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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1288**

Kevin Cosgrove,  
Appellant,

vs.

Regents of the University of Minnesota, et al.,  
Respondents.

**Filed March 4, 2013  
Reversed in part; vacated in part  
Cleary, Judge**

Hennepin County District Court  
File No. 27-CV-11-25382

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Considered and decided by Cleary, Presiding Judge; Hooten, Judge; and Smith,  
Judge.

**UNPUBLISHED OPINION**

**CLEARY**, Judge

Appellant challenges the district court's summary-judgment dismissal of his claim  
against respondents for failure to timely pay wages in violation of Minn. Stat. § 181.13

(2010). By notice of related appeal, respondents challenge the district court's determination that it had subject-matter jurisdiction in this action. Because the district court lacked subject-matter jurisdiction, we reverse its jurisdictional order and vacate its summary-judgment order.

## **FACTS**

In 2010, the parties entered into a "Memorandum of Agreement" (MOA) that set forth terms of appellant Kevin Cosgrove's employment with the University of Minnesota (university). The MOA states that appellant would:

serve as an Assistant Football Coach "Defensive Coordinator", class 9/93, with a 100% time, A (12-month), J (multi-year) academic appointment effective as of Friday, January 9, 2009, and ending February 15, 2012, or when Coach Tim Brewster is no longer the head football coach at the University of Minnesota, whichever occurs first.

According to the MOA, appellant's employment was subject to the university's Academic Professional and Administrative (P&A) Policies and Procedures. The MOA contains the following provision:

During the term of your contract, and in accordance with P&A Policies and Procedures, the University may non-renew your appointment and reassign you to other or no duties without just cause. In the alternative, the University may terminate this Agreement at any time without just cause upon ninety (90) days written notice to you. In such event, the University shall pay you as a termination fee based on the terms of this Agreement the base salary amount payable to you . . . for the remainder of your employment within thirty (30) days of the end of the notice period.

Coach Brewster ceased to be the university's head football coach on October 17, 2010. On November 15, 2010, the university sent appellant a letter stating that

appellant's "appointment as an Assistant Football Coach, P&A appointment . . . will end on February 15, 2011." The letter states, "In accord with University Administrative Policy: *Non-Renewal of Appointments for Academic Professional and Administrative Employees* . . . regarding notice of non-renewal for P&A appointments, this letter provides written timely notice."

In March 2011, appellant sent the university a demand for payment of a termination fee of the remainder of his three-year salary. Appellant argued that, because his employment was terminated without just cause, under the MOA the university was required to pay him the termination fee. The university rejected appellant's demand, maintaining that, according to the terms of the MOA, the MOA had ended on October 17, 2010, when Coach Brewster ceased to be the university's head football coach. The university claimed that appellant then became an at-will employee of the university and that no termination fee was due to him.

In May 2011, appellant filed a petition with the university's Office for Conflict Resolution (OCR) to dispute the university's "[f]ailure to pay salary owed pursuant to [the MOA]." In June 2011, the OCR issued a "jurisdictional determination" stating that, because appellant's petition had not been filed within six weeks of the effective date of termination of his employment, in accordance with conflict-resolution policy, the petition was not timely filed and was being dismissed. The determination also stated that appellant could object in writing within two weeks and that the matter would then be reviewed by the Senior Vice President for Academic Affairs, in accordance with conflict-resolution policy.

Appellant did not submit a written objection to the OCR's determination, but instead filed a petition for writ of certiorari with this court, which discharged the writ of certiorari and dismissed the appeal. *Cosgrove v. Univ. of Minn.*, No. A11-1349 (Minn. App. Sept. 21, 2011) (order). This court held that—because appellant had not exhausted the grievance process through the university before seeking certiorari review and because appellant had not timely sought certiorari review even if he believed that the grievance process was inapplicable—this court lacked jurisdiction to review the appeal. *Id.*

In December 2011, appellant filed a complaint in district court seeking “wages due and owing.” The sole legal theory alleged in the complaint was that respondents violated Minn. Stat. § 181.13 by failing to pay wages to which appellant is entitled within 24 hours of his demand for them. Respondents filed a motion to have the complaint dismissed for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. Respondents argued that the district court lacked subject-matter jurisdiction because a petition for writ of certiorari is the exclusive means by which a university decision related to employment with the university may be reviewed. Respondents also argued that appellant had failed to state a viable claim under Minn. Stat. § 181.13 because they had not refused to pay wages that were actually earned.

In May 2012, the district court issued an order granting summary judgment in favor of respondents and dismissing the complaint. In a memorandum attached to the order, the court stated that respondents were entitled to summary judgment because appellant had no right to a termination fee under the terms of the MOA and because the termination fee did not constitute “wages or commissions actually earned and unpaid”

under Minn. Stat. § 181.13(a). In June 2012, the district court issued an order ruling that it did have subject-matter jurisdiction in this action because Minn. Stat. § 181.171, subd. 1 (2010), “expressly authorizes a district court action.” This appeal and related appeal follow.

## DECISION

Respondents challenge the district court’s determination that it had subject-matter jurisdiction in this action. “Subject-matter jurisdiction is the court’s authority to hear the type of dispute at issue and to grant the type of relief sought.” *Seehus v. Bor-Son Constr., Inc.*, 783 N.W.2d 144, 147 (Minn. 2010). Whether a court has subject-matter jurisdiction is a question of law that is reviewed de novo. *Tischer v. Hous. & Redev. Auth. of Cambridge*, 693 N.W.2d 426, 428 (Minn. 2005).

Certiorari review “is the only method available for review of a university [employment] decision.” *Shaw v. Bd. of Regents of Univ. of Minn.*, 594 N.W.2d 187, 190–92 (Minn. App. 1999) (holding that “[a] breach of contract claim based on a termination decision by the University of Minnesota is reviewed only on a writ of certiorari” and affirming the district court’s determination that it lacked subject-matter jurisdiction to review the claim), *review denied* (Minn. July 28, 1999); *see also Maye v. Univ. of Minn.*, 615 N.W.2d 383, 385–87 (Minn. App. 2000) (affirming a district court’s determination that it lacked subject-matter jurisdiction to review a breach-of-contract claim based on the university’s failure to promote the appellant). Prior to seeking certiorari review, an employee or former employee of the university who is challenging a university decision must exhaust the applicable grievance process. *Stephens v. Bd. of*

*Regents of Univ. of Minn.*, 614 N.W.2d 764, 772–74 (Minn. App. 2000) (stating that the university is a “unique constitutional corporation” and that “the internal management of the [u]niversity has been constitutionally placed in the hands of the regents alone”) (alteration in original) (quotations omitted), *review denied* (Minn. Sept. 26, 2000). “[A]llowing a university employee to circumvent the grievance process applicable to [his] position would encourage employees to ignore the university’s grievance processes and thereby weaken the constitutional authority of the institution.” *Id.* at 774.

Appellant is challenging the university’s decision that he is not entitled to payment of a termination fee under the terms of the MOA. This decision must be reviewed through the university’s grievance process, followed by certiorari review, and thus the district court lacked subject-matter jurisdiction to review the university’s decision. Appellant did file a petition with the OCR, and the OCR dismissed the petition, stating that appellant had failed to satisfy the jurisdictional requirements for review of his grievance. Appellant then declined to submit a written objection to the OCR’s determination to be reviewed by the Senior Vice President for Academic Affairs, and instead filed a petition for writ of certiorari with this court. This court discharged the writ of certiorari and dismissed the appeal due to appellant’s failure to exhaust the university’s grievance process and failure to timely seek certiorari review.

Appellant contends that his current claim actually is that of violation of Minn. Stat. § 181.13(a), which states:

When any employer employing labor within this state discharges an employee, the wages or commissions actually earned and unpaid at the time of the discharge are

immediately due and payable upon demand of the employee.  
If the employee's earned wages and commissions are not paid  
within 24 hours after demand . . . the employer is in default.

Appellant argues that Minn. Stat. § 181.171 (2010), expressly provides that his claim may be brought in district court. According to Minn. Stat. § 181.171, subd. 1, "A person may bring a civil action seeking redress for violations of section[] . . . 181.13 . . . directly to district court." The district court agreed with appellant that this statute authorizes this action to proceed in district court.

The Minnesota Supreme Court has stated that Minn. Stat. § 181.13(a) does not create a substantive right that allows a terminated employee to use the statute as the basis for a claim for wages. *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 125–26 (Minn. 2007). In *Lee*, the court noted that section 181.13(a) "provides for a civil penalty when an employer fails to pay an employee after discharge upon demand of the employee," and that the statute "should be strictly construed." *Id.* at 125 (quotation omitted). The court stated, "[i]f we interpreted section 181.13(a) as creating a substantive right for discharged employees to challenge non-payment of wages, employers could be subject to civil penalties for failing to pay wages that the employer had no reasonable way of predicting it owed." *Id.* at 126. The court concluded that "section 181.13(a) is a timing statute, mandating not *what* an employer must pay a discharged employee, but *when* an employer must pay a discharged employee." *Id.* at 125.

The Minnesota Supreme Court recently reiterated this discussion from *Lee*, stating that section 181.13(a) "sets forth requirements and restrictions respecting the method, timing, and procedures by which wages are paid," and that "wages that an employee has

actually earned are defined by the employment contract between the employer and the employee and cannot be determined through a claim brought under section 181.13(a).” *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 836–37 (Minn. 2012) (quotation omitted). The court stated: “To recover under the statute the employee must establish an independent, substantive legal right, separate and distinct from section 181.13 to the particular wage claimed.” *Id.* at 837.

Under *Lee* and *Caldas*, whether wages are owed to appellant is not properly determined through a claim brought under section 181.13. Rather, the allegation that appellant has a right to wages that remain unpaid would need to be undisputed before appellant could maintain a section 181.13 claim for untimely payment of those wages.

The Minnesota Supreme Court has previously held that “creative pleading” and the way that a claim is framed in a complaint does not change whether a district court has subject-matter jurisdiction in an action. *See Willis v. Cnty. of Sherburne*, 555 N.W.2d 277, 280–82 (Minn. 1996). In *Willis*, the court explained that, while a district court would generally have subject-matter jurisdiction over an employee’s breach-of-contract claim, the plaintiff’s claim was actually that of wrongful termination, which the plaintiff had framed as a breach-of-contract claim in the complaint. *Id.* Because a wrongful-termination claim by a governmental employee such as the plaintiff must be reviewed administratively, followed by certiorari review, the court held that the district court lacked subject-matter jurisdiction to consider plaintiff’s claim. *Id.* The plaintiff could not get around this jurisdictional deficiency by “cloak[ing his claim] in the mantle of breach of contract.” *Id.* at 282; *see also Tischer*, 693 N.W.2d at 432.

In this action, the heart of appellant's argument is that he is entitled to payment of a termination fee under the terms of the MOA. This dispute over the termination fee does not fall under section 181.13, which is a timing statute. The dispute is that of an alleged breach of the MOA by the university, which must be resolved through the university's grievance process, followed by certiorari review. Appellant cannot circumvent the district court's lack of subject-matter jurisdiction over his claim by framing it as a section 181.13 violation. See *Brenny v. Bd. of Regents of Univ. of Minn.*, 813 N.W.2d 417, 420–22 (Minn. App. 2012) (holding that the district court lacked subject-matter jurisdiction over the plaintiff's tortious-interference-with-contract claim, which arose out of the university's employment decisions with respect to plaintiff); *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 332–33 (Minn. App. 2007) (holding that the district court lacked subject-matter jurisdiction over the plaintiff's tort claims, which arose out of the university's decision to terminate plaintiff's employment). Because appellant's claim for the termination fee does not fall under section 181.13, section 181.171, subdivision 1, does not confer subject-matter jurisdiction on the district court in this action.

Because the district court erred by ruling that it had subject-matter jurisdiction, the court's June 2012 order is reversed. The court's summary-judgment order of May 2012 is vacated. We therefore need not reach any of the remaining issues on appeal.

**Reversed in part; vacated in part.**