Filed 1/28/13 Bietz v. Westwood U. Sch. Dist. CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

HENRY BIETZ, Plaintiff and Appellant, v. WESTWOOD UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	C070217 (Super. Ct. No. 51231)

The trial court sustained the Westwood Unified School District's (District) demurrer without leave to amend, finding that the District's Board policy 2121, patterned on Government Code section 53260's mandatory provisions, provides the exclusive administrative remedy for termination of Superintendent Henry Beitz's contract for illegal practices. The ruling, in effect, means that section 53260, and therefore policy 2121, bar litigation of a claim for damages as a matter of law if the District terminates a superintendent's contract because it believes the superintendent has engaged

in fraud, misappropriation of funds, or other illegal fiscal practices and its belief is confirmed by an independent audit. (Gov. Code, § 53260, subd. (b)(1).)[1]

We asked for supplemental briefing on the threshold and dispositive issue in the case: whether Government Code section 53260, which is entitled "Maximum cash settlement provisions in contracts of employment; Settlement on termination of contract of district superintendent of schools" and refers, by its terms, to "settlements" (Deering's Ann. Gov. Code, § 53260 (2004 ed.)), applies at all to a lawsuit brought pursuant to various provisions of the Education Code and does not involve a settlement.[2] (See, e.g., *Page v. MiraCosta Community College Dist.* (2009) 180 Cal.App.4th 471 (*Page*).) The District argues that the term "settlement," as used in section 53260, subdivision (a) and construed by the court in *Page*, has an entirely different meaning as used in subdivision (b). We disagree and accordingly reverse.

FACTS

On appeal of a judgment of dismissal following the sustaining of a demurrer without leave to amend, we must assume the truth of the facts alleged by the plaintiff, including exhibits attached to the complaint. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Satten v. Webb* (2002) 99 Cal.App.4th 365, 374-375.) We can also consider matters subject to judicial notice. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Our recitation of the facts, therefore, is based upon the pleadings and requests for judicial notice.

The District hired Bietz in 2000 to serve as its superintendent for a four-year term and extended the term of the contract in 2004 and again in 2008. In 2001 the District chartered the Westwood Charter School (WCS). Bietz alleges that the District thereafter

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[1] All further statutory references are to the Government Code unless otherwise designated.

[2] We need not, therefore, address the remainder of the issues raised in the briefs.

"failed to comply with its statutorily required oversight of WCS." In or about 2004 Bietz also became the superintendent of WCS while maintaining his position as superintendent of the District. According to the complaint, both boards approved this arrangement, in which he headed a school he was charged with overseeing as a superintendent of the District.

At issue is the 2008 employment agreement. Two paragraphs are pertinent. Paragraph g provides: "This contract is subject to all applicable laws and regulations of the State of California. The State Board of Education, and the Governing Board of the Westwood Unified School District. [*Sic*.] Said laws, rules and regulations are hereby made a part of the terms and conditions of this contract as though herein set forth." Paragraph h states: "It is further understood and agreed that the Governing Board must comply with the provisions of State Law relating to termination of a superintendent's contract."

In December 2008 the Lassen County Office of Education entered into a contract with the Fiscal Crisis & Management Assistance Team (FCMAT) to provide an Assembly Bill No. 139 extraordinary audit to determine if the District and/or WCS was in violation of statutes governing conflicts of interest (§§ 1090-1099) or employment (§§ 1126-1127). After an extensive investigation, FCMAT issued a report with detailed findings, including violations of various Government Code sections. The trial court took judicial notice of the report.

FCMAT found that Bietz's simultaneous employment as superintendent of the District and of WCS, as well as his receiving payments for consulting services provided to Westwood Charter School Services, Inc., was a three-way compensation scheme in violation of conflict of interest laws. FCMAT also found that Bietz failed to list this conflict of interest on his form 700 statement of economic interest, which is required to be filed with the state pursuant to sections 1126 and 87300 through 87313.

Bietz alleges that FCMAT's report "wrongly took issue" with his simultaneous service. The Attorney General thereafter initiated criminal proceedings for conflict of interest against Bietz. In March 2009 the District approved Bietz's request for a one-year leave of absence as superintendent of the District. About a year later, he informed the board that he planned to return to work for the District on July 1, 2010.

On May 5, 2010, the interim superintendent, on behalf of the board, informed Bietz that it had decided to rescind his employment contract. According to the written notification, "The Board's decision is based on a determination that you have breached your contract with the District by (1) failing to properly disclose conflicts of interest to the Board; (2) committing other violations of conflict of interest laws while simultaneously serving as the District's superintendent, superintendent of the Westwood Charter School ('WCS') and a consultant to WCS; (3) failing to disclose financial interests on your FPPC Form 700, Statement of Economic Interest filings; (4) failing to properly notify laid off certificated employees of their reemployment rights; and (5) failing to properly hire certificated employees."

In a response to the District's notification, counsel for Bietz objected to the notice of rescission, arguing that a rescission was inconsistent with a breach of contract. The District thereafter terminated Bietz's employment contract as superintendent and gave him the option of taking a teaching position.

Bietz filed a complaint for breach of contract and indemnity. The indemnity claim is no longer at issue. He alleges that "[a]s a direct and proximate result of [the District's] actions, [Bietz] has suffered damages consisting of loss of his salary and compensation, including retirement benefits, damages to his income earning ability, damages to his professional and personal reputation, and has suffered significant emotional distress, all to be shown in a sum according to proof." The trial court sustained the District's demurrer without leave to amend and Bietz appeals.

DISCUSSION

We begin, as we must, with the express language of the statute at issue. Section 53260 states:

"(a) All contracts of employment between an employee and a local agency employer shall include a provision which provides that regardless of the term of the contract, if the contract is terminated, the maximum cash settlement that an employee may receive shall be an amount equal to the monthly salary of the employee multiplied by the number of months left on the unexpired term of the contract. However, if the unexpired term of the contract is greater than 18 months, the maximum cash settlement shall be an amount equal to the monthly salary of the employee multiplied by 18.

"(b)(1) Notwithstanding subdivision (a), if a local agency employer, including an administrator appointed by the Superintendent, terminates its contract of employment with its district superintendent of schools that local agency employer may not provide a cash or noncash settlement to its superintendent in an amount greater than the superintendent's monthly salary multiplied by zero to six if the local agency employer believes, and subsequently confirms, pursuant to an independent audit, that the superintendent has engaged in fraud, misappropriation of funds, or other illegal fiscal practices. The amount of the cash settlement described in this paragraph shall be determined by an administrative law judge after a hearing.

"(2) This subdivision applies only to a contract for employment negotiated on or after the effective date of the act that added this subdivision [fn. omitted].

"(c) The cash settlement formula described in subdivisions (a) and (b) are maximum ceiling on the amounts that may be paid by a local agency employer to an employee and is not a target or example of the amount of the cash settlement to be paid by a local agency employer to an employee in all contract termination cases."

In *Page*, the court analyzed the language of the statute, its purpose, and the relevant legislative history. "Applying plain and commonsense meaning to the statute's

words [citation], the payment limitations of section 53260 apply to any 'settlement' a public employee 'may receive' under his or her contract in the event that contract is severed or terminated before the end of the contract term. Use of the permissible verbal auxiliary 'may' suggests the statute does not mandate that the employee receive any of the specified cash and benefits upon contract termination. [Citations.] That conclusion is bolstered by subdivision (c) of section 53260, which provides that the formulas of subdivisions (a) and (b) are 'maximum ceiling[s],' not target or example amounts. Thus, depending on the number of months remaining on the unexpired term of the employee's contract, the employer and employee are entitled to negotiate a cash settlement of any amount up to the specified maximum." (*Page*, *supra*, 180 Cal.App.4th at pp. 488-489.)

The court divined the purpose of the statute from the legislative history. "[T]he Assembly Local Government Committee analysis states: '[T]he author has introduced this bill to address the concern that local governments are using their limited public resources to "buy out" the contracts of highly paid executives.' (Assem. Com. on Local Government, Analysis of Sen. Bill No. 1972 (1991-1992 Reg. Sess.) as amended June 24, 1992, p. 3.) It provides the following background: 'Most of the nearly 1.4 million Californians who work for local agencies . . . serve in civil service systems. However, top administrators and managers usually serve at the pleasure of local elected officials. Some of these executive officials, such as school superintendents . . . have employment contracts with their local agency employers.' (*Id*. at p. 2.) It included conclusions from a January 1992 report of the state Auditor General, which noted that school and community college districts enter into employment contracts with their superintendents, and listed the average net settlement payments made upon early termination of the contract, as well as the remaining contract periods. (*Ibid*.) The Auditor General was concerned about the impact of early renegotiation, renewal and contract extension practices on the size of monetary settlements occurring upon early contract termination." (*Page*, *supra*, 180 Cal.App.4th at pp. 490-491.)

The Senate Local Government Committee expressed similar concerns about the amount of settlement payments. The committee analysis explains: "Some observers are troubled that local governments use their scarce public revenues to 'buy out' the contracts of highly paid executives. . . . Although relatively rare, some local governments buy-out their executives' contracts when they fire them. Even when school districts renew superintendents' contracts early, they sometimes turn around and let them go. These practices produce cash settlements that disturb public watchdogs. One hospital district terminated its chief executive 32 months before the contract expired, paying $206,042 in settlement. A community college district paid its superintendent $126,000 to settle the seven remaining months of an unexpired contract. While no-cut contracts may be fine for professional sports figures, local governments should not pay their former executives not to work. S.B. 1972 imposes statewide standards on local contracts to limit excessive cash settlements." (Sen. Com. on Local Government, Analysis of Sen. Bill No. 1972 (1991-1992 Reg. Sess.) p. 2.)

Interestingly, there is no mention in *Page* or in its analysis of the Senate or Assembly Committees of any intention to abolish an employee's rights to bring civil actions under the Education Code or the Government Code. Rather, the purpose was to place maximum ceilings on settlement payments whether the employer unilaterally terminated the contract, or the employer and employee came to an agreement. The court in *Page* made clear "[t]he statute does not speak to the underlying *reasons* for the contract termination or the nature of legal claims, if any, asserted by the public employee in connection with such termination; it is silent on those points. On its face, the statute's application is unqualified: it is not conditioned by or limited to any particular circumstance prompting the termination and settlement of the public employee's contract. Rather, its cash and noncash settlement limitations apply 'if the contract is terminated' regardless of the underlying reasons for termination or the employee's legal claims he or she may possess at the time of termination." (*Page*, *supra*, 180 Cal.App.4th at p. 489.)

"Further, the Legislature expressly considered, but rejected, having the statutory limitations apply only to circumstances in which the parties mutually agreed to terminate the contract, presumably instances not involving the employee's assertion of legal claims or causes of action." (*Id*. at pp. 491-492.)

Nevertheless, the District argues that the use of "settlements" in subdivision (b) of section 53260 does not have the same plain and commonsense meaning it has in subdivision (a) of that section, the particular subdivision at issue in *Page*. The District argues that to use the same definition of the word "settlement" would render subdivision (b) meaningless. In its supplemental letter brief, the District explains: "This interpretation of the term 'settlement' in subdivision (b) is bolstered by the fact subdivision (b) <u>only applies</u> if the public entity believes the superintendent has engaged in fraud, misappropriation of funds or other illegal fiscal practices. This subdivision <u>does not</u> require the superintendent <u>to agree</u> he or she has engaged in such misconduct, only that the public entity holds this belief. It would be a rare day that a superintendent admits or concedes to such misconduct such that they would agree to limit their compensation to no more than 6 months as called for by subdivision (b)."

On its face, we must reject the notion that the Legislature would use a word as important as "settlement" in the title and one subdivision of a statute and, without any indication or explanation, use the same word to mean something entirely different in the very next subdivision. Such an argument violates the fundamental rule of statutory construction that compels us to apply the plain meaning of the words used in the statute.

Nor do we accept the District's argument that subdivision (b) of section 53260 is meaningless if we construe "settlement" to mean settlement. The District contends that requiring the parties to have an agreement as to the amount in dispute does not make sense in the context of subdivision (b), in which they are required to go in front of an administrative law judge for a formal hearing during which each side vigorously advocates its position. The District ignores the statutory language which limits any

hearing by an administrative law judge to the determination of "[t]he amount of the cash settlement described in this paragraph . . . ." The "cash settlement described in this paragraph" is earlier defined as being an amount paid following termination of a contract of employment by way of a "settlement," which may not be greater than an amount equal to six months' salary. (§ 53260, subd. (b).)

It is not for us to determine how frequently a superintendent would be willing to settle his claims for a maximum of six months' salary when a district believes he has been engaged in financial irregularities, or to assess the wisdom of the Legislature's statutory scheme. Rather, our job is to construe the statutory language in context and to effectuate the purpose of the law. The District assumes that "settlement" means the parties have to agree on a settlement amount. Not so. A superintendent may be willing to forego his right to bring a civil claim for damages and submit the determination as to the amount of the damages, subject to the ceiling, to an administrative law judge. Thus, section 53260 is silent as to the superintendent's choice of remedies and says nothing about curtailing his right to pursue a civil claim instead of settling with the District. Rather, the purpose of the law is to restrain the District's generosity, not to deprive an employee of a right to a civil action and the opportunity to prove damages in excess of the ceiling imposed by section 53260.

We conclude, therefore, that the demurrer without leave to amend was improvidently sustained. The statute upon which the District premised its demurrer limits cash settlements in the event a district terminates a superintendent's contract early; it does not apply to a civil action initiated by the aggrieved superintendent. There is nothing in the language or history of section 53260 to suggest that the Legislature intended to abolish an employee's civil claim for damages. Rather, the statute expressly states, and therefore we must divine the Legislature's intent to mean, that section 53260 caps settlement payments. The trial court erred by applying the statute so as to foreclose Bietz from pursuing whatever rights he has to a breach of contract claim. This case

simply does not involve the problem sought to be addressed by the statute -- a huge settlement payment to someone the District believes has engaged in financial improprieties.

DISPOSITION

The judgment is reversed. Bietz shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

RAYE, P. J.

We concur:

BLEASE, J.

MAURO, J.