IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SHARON A. WALKER,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM and DAVID MARKEE, Chancellor of the University of Wisconsin-Platteville,

Defendants.

OPINION AND ORDER

03-C-0066-C

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Defendants Board of Regents and David Markee have moved pursuant to Fed. R. Civ. P. 50(c)(1) and 60(b) to amend the judgment in this case. They contend, correctly, that the court erred in denying their motion for a new trial as moot in light of the granting of the motion for judgment as a matter of law. Plaintiff Sharon A. Walker objects to the motion, arguing that it should have been brought under Fed. R. Civ. P. 59(e) and that even if it is brought properly under Rule 60(b), it is untimely because it was not filed within the time for taking an appeal.

Judgment in this case was entered on July 29, 2004. Plaintiff filed her appeal on

August 16, 2004, seeking reversal of the court's grant of judgment as a matter of law. Defendants filed their motion to amend the judgment one day before plaintiff filed and served her appellate brief and short appendix.

It is clear that, as defendants point out, it was error to deny the motion for a new trial as moot. Fed. R. Civ. P. 50(c)(1) ("If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed"); McKinnon v. City of Berwyn, 750 F.2d 1383, 1389 (7th Cir. 1984) (Rule 50(c)(1) requires judge to rule conditionally on motion for new trial, rather than reserve ruling when granting motion for judgment as matter of law, so that if the grant of the motion for judgment as a matter of law is erroneous, court of appeals can correct ruling on motion for new trial at same time and avoid successive appeals). Had defendants brought their motion under Rule 59(e), I would have entertained it promptly, corrected the mistake and decided the issue in favor of defendants. Once I found that defendants could meet the higher standard required for granting a motion for judgment as a matter of law, I would have to find that they could meet the lower standard required for ordering a new trial. If no reasonable jury could have found in favor of plaintiff, defendants would be entitled to have the case retried before another jury.

It does not follow, however, that defendants can prevail on their motion to amend

3the judgment. They make a good case for characterizing the denial of the motion for a new trial as moot is a "mistake" within the meaning of Rule 60(b)(1) for which a court may relieve a party from a final judgment. However, the Court of Appeals for the Seventh Circuit has taken a restrictive view of motions to correct similar kinds of mistakes under Rule 60(b), particularly when they have not been filed within the time for taking an appeal or "pressed on the trial court after the grant of [judgment as a matter of law]." Henderson v. DeRobertis, 940 F.2d 1055, 1057 n.1 (7th Cir. 1991). It is not entirely clear what the appellate court's position is on the use of Rule 60(b) for this purpose. In McKnight v. United States Steel Corp., 726 F.2d 33, 335-36 (7th Cir. 1984), the court rejected the use of the rule to correct a judgment based on a law that was overruled after the judgment had been entered, but in Bank of California v. Arthur Andersen & Co., 709 F.2d 1174, 1176-77 (7th Cir. 1983), it allowed a motion to amend under Rule 60 when the court had erred in dismissing a claim "on the merits." However, the court re-characterized the motion as one brought under Rule 60(b)(1). In Peacock v. Board of School Commissioners, 721 F.2d 210, 214 (7th Cir. 1983), the court disallowed a Rule 60(b) motion because it was not filed within the time for taking an appeal and therefore could not be said to have the effect of saving the trouble of an appeal.

Defendants could argue that granting their motion to amend would not extend the time for taking an appeal and thus would avoid a major concern about eluding the restraints

of Rule 59 through the use of Rule 60(b); their motion relates to a matter of clear error on the court's part rather than a disputed error of legal interpretation; and the intent of the amendment of Rule 60 was to allow motions to be brought under this rule to challenge mistakes made by the court and allow the court to correct them. In my view, however, plaintiff has the stronger case: granting the motion would delay the course of the appeal because the parties would need an opportunity to address the court's grant of a new trial. Moreover, granting the motion would not save the court of appeals any trouble. Unlike the judge in McKinnon, 750 F.2d at 1389, I did not reserve a ruling on the motion for a new trial but denied it. Therefore, the court of appeals will not be bothered with the issue of a new trial in the future if defendants' motion is denied.

Had defendants moved within the time for taking an appeal, I would be inclined to grant the motion to amend, even with the lack of clear guidance on the issue from the court of appeals. Because they did not move promptly, however, they are not in a strong position to argue for an expansive view of Rule 60(b).

ORDER

IT IS ORDERED that the motion filed by defendants Board of Regents of the University of Wisconsin System and David Markee to alter or amend the judgment entered

on July 29, 2004, is DENIED.

Entered this 17th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge