § 48.685 was unconstitutional. Brister subsequently settled with Penfield, which was then dismissed as a party.

¶4 Brister and DCF filed cross-motions for summary judgment. The circuit court granted DCF's motion and consequently, dismissed the case in its entirety.

DISCUSSION

¶5 DCF argued mootness below. The circuit court rejected this argument and addressed the merits of Brister's claims before concluding that the action should be dismissed. We take a different approach. In light of DCF's December 16, 2011 letter, there is no existing dispute between the parties as to whether WIS. STAT. § 46.685(5)(br)5. applies to Brister; as such, her argument is moot. *See* ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973) (we may affirm on basis other than that relied upon by circuit court).

¶6 "An issue is moot when its resolution will have no practical effect on the underlying controversy. Mootness is a question of law that we review independently." ***PRN Assocs. LLC v. DOA***, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559 (internal citation omitted).

> [This court] has explained that "a moot question is one which circumstances have rendered purely academic." ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425. Appellate courts generally decline to reach the merits of an issue that has become moot. ***Riesch*** [***v. Schwarz***, 2005 WI 11, ¶12, 278 Wis. 2d 24, 692 N.W.2d 219].

PRN Assocs., 317 Wis. 2d 656, ¶29 (footnote omitted).

¶7 Brister's action is against DCF. DCF, however, has never applied WIS. STAT. § 46.685 to her—and, in fact, has said that it would not object to any employer's finding that the statute does not apply to her given the absence of any records regarding her conviction. On this point, we agree with the analysis offered by DCF in its memorandum supporting its motion for summary judgment:

> Ms. Brister's claim against DCF is that its "interpretation" of Wis. Stat. § 46.685 permanently bars her from employment either as a van driver or a Head Start teacher at any state-regulated facility because of her past conviction. This claim must fail as moot given the letter sent on behalf of DCF to Ms. Brister's attorneys on December 16, 2011. The letter informed them that, given the absence of court records detailing Ms. Brister's conviction, DCF would accept "a finding by Penfield, *or by any other employer*, that they cannot determine that Ms. Brister's past conviction is a bar to her employment as a caregiver."
>
> DCF has not doomed Ms. Brister to face "the prospect of never again being employable as a caregiver in a state-regulated daycare facility." DCF can neither guarantee Ms. Brister a position as a caregiver nor shield her from termination of at-will employment. However, DCF has stated that it will not challenge Ms. Brister's employment as a caregiver in any capacity if any potential employer decides that she is employable despite her 1981 conviction, given the dearth of detail available about it. Therefore, any "live dispute" that may have arguably existed between these parties is now remedied and Ms. Brister's claim for declaratory relief against DCF is moot.

(Record citations omitted; emphasis in DCF's memorandum.)

¶8 We recognize that the rule of dismissal for mootness is not without exceptions. Namely, this court "will consider a moot point if 'the issue has great public importance, a statute's constitutionality is involved, or a decision is needed to guide the [circuit] courts.'" ***Litscher***, 233 Wis. 2d 685, ¶3 (citation omitted). Additionally, "we take up moot questions where the issue is 'likely of repetition

and yet evades review' because the situation involved is one that typically is resolved before completion of the appellate process." ***Id.*** (citation omitted).

¶9 In an alternative argument, Brister challenges the constitutionality of the statute; however, addressing that argument in this context would essentially amount to an advisory opinion, which is something we do not provide. *See* ***Commerce Bluff One Condo. Ass'n, Inc. v. Dixon***, 2011 WI App 46, ¶22 n.6, 332 Wis. 2d 357, 798 N.W.2d 264 (this court does not provide advisory opinions); *see also* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts should decide cases on narrowest possible grounds). We further conclude that the circumstances before us do not warrant the application of any of the other exceptions to the mootness doctrine.

By the Court.—Order affirmed.

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