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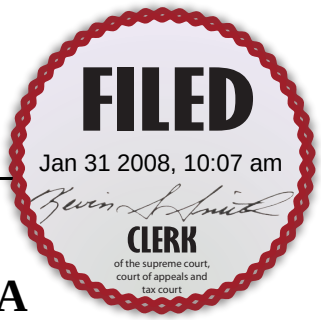

IN THE
COURT OF APPEALS OF INDIANA

SCI INDIANA FUNERAL SERVICE, L.P., d/b/a ROSELAWN MEMORIAL PARK,	)	
Appellant-Defendant,	)	
vs.	)	No. 84A04-0706-CV-333
ROBERT E. MUSGRAVE,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael J. Lewis, Judge
Cause No. 84D06-0607-CC-5145

January 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

SCI Indiana Funeral Service, L.P., doing business as Roselawn Memorial Park ("SCI"), brings this interlocutory appeal claiming that the trial court erred in denying its motion for summary judgment.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

Robert E. Musgrave was employed by SCI from April 1999 until his involuntary termination on October 14, 2005. During the course of his employment, Musgrave accrued 186.5 hours of unused sick leave. The conditions under which Musgrave earned and could have used his paid sick leave were set forth in SCI's Employee Handbook ("Handbook").

Musgrave executed an acknowledgment of receipt of the Handbook on four separate occasions—April 1999, February 2001, October 2002, and October 2004. *Appellant's App.* at 42-45. The acknowledgment provided in pertinent part as follows:

> I, Robert Musgrave, hereby acknowledge that I have received a copy of the Company's Employee Handbook, which provides guidelines on the policies, procedures, and programs affecting my employment. I understand that I am employed At-Will and the Company can, at its discretion, modify, eliminate, revise, or deviate from the guidelines and information in this handbook as circumstances or situations warrant.
>
> . . . .
>
> I accept responsibility for familiarizing myself with the information in this handbook and will seek verification or clarification of its terms or guidance where necessary.

Id.

In addition, the Handbook outlined that sick leave could not be used to augment vacations, holidays, or other time off. *Id*. at 32. Instead, sick leave could be used only when

the employee or an immediate family member was sick or injured. *Id*. at 32-33. Advanced approval was required to use sick leave for medical and dental appointments in non-emergency situations, and SCI had the right to request a physician's statement or certification for any absence charged to sick leave. *Id*. at 32. Further, the Handbook specifically provided, "Terminating employees will not receive pay for unused sick leave." *Id*. at 33.

Upon his termination, Musgrave demanded compensation for 186.5 hours of unused sick leave. When SCI refused, Musgrave filed suit against SCI arguing that he was entitled to this compensation as a wage. *Id*. at 46. SCI moved for summary judgment on the basis that Musgrave's sick leave did not qualify as wages. Musgrave filed a Brief in Response to Defendant's Motion for Summary Judgment and submitted an affidavit of Keith Davis, a former SCI employee, who claimed to have been compensated for sick leave after his voluntary termination. SCI, in turn, submitted a Reply Brief. *Id*. at 61.

The trial court heard oral argument on SCI's motion for summary judgment and, on April 11, 2007, denied its motion finding that a genuine issue of material fact precluded summary judgment. *Id*. at 5. The trial court reasoned:

> The Court, having heard arguments from Defendant's and Plaintiff's counsel, and reviewed evidentiary matter designated to the court, finds that it was alleged that Defendant previously provided "sick leave" pay to another individual who was dismissed, similarly to plaintiff which was not in accordance with the employee manual.

Id. Thereafter, the trial court certified its order for interlocutory appeal, and this court accepted jurisdiction over the appeal in July 2007. SCI now appeals.

DISCUSSION AND DECISION

We initially note that Musgrave failed to file a brief in this appeal. Accordingly, we do not undertake the burden of developing arguments for Musgrave, as that duty remains with him. *DAP, Inc. v. Akaiwa*, 872 N.E.2d 1098, 1100 (Ind. Ct. App. 2007). Normally, when the appellee does not file a brief, we apply a less stringent standard of review and may reverse the trial court when the appellant establishes prima facie error. *Id*. "Prima facie" is defined as "at first sight, on first appearance, or on the face of it." *Id*. (quoting *Johnson County Rural Elec. Membership Corp. v. Burnell*, 484 N.E.2d 989, 991 (Ind. Ct. App. 1985)).

The purpose of summary judgment is to terminate litigation about which there can be no dispute and which may be determined as a matter of law. *Swift v. Speedway Superamerica, LLC*, 861 N.E.2d 1212, 1213 (Ind. Ct. App. 2007), *trans. denied*. Our standard of review is the same as that of the trial court. *Id*. Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Naugle v. Beech Grove City Sch.*, 864 N.E.2d 1058, 1062 (Ind. 2007). For summary judgment purposes, a fact is "material" if it bears on ultimate resolution of relevant issues. *Graves v. Johnson*, 862 N.E.2d 716, 719 (Ind. Ct. App. 2007) (citing *Kreighbaum v. First Nat'l Bank & Trust*, 776 N.E.2d 413, 419 (Ind. Ct. App. 2002)).

In his complaint, Musgrave sought compensation for his unused sick leave contending, "That according to Indiana law, unused sick time is included within the definition of 'wages.'" *Appellant's App.* at 47. This court has recognized that benefits may

take the form of "present" or "deferred" compensation. *Williams v. Riverside Cmty. Corr. Corp.*, 846 N.E.2d 738, 743 (Ind. Ct. App. 2006), *trans. denied*. Present compensation "vests upon the performance of labor without any additional requirement." *Swift*, 861 N.E.2d at 1214 (citing *Williams*, 846 N.E.2d at 744). However, deferred compensation, such as vacation or sick leave, "only vests upon the 'performance' of some requirement in addition to—or even apart from—the performance of labor, be it the passage of time, the attainment by an employee of a certain age, or any other variable as set forth either by policy or by agreement of the parties." *Williams*, 846 N.E.2d at 744; *see Swift*, 861 N.E.2d at 1214-15. Additionally, unlike present compensation, which indefeasibly vests upon the performance of labor, "deferred compensation is subject to forfeiture unless it arises from a contract—as opposed to an employer's policy—and that contract lacks any express terms providing for its forfeiture." *Williams*, 846 N.E.2d at 744; *see Swift*, 861 N.E.2d at 1214-15.

Our court has recognized that an employee's entitlement to compensation for deferred compensation benefits is addressed on a case-by-case basis "taking into account the particular intricacies of the employment relationship between any two parties before the court." *Williams*, 846 N.E.2d at 747. While the inquiry may be fact sensitive, the matter may nevertheless be appropriate for summary judgment where, like here, the material facts are not in dispute. *See Rhodes v. Wright*, 805 N.E.2d 382, 385, 387 (Ind. 2004) (while summary judgment is rarely appropriate in fact sensitive negligence cases, summary judgment is appropriate when undisputed material evidence negates one element of negligence claim).

Three Indiana cases inform our decision. *See Williams*, 846 N.E.2d at 748-51; *Schwartz v. Gary Cmty. Sch. Corp.*, 762 N.E.2d 192 (Ind. Ct. App. 2002), *trans. denied*; *Shorter v. City of Sullivan*, 701 N.E.2d 890 (Ind. Ct. App. 1998), *trans. denied*. In *Shorter*, two employees, who resigned from their employment after having accrued significant amounts of sick leave, filed a complaint against their employer seeking remuneration for this leave. The employees argued that sick leave benefits, like vacation benefits, were a form of deferred compensation for which an employee, under certain circumstances, must be compensated upon termination. Following a bench trial, the trial court entered the following order:

> Sick leave, while defined by statute as wages, may only be received under the policy of the City of Sullivan when ill, injured, or when immediate family is ill or injured.
>
> Although sick leave is accumulated at one (1) day per month and up to sixty (60) days can be accumulated, it is payable only upon illness or injury as above described. One may accumulate it only for future illness or injury and you can receive it only if you are ill or injured or off work due to illness or injury.
>
> Therefore, since Plaintiffs terminated their employment and as such they can no longer satisfy the requirement of sick leave benefits, they forfeit the accumulated sick leave. There is no loss to them since they were paid for every day that they worked and every day they were off sick or injured. Vacation days are paid for idleness and to which an employee is entitled without regard to any other condition.
>
> The Court therefore finds Plaintiffs should take nothing by way of their Complaint herein.

Id. at 891-92. On appeal, this court agreed. Unlike accumulated vacation time, which could be taken without any conditions after that benefit was earned, an employee could take sick leave only under certain conditions. *Id*. at 892. The *Shorter* court concluded, "Absent some

personnel policy language to the contrary, employees are not entitled to compensation for sick leave which has been accumulated but not used when the employee terminates employment." *Id*.

In *Schwartz*, the personnel policy reflected the employer's decision to make sick leave comparable to vacation leave. There, the employer permitted employees to convert up to ten vacation days a year into sick days. 762 N.E.2d at 197. The employer's policy allowed a "terminating administrative employee to receive $50.00 a day for each unused day of sick time, up to a maximum of 200 days. That policy ma[de] the payment of unused sick time the same as the payment of earned but unused vacation pay." Id. at 199 n.2. As such, our court determined that Schwartz was entitled both to the payment of unused sick leave as wages, and to liquidated damages and attorney fees for the employer's delay in paying these wages.

In *Williams*, the employer set forth the terms of its benefits in its employee handbook. 846 N.E.2d at 741. Williams acknowledged receipt of this handbook and the terms therein. *Id*. Like the instant case, the employer in *Williams* paid terminated employees for accrued but unused vacation leave, but did not pay for sick leave. *Id*. Williams was terminated and sought compensation for her sick leave. When her employer denied her claim, Williams sued. The parties filed various motions for summary judgment. Finding no genuine issue of material fact, the trial court granted the employer's motion for summary judgment. *Id*. at 740.

Recognizing *Shorter* as the applicable precedent, the *Williams* court reasoned:

> With regard to sick pay, the language of [the employer's] Handbook sets forth several specific situations, besides personal illness, under which an employee may be approved to use sick leave. These situations include "bona fide

> medical appointments of the employee and the employee's dependents," "prior to or during a medical or personal leave of absence," or, upon exhaustion of accrued vacation time, to care for a dependent or elderly parent. The Handbook contained no other provision allowing for sick pay to be converted or otherwise made available to an employee. Because Riverside's sick pay policy limited its employees' use of the benefit in this manner, the *Shorter* court's analysis applies, and the policy before us cannot properly be characterized as a benefit that automatically vests when earned. Therefore, Williams was not entitled to any accrued sick pay upon termination of her employment, and the trial court properly entered summary judgment for Riverside.

Id. at 750 (citations omitted).

Here, the Handbook governed Musgrave's ability to accrue and use vacation and sick leave, which the employer viewed as different kinds of benefits. *See Taylor v. Cmty. Hosps. of Ind., Inc.*, 860 N.E.2d 1200, 1204 (Ind. Ct. App. 2007), *trans. denied*. SCI's vacation leave was intended to address an employee's need for "periods of rest and relaxation." *Appellant's App.* at 38. "Terminating employees [were] compensated for earned and unused vacation on a prorated basis according to the accrual rate." *Id*. at 42. By contrast, "[s]ick leave protect[ed] employees against salary loss during a personal illness or injury." *Id.* This leave could be used for absences due to an employee's illness or injury and, with prior approval, for medical appointments, dental appointments, or to care for ill or injured members of the immediate family. *Id*. at 42-43. A terminated employee did "not receive pay for unused sick leave." *Id*. at 44.

The parties agreed that Musgrave accrued 186.5 hours of sick leave prior to his termination. Further, Musgrave conceded the accuracy of the case law analysis provided by SCI. *Tr*. at 9. Even so, the parties disagreed as to the significance of the affidavit of the former SCI employee, Davis, who claimed to have been compensated for his unused sick

leave. Musgrave contended that this affidavit reveals an inconsistent application of the company policy, which created a genuine issue of material fact regarding whether Musgrave should have been paid for his sick leave. We cannot agree.

The terms of SCI's sick leave policy arise solely from the Handbook. The Handbook creates the benefit and defines the terms for accruing and using the benefit. Contrary to Musgrave's assertion, we find no support for the proposition that SCI must uniformly apply its policies to employees.[1] In the absence of a claim of illegal employment discrimination, the fact that SCI may not have followed the sick leave policy regarding another employee is immaterial unless SCI promised Musgrave the same payment, and Musgrave reasonably relied on this promise. *See Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 573, 580-81 (Ind. 2007) (homeowners brought suit on theory of promissory estoppel claiming that they would have joined prior suit but for airport authority's promise that all neighbors would be treated "alike"). Musgrave makes no such claim of promissory estoppel or reasonable reliance.

In his complaint, Musgrave asserted that, under Indiana law, "unused sick time is included within the definition of wages." *Appellant's App.* at 47. While this is a correct statement under the facts of a case like *Schwartz*, where an employer pays for unused sick leave, unused sick leave that an employer deems noncompensable is not a wage. *See*

[1] Citing to IC 22-4-15-1(d)(2), *St. Mary's Medical Center of Evansville, Inc. v. Review Board of Indiana Employment Security Division*, 493 N.E.2d 1275, 1278 (Ind. Ct. App. 1986), and *Frank v. Review Board of Indiana Employment Security Division*, 419 N.E.2d 1318, 1318 (Ind. Ct. App. 1981), Musgrave contends that an employer must uniformly enforce the policies set forth in its handbook with regards to terminations. *Appellant's App.* at 58. While this is the correct standard for determining whether an employer has just cause to terminate an employee who did knowingly violate "a reasonable and uniformly enforced rule of an employer," IC 22-4-15-1(d)(2), Musgrave is mistaken in asserting that this standard applies to an

Williams, 846 N.E.2d at 750; *Shorter*, 701 N.E.2d at 892. Here, the Handbook was clear. Musgrave could not and should not have expected to be paid for his unused sick leave. The trial court erred in finding that a conflict in application of company polices, without a concurrent claim of reasonable reliance or promissory estoppel, created a genuine issue of material fact. We therefore reverse and remand with instructions to the trial court to enter summary judgment in favor of SCI.

Reversed and remanded.

RILEY, J., and MAY, J., concur.

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employer's payment of benefits.