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DISTRICT IV

June 3, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2020AP1322

Kim Ramminger v. State of Wisconsin Dept. of Safety and
Professional Services (L.C. # 2019CV1824)

Before Blanchard, Kloppenburg, and Graham, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kim Ramminger appeals a circuit court order that dismissed Ramminger's petition for a writ of mandamus to compel action by the Wisconsin Department of Safety and Professional Services ("the Department"). Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We summarily affirm.

In July 2019, Ramminger filed in the circuit court a petition for a writ of mandamus that would direct action by the Department. According to the petition, in August 2018 Ramminger had filed a complaint with the Department alleging that he was exposed to mold in the course of his employment with the Division of Facilities Planning & Management of the University of Wisconsin. In response, the Department informed Ramminger that it had decided not to take any action on the complaint and that it did not have jurisdiction over the matter.

Ramminger asserted in his mandamus petition that the Department had failed to perform its duties as mandated under WIS. STAT. § 101.02(15) in response to his complaint. He asserted that § 101.02(15)(c) required the Department, “[u]pon petition by any person that any employment or place of employment or public building is not safe, ... [to] proceed ... to make such investigation as may be necessary to determine the matter complained of.” He also asserted that § 101.02(15)(h) commanded the Department to “investigate, ascertain, declare and prescribe what safety devices, safeguards or other means or methods of protection are best adapted to render the employees of every employment and place of employment and frequenters of every place of employment safe.” He argued that he was entitled to a writ of mandamus compelling the Department to investigate the alleged mold issue at his workplace and to take any necessary measures to ensure employee safety, as he argued the Department was required to do under these two subparts of § 101.102(15).

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

The circuit court dismissed the petition on the ground that it failed to state facts that would entitle Ramminger to relief.

A petition for a writ of mandamus must establish that: (1) the petitioner has a clear legal right to the relief sought; (2) the duty the petition seeks to enforce is plain; (3) the petitioner will be substantially damaged by nonperformance of the duty; and (4) the petitioner has no adequate remedy at law. *Voces De La Frontera, Inc. v. Clarke*, 2017 WI 16, ¶11, 373 Wis. 2d 348, 891 N.W.2d 803. We review a circuit court’s denial of a petition for a writ of mandamus for an erroneous exercise of discretion. *See State ex rel. Zignego v. Wisconsin Elections Comm’n*, 2020 WI App 17, ¶32, 391 Wis. 2d 441, 941 N.W.2d 284, *aff’d as modified*, 2021 WI 32, ¶38, 396 Wis. 2d 391, 957 N.W.2d 208. However, pertinent here, we treat a motion to dismiss a petition for a writ of mandamus in the same manner as we treat a motion to dismiss a complaint in a civil action, and whether a petition states a claim for relief is a question of law, which we review de novo. *See* WIS. STAT. § 783.01; *State ex rel. Griffin v. Litscher*, 2003 WI App 60, ¶6, 261 Wis. 2d 694, 659 N.W.2d 455. On our review, we accept as true the facts alleged in the pleading. *See Griffin*, 261 Wis. 2d 694, ¶6. A petition is legally insufficient if there are no conditions under which the petitioner can prevail. *See id.*

We conclude that Ramminger has failed to identify a basis for the second writ requirement summarized above, namely, a plain duty of the Department that may be compelled by mandamus.² “An act which requires the exercise of discretion does not present a clear legal duty and cannot be compelled through mandamus.” *Nasser v. Miller*, 2010 WI App 142, ¶5, 329 Wis. 2d 724, 793

² Because we reach the dispositive conclusion that Ramminger fails to identify a plain duty, we do not address the other arguments in the parties’ briefs.

N.W.2d 209. Here, Ramminger does not dispute that WIS. STAT. § 101.02(15)(c) gives the Department broad discretion to determine what type and manner of investigation is necessary based on a complaint of an unsafe workplace. His argument is based on the fact that § 101.02(15)(c) contains mandatory language that, “[u]pon petition” that a “place of employment” “is not safe,” the Department “shall proceed” to make “such investigation as may be necessary to determine the matter complained of.” He argues that this language dictates that, on the facts here, the Department was obligated to “proceed” to exercise its discretion to determine what investigation was necessary and that it violated this requirement when it refused to take any action on the complaint based on its position that it lacked jurisdiction over the matter. However, because the determination as to what type and manner of investigation to conduct based on Ramminger’s complaint, including whether an investigation “may be necessary,” was broadly discretionary with the Department, mandamus was not an appropriate remedy. See *Law Enf’t Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89 (1981) (mandamus is not an appropriate remedy ““when the duty is not clear and unequivocal and requires the exercise of discretion”” (quoted source omitted)). Ramminger’s contention that the Department failed to exercise its discretion at all is another way of saying that the Department erroneously exercised its discretion in deciding that an investigation was not “necessary,” see § 101.02(15)(c), and does not render the discretionary act subject to mandamus. It remains that, because the act of the Department that Ramminger sought to compel was discretionary, mandamus was not an available remedy. Accordingly, we conclude that the circuit court properly dismissed the petition.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals