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DISTRICT II

August 3, 2022

To:

Hon. Chad G. Kerkman
Circuit Court Judge
Electronic Notice

Hon. Mary Kay Wagner
Circuit Court Judge
Electronic Notice

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

2021AP1065 Glenn Oleksak v. Gateway Technical College (L.C.# 2019CV674)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Glenn Oleksak appeals from an order granting Gateway Technical College's (Gateway) motion for summary judgment, denying Oleksak's motion for summary judgment, and dismissing Oleksak's amended complaint with prejudice.[1] Gateway cross-appeals from an order entered by the circuit court before the summary judgment ruling that granted in part and denied

[1] The Honorable Mary Kay Wagner ruled on the motions for summary judgment.

in part Gateway's motion to dismiss the amended complaint.[2] 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).[3] For the following reasons, we conclude that the circuit court should have granted Gateway's motion to dismiss in its entirety because it is apparent that Oleksak did not comply with Wisconsin's notice of claim statute, WIS. STAT. § 893.80(1d), before commencing this action. Accordingly, we reverse the portion of the order denying Gateway's motion to dismiss and affirm the order dismissing the amended complaint.

We consider the issue raised by Gateway in its cross-appeal first because it involves the threshold question whether Oleksak had the ability to pursue the present action against Gateway, and a ruling in Gateway's favor would be dispositive of the other issues before us. *See* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2006 WI App 109, ¶19, 293 Wis. 2d 668, 721 N.W.2d 127, *aff'd*, 2008 WI 22, 308 Wis. 2d 103, 746 N.W.2d 762. Therefore, we begin by briefly summarizing the allegations in the amended complaint.

Oleksak enrolled as a student at Gateway and began taking classes in the Fall 2017. Gateway is a technical college organized under Wisconsin law and is a "state institution." In the Spring 2019 semester, Oleksak enrolled in an English composition course. Oleksak's professor gave him an "A" for his midterm grade in the class and encouraged him to "keep up the good work." Oleksak alleges that he successfully passed the course on April 17, 2019, receiving a final grade of 81%, which was posted on an online platform called Blackboard that students can

[2] The Honorable Chad G. Kerkman entered the order granting in part and denying in part Gateway's motion to dismiss.

[3] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

use to track their grades throughout the semester. At no time during the semester did Oleksak's professor or anyone else at Gateway express any concerns to Oleksak regarding his coursework.

On April 26, 2019, Oleksak's father contacted Gateway about why the grade for the English course was missing from his son's transcript. At some point thereafter, Gateway called Oleksak's father and informed him that Oleksak would need "to come in for a meeting before his final grade could be posted." Gateway did not advise Oleksak in writing of this meeting before it took place and did not inform Oleksak or his father what would be discussed at the meeting.

The meeting took place on May 2, 2019. The Gateway officials present were Dr. Tammi Summers and Zina Haywood, Gateway's Executive Vice President/Provost. Oleksak attended along with his parents. According to a letter later sent to Gateway by Oleksak's attorney, the Gateway officials informed Oleksak during the meeting that he was suspected of a "'third occurrence' of academic misconduct." Oleksak denied the allegation of misconduct but subsequently received a letter from Gateway dated May 6, 2019, informing him that he was being suspended from Gateway from that date until the Spring 2020 semester. Oleksak alleges that the May 6 letter bears a postal address for him that is not his actual address.

On or about May 23, 2019, Haywood received the aforementioned letter from Oleksak's attorney. The letter began by noting that Haywood's May 6 letter had been sent to the wrong postal address. The letter then informed Gateway that Oleksak was appealing Gateway's decision to suspend him for several reasons. First, Oleksak was not given advance notice of the reason for the May 2 meeting, and as a result "was never notified to be prepared to discuss that issue for the meeting." Oleksak's attorney characterized Gateway's failure to inform Oleksak of the meeting's purpose as a denial of "due process." Second, Oleksak's attorney disputed

Gateway's identification of the most recent report of academic misconduct as Oleksak's third such report, claiming that a Gateway official had characterized a prior instance of discipline in 2018 as nonacademic in nature. Third, Oleksak's attorney repeated that Oleksak had not received help on the writing assignments and submitted other examples of his work from other classes, which the attorney claimed were comparable and showed that Oleksak was capable of doing work of the quality his writing instructor had questioned. The letter concluded by stating the reasons for Oleksak's appeal and the relief he sought:

> We are requesting a due process hearing on this suspension. Glenn Oleksak never received notification of the charges against him, at worst, this is the second not the third violation, and he never received a hard copy of the decision at his home address. The so-called decision of May 6, 2019 is deficient in that it never specifies with particularity the academic misconduct. The letter of May 6, 2019, does not identify the objectionable work, so my client is left unknowing what he did wrong. A review of his semesters work indicates that it is all [of] comparable quality. The midterm grade for the course was an "A" at the midterm. [Oleksak's instructor]'s comment next to the grade was "keep up the good work." Therefore, his work of comparable quality in all of his courses throughout the year and nothing has been brought to anyone's attention [to the] contrary.
>
> Therefore, we are requesting that the suspension be set aside, and that Glenn Oleksak be reinstated and that the final grade of "B–" be posted on his official transcript with a reflection that he received a "B–" for the Spring 2019 semester.

In response, Gateway scheduled a meeting for June 4, 2019. Oleksak alleges that neither he nor his attorney received notice of this meeting and thus did not attend. More specifically, Oleksak alleges that notice of the meeting was "allegedly" sent to his student email address, but he did not receive it because he "was not a student at Gateway any longer." Gateway did not send notice of the meeting to Oleksak's postal address or to his attorney. Oleksak alleges further that as a result of his absence at the June 4 hearing, Gateway upheld his suspension and he received a failing grade for the course.

Oleksak commenced this action on June 7, 2019, alleging that Gateway suspended him without due process of law and in violation of the school's 2018-19 student handbook. Gateway filed a motion to dismiss, arguing in part that Oleksak had not complied with Wisconsin's notice of claim statute, WIS. STAT. § 893.80(1d). Before the motion was decided, Gateway removed the case to the United States District Court for the Eastern District of Wisconsin. The federal court dismissed Oleksak's due process claim because Oleksak had not alleged that he was deprived of a constitutionally protected property interest. The federal court granted Oleksak leave to file an amended complaint but later remanded the case to state court.

After remand, Oleksak filed his amended complaint, again asserting that Gateway suspended him without due process and in breach of the "implied contractual relationship" between him and Gateway. Specifically, Oleksak cited the following acts and omissions as the factual bases for his claims:

> (1) Gateway's failure to inform Oleksak in advance what would be discussed at the May 2, 2019 meeting;
>
> (2) Gateway's failure to inform Oleksak or his attorney of the June 4, 2019 meeting other than via an email to his student account, which Oleksak alleges does not comply with procedures set forth in Gateway's student handbook; and
>
> (3) By not providing proper notice of the June 4 meeting, Gateway denied Oleksak certain rights under the school's student handbook, including the right to be represented by legal counsel at the meeting.

Oleksak alleged further that he had "given written notice under" WIS. STAT. § 893.80, citing his counsel's May 23 letter to Haywood which was attached to the amended complaint. In his prayer for relief, Oleksak demanded the following: (1) a "declaration that [Gateway] has violated [Oleksak]'s rights by violating its own rules and regulations"; (2) immediate

reinstatement at Gateway; (3) expungement of Oleksak's suspension and that "his final grade of B- be posted on his official transcript"; and (4) an award of damages and attorney fees.

Gateway again moved to dismiss, arguing in part that the May 23 letter did not satisfy the requirements of WIS. STAT. § 893.80. The circuit court held a hearing on the motion on May 8, 2020, at which Gateway's counsel argued that the May 23 letter could not satisfy the statutory notice requirement because Oleksak's claims were premised on events that occurred after that letter had been sent to Gateway. The circuit court agreed that "notice was not given regarding any type of litigation regarding the June 4th hearing" and dismissed the amended complaint to the extent it was based on "alleged actions or omissions that occurred after May 23, 2019."

The court then turned to the events that preceded the May 23 letter, including Gateway's failure to give Oleksak advance notice as to the subject of the May 2 meeting. Oleksak's counsel clarified that the amended complaint asserted a claim "not [based on] the constitutional right to due process that we have in court, but rather the due process that was set up by the college" in the student handbook. The circuit court construed this allegation to assert a breach of contract claim against Gateway. It denied Gateway's motion to dismiss the amended complaint insofar as it alleged claims premised on pre-May 23 events, referring specifically to the allegation that Gateway had violated its rules governing student discipline by neglecting to advise Oleksak of the subject of the May 2 meeting or inform him that he had the right to be represented by legal counsel, testify, and call witnesses.

In January 2021, Gateway and Oleksak filed motions for summary judgment, which the circuit court heard on April 22, 2021. After hearing argument from the parties, the court determined that: (1) Oleksak did not have a viable due process claim for reasons explained by

the federal court; (2) the student handbook did not constitute a contract between Oleksak and Gateway; and (3) the court could not "substitute its own judgment for the school's judgment" about whether "the substitution of work by the student for someone else's work is accurate or not." Based upon these determinations, the court granted Gateway summary judgment and dismissed Oleksak's amended complaint with prejudice.

In its cross-appeal, Gateway argues that the circuit court should have dismissed the amended complaint in its entirety because Oleksak failed to comply with the requirements of the notice of claim statute. WISCONSIN STAT. § 893.80(1d) sets forth an affirmative defense available to governmental entities, *see* ***Maple Grove Country Club Inc. v. Maple Grove Estates Sanitary District***, 2019 WI 43, ¶36, 386 Wis. 2d 425, 926 N.W.2d 184, and may serve as grounds for dismissal if the amended complaint makes it apparent that the defense bars Oleksak's claims. *See* ***Energy Complexes, Inc. v. Eau Claire County***, 152 Wis. 2d 453, 463 n.7, 449 N.W.2d 35 (1989). We interpret and apply the statute independently of the circuit court. ***Yacht Club at Sister Bay Condo. Ass'n, Inc. v. Village of Sister Bay***, 2019 WI 4, ¶17, 385 Wis. 2d 158, 922 N.W.2d 95.

WIS. STAT. § 893.80(1d)

WISCONSIN STAT. § 893.80(1d) requires persons wishing to bring suit against governmental entities to "give two separate types of notice" before doing so. ***Clark v. League of Wis. Muns. Mut. Ins. Co.***, 2021 WI App 21, ¶11, 397 Wis. 2d 220, 959 N.W.2d 648. Subsection (1d) states in relevant part that "no action may be brought or maintained against any … governmental subdivision or agency thereof … unless:"

> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the … governmental subdivision or agency … under [WIS. STAT. §] 801.11. Failure to give the requisite notice shall not bar action on the claim if the … subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant … subdivision or agency … ; and
>
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant … subdivision or agency and the claim is disallowed.

Sec. 893.80(1d)(a)-(b). The statute's "two notice provisions … serve different purposes." ***Yacht Club***, 385 Wis. 2d 158, ¶19. Wisconsin case law has consistently recognized that substantial, rather than strict, compliance with these two notice requirements is all that is required. *See, e.g.*, ***Townsend v. Neenah Joint Sch. Dist.***, 2014 WI App 117, ¶23, 358 Wis. 2d 618, 856 N.W.2d 644.

As noted above, Oleksak alleged in his amended complaint that his attorney's May 23 letter to Haywood constituted "written notice under" WIS. STAT. § 893.80 and attached the letter to his pleading. Neither party identifies any other writing which could have satisfied either of the notice requirements. Accordingly, we focus our analysis on the May 23 letter. For the reasons that follow, we conclude that the letter does not satisfy either the notice of injury requirement in § 893.80(1d)(a) or the notice of claim requirement in § 893.80(1d)(b).

NOTICE OF INJURY—WIS. STAT. § 893.80(1d)(a)

WISCONSIN STAT. § 893.80(1d)(a) requires a claimant to provide formal notice of an injury so that the governmental entity may "promptly investigate and evaluate the underlying

circumstances that may later give rise to a claim." ***Clark***, 397 Wis. 2d 220, ¶12. Specifically, subsection (1d)(a) requires that "within 120 days of the event giving rise to the claim, the plaintiff must serve on the defendant, pursuant to WIS. STAT. § 801.11, 'written notice of the *circumstances* of the claim,' signed by the plaintiff or his or her agent or attorney." ***Clark***, 397 Wis. 2d 220, ¶13 (citing § 893.80(1d)(a)). However, to "mitigate the potential harshness that might ensue from the strict application of this requirement, the statute contains a 'savings clause'" that excuses the "failure to provide formal notice where: (1) the defendant 'had actual notice of the claim,' and (2) the plaintiff 'shows to the satisfaction of the court that the delay or failure to give the requisite [formal] notice has not been prejudicial.'" ***Clark***, 397 Wis. 2d 220, ¶14 (alteration in original; citing § 893.80(1d)(a)). In effect, the savings clause spells out the requirements for substantial compliance with the "notice of injury" requirement. ***Clark***, 397 Wis. 2d 220, ¶14. A governmental entity is prejudiced if it is unable to adequately defend a claim because it "lacked sufficient opportunity to conduct a prompt investigation." ***Id.***, ¶23. "The plaintiff has the burden of proving the giving of notice or actual notice and the nonexistence of prejudice." ***Elkhorn Area Sch. Dist. v. East Troy Cmty. Sch. Dist.***, 110 Wis. 2d 1, 5, 327 N.W.2d 206 (Ct. App. 1982).

Oleksak does not argue that the May 23 letter strictly complied with the notice of injury provision in WIS. STAT. § 893.80(1d)(a). Nor could he; at a minimum, neither the amended complaint nor the letter itself suggest that Oleksak served the letter on Gateway in conformity with WIS. STAT. § 801.11. Sec. 893.80(1d)(a). Instead, citing ***Brockert v. Skornicka***, 711 F.2d 1376 (7th Cir. 1983), Oleksak argues that he substantially complied with § 893.80(1d)(a) because his attorney's May 23 letter provided "actual notice" of his claim.

Oleksak has not carried his burden to show substantial compliance with WIS. STAT. § 893.80(1d)(a). Substantial compliance requires that the governmental entity have actual notice "of the *claim*," not just the "circumstances" out of which a claim might arise in the future. *See* ***Clark***, 397 Wis. 2d 220, ¶14. This is an important distinction. Strict compliance with § 893.80(1d)(a) requires formal notice of "the circumstances of the claim[.]" Sec. 893.80(1d)(a). As we explained in ***Clark***, "[b]y its very nature (timing, signature, and service) formal notice conveys to the defendant that the injured party is at least contemplating filing suit." ***Id.***, ¶20. In contrast, "[a]ctual notice, which may occur in a variety of ways, carries no such implication." ***Id.*** Accordingly, we stated in ***Clark*** that "actual notice should include some indication that the injured party intends to hold the defendant liable." ***Id.*** In support, we cited our decision in ***Markweise v. Peck Foods Corp.***, 205 Wis. 2d 208, 220-21, 556 N.W.2d 326 (Ct. App. 1996), in which we explained that actual notice "requires that the government entity not only have knowledge about events for which it may be liable, but also the identity and type of damage alleged to have been suffered by a potential claimant."

The May 23 letter does not meet these standards. As to events that had already occurred by that date, the letter contains no indication that Oleksak intended, or was at least contemplating, a lawsuit against Gateway. The letter does not assert that Gateway had breached any contract with him and gives no indication that Oleksak intended to hold Gateway liable for that (or any other) harm. Oleksak's due process concern raised in the letter also did not indicate an intention to file a legal claim against Gateway. This is understandable, in part, since Oleksak's attorney sent the letter before the disciplinary proceedings against Oleksak had concluded. The letter informed Gateway that Oleksak sought to appeal the suspension and asked that Oleksak be reinstated, the suspension rescinded, and that Oleksak receive a B- minus for the

course. At that point, it remained a possibility that Gateway could have addressed any procedural complaints arising out of the May 2 meeting in the appeal, and even could have reinstated Oleksak and lifted his suspension.

As to events that occurred after May 23, the letter does not (and could not) provide Gateway with actual knowledge of the circumstances, much less circumstances giving rise to a claim, relating to the June 2 meeting. Oleksak filed this action three days after Gateway upheld the suspension; Oleksak identifies no written or oral communication in that three-day period that could have given Gateway actual notice of the post-May 23 circumstances on which his claim was based.[4]

The Seventh Circuit's decision in ***Brockert*** does not require a different conclusion. In that case, Brockert, a City of Madison employee, challenged the constitutionality of a city ordinance requiring him to reside within the city limits after the mayor refused to extend a previously-issued exemption. ***Brockert***, 711 F.2d at 1378-79. Brockert initially filed a lawsuit challenging the ordinance in state court and within 120 days after the mayor's decision confirming expiration of the exemption. ***Id.*** at 1378. Brockert's state court action was later dismissed by stipulation and he filed a new lawsuit challenging the ordinance in federal court. ***Id.*** at 1379. On summary judgment, the defendants argued that WIS. STAT. § 893.80 barred Brockert's federal lawsuit because he had not filed a notice of claim within 120 days after the mayor's decision. ***Brockert***, 711 F.3d at 1380 n.3. In a two-sentence footnote, the district court

[4] In responding to Oleksak's arguments, Gateway cites two of our unpublished decisions in violation of WIS. STAT. RULE 809.23(3)(a)—***Kress v. Town of Crescent***, No. 1988AP125, unpublished slip op. (WI App Nov. 8, 1988) and ***Maloney v. St. Croix County Sheriff's Department***, No. 1992AP956, unpublished slip op. (WI App Nov. 3, 1992). We expect that noting these improper citations here will be sufficient to deter Gateway's counsel from violating this rule in the future.

disagreed, deeming the lawsuit filed in state court sufficient to have provided "actual notice" of Brockert's claim. ***Id.***

The facts in this case are materially distinguishable from those in ***Brockert***. Most importantly, by its very nature, the state court action deemed to provide "actual notice" in that case evinced Brockert's intent to hold the defendants liable for his allegedly unconstitutional dismissal. The same cannot be said for the May 23 letter in this case, which was sent before the conclusion of Gateway's disciplinary proceeding and merely requested that Gateway hear an appeal of its initial decision to suspend Oleksak pursuant to the school's internal rules.[5]

NOTICE OF CLAIM—WIS. STAT. § 893.80(1d)(b)

Even if Oleksak could show substantial compliance with the notice of injury provision, his claim would still be barred because he has not shown that he provided Gateway the notice of claim required under WIS. STAT. § 893.80(1d)(b). That provision requires that a "claim containing the address of the claimant and an itemized statement of the relief sought [to be] presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant … subdivision or agency" and disallowed. Sec. 893.80(1d)(b). This requirement "serves the primary purpose of giving the defendant 'the opportunity to compromise and settle a claim, thereby avoiding costly and time-consuming litigation.'" ***Clark***, 397 Wis. 2d 220, ¶15 (quoting ***Yacht Club***, 385 Wis. 2d 158, ¶20). To fulfill that purpose, the notice must give the government entity "enough information 'so that it can budget accordingly for either a settlement

[5] We also note that, despite having the burden to do so, Oleksak offers no argument in either of his appellate briefs concerning the second prong of substantial compliance under WIS. STAT. § 893.80(1d)(a)—lack of prejudice. *See* ***Elkhorn Area Sch. Dist. v. East Troy Cmty. Sch. Dist***., 110 Wis. 2d 1, 5, 327 N.W.2d 206 (Ct. App. 1982).

or litigation.'" ***City of Racine v. Waste Facility Siting Bd.***, 216 Wis. 2d 616, 622, 575 N.W.2d 712 (1998) (citation omitted).

The May 23 letter substantially complies with some, but not all, of the statutory requirements. It includes Oleksak's address and is directed to Haywood, Gateway's Executive Vice President/Provost, who is presumably a "proper representative" to receive it on account of her involvement in the disciplinary proceeding. *See* ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶31, 235 Wis. 2d 610, 612 N.W.2d 59 (citation omitted). The letter also identifies some of the relief Oleksak seeks in this lawsuit. Importantly, however, the letter makes no mention of monetary damages or other monetary relief. "A notice of claim must state the requested relief in terms of a specific dollar amount." ***Id.***, ¶30. Oleksak included in both his initial complaint and amended complaint a request that "Gateway Technical College pay damages and attorney's fees[.]" But the May 23 letter does not mention such relief, much less quantify it. Governmental entities need this information if they are to "budget … for either a settlement or litigation." ***City of Racine***, 216 Wis. 2d at 622 (citation omitted). By omitting it, the May 23 letter deprived Gateway of information that was important to fully evaluate Oleksak's potential claim and make an informed decision about whether to settle it. For this reason, Oleksak has not shown that he substantially complied with WIS. STAT. § 893.80(1d)(b).

Costs awarded on the cross-appeal only.

Therefore,

IT IS ORDERED that the circuit court's order denying Gateway's motion to dismiss is reversed and the order dismissing Oleksak's amended complaint 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