

**INTEROFFICE COMMUNICATION
COUNTY OF MILWAUKEE**

DATE: November 14, 2018

TO: Theodore Lipscomb, Sr., Chairman, County Board of Supervisors

FROM: Alan M. Levy, Esq., Lindner & Marsack, S.C.

SUBJECT: *James Kubicek LCSW v. Milwaukee Co. Behavioral Health Division
and Milwaukee Co. Dept. of Health & Human Services*
Milwaukee County Case No. 16-CV-1031

As outside counsel for the Defendants, I request that this matter be referred to the Committee on Judiciary, Safety and General Services for approval of a settlement. I request authority to settle the claims of plaintiff James Kubicek for the total sum of \$350,000.00, to be paid by Milwaukee County.

Kubicek was a long-time deputy administrator and, as occasionally needed, acting administrator of the Behavioral Health Division (“BHD”) of the County’s Department of Health and Human Services (“DHHS”). In November 2014 he was offered an executive position at what was to be the new Brown Deer facility of Rogers Memorial Hospital. Had he continued in his position with BHD until the fall of 2015, he would have been eligible to begin receiving a normal pension from ERS of approximately \$3,900 per month pursuant to the “Rule of 75,” an early retirement benefit available to some County employees that permits them to retire with a full pension when the sum of their age and County service credits equals or exceeds 75.

Kubicek alleged that he accepted this Rogers position effective January 9, 2015 only because he had been promised continued County employment that would qualify him for the Rule of 75 benefit. To accomplish this, Kubicek exhausted his unused vacation and other paid time off and then he took a position as a “pool social worker” (which had no regular work schedule or required hours but allowed him to continue as a County employee) until he accumulated sufficient age (not additional service) to qualify for the Rule of 75 benefit in February 2016.

The County contended that Kubicek became a probationary employee upon taking the pool social worker position; he was terminated from that employment without cause or hearing effective May 18, 2015. Therefore, he was eligible for a deferred pension at age 60 (in 2024), but no Rule of 75 benefit.

In February 2016 Kubicek sued BHD and DHHS in Milwaukee County Circuit Court. He made three claims:

- He had a contract right to the Rule of 75 benefit based on an agreement with BHD and HHS management and his discharge breached that agreement.
- By the rules of estoppel, the County had promised the Rule of 75 benefit, Kubicek had depended on receiving it, and the discharge violated that entitlement.
- He was the victim of a wrongful discharge.

The case was tried to a jury in late July/early August 2018 before Hon. Timothy Witkowiak. At the end of the four-day trial:

- The Court found there was no contract, and that claim was dismissed by the plaintiff.
- The jury found that Kubicek reasonably relied on statements made by authorized management officials so that the County was estopped and Kubicek was entitled to hold the pool social worker position until he received the Rule of 75 benefit in 2016.
- The Court took the wrongful discharge claim away from the jury and said it would decide the issue on its own. Plaintiff's theory was that he had some level of civil service protection and rights to notice and hearing before he could be terminated without cause while a probationary employee. The County argued that, as a probationary employee, Kubicek was not covered by or entitled to protection under Civil Service Rules. This issue has been stayed until December 3, 2018 while settlement discussions are in progress.

Had Kubicek been able to achieve the Rule of 75 in 2016 he would have received approximately \$3,900.00 per month for an estimated total of over \$426,000.00 before he reached age 60, when he would have been eligible for a normal deferred vested pension. (This does not include increases for COLA and any other increase applicable to all ERS retirees.) The monthly benefit as of July 2018 would have increased to \$4,518.76, and the payouts Kubicek would have received between 2016 through the 2018 trial totaled \$126,676.00.

Counsel for the parties have negotiated a settlement document that provides:

- The County pays Kubicek a lump sum of \$350,000.00 (at least \$76,000.00 less than the total estimated exposure without including COLA or other increases); and

- Kubicek receives a deferred joint and survivor pension of \$3,954.37 at age 60 (subject to future COLA and other general increases).
- The County receives a full waiver and release, including dismissal of the complaint with prejudice and with no ruling on the issue of wrongful discharge or Civil Service Rules and rights.
- Each party would be responsible for its own attorney fees and costs of litigation.

Outside trial counsel, Corporation Counsel, and the Wisconsin County Mutual Insurance Corporation recommend acceptance of this settlement because:

- The dollar payout to Kubicek is 18% less than the obligation found by the jury verdict.
- There will be no award of attorney fees or costs to Kubicek.



Alan M. Levy, Esq., Lindner & Marsack, S.C.

cc: Kelly Bablitch
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