STATE OF WISCONSIN | CIRCUIT COURT BRANCH 42 | MILWAUKEE COUNTY

VICTORIA MARONE

Plaintiff,

v.

MILWAUKEE AREA TECHNICAL COLLEGE DISTRICT

Case No. 13-CV-004154

Defendant,

Hon. David A. Hansher

v.

AMERICAN FEDERATION OF TEACHERS, LOCAL 212, WFT, AFL-CIO

Intervenor-Defendant.

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS SEEKING DISMISSAL IN FULL OR IN PART

In 2011, legislation known as "Act 10"[1] fundamentally changed the Municipal Employment Relations Act ("MERA") and public employee collective bargaining in Wisconsin. Public employers and labor organizations previously were required to bargain over wages, hours, and conditions of employment. Under the law as amended by Act 10, however, collective bargaining over anything other than total base wages is prohibited for many public employers and their employees.

There have been several legal challenges to Act 10, and on September 14, 2012, Dane County Circuit Court Judge Juan Colas issued a decision declaring portions of Act 10's

[1] 2011 WI Act 10.

collective bargaining limitations unconstitutional.[2] A notice of appeal from Judge Colas' decision was filed just four days later. The Wisconsin Supreme Court accepted certification of the appeal from the Court of Appeals (without decision). Consequently, the Supreme Court's ruling as to the constitutionality of Act 10 remains uncertain.[3]

In this context, intervenor-defendant American Federation of Teachers, Local 212, WFT, AFL-CIO ("Local 212") and defendant Milwaukee Area Technical College District ("MATC") opened discussions over the successor contracts to the current collective bargaining agreements, which took effect before Act 10 and expire in February 2014. Mindful of the uncertainty in the law at the time (between November 2012 and February 2013), the future agreements ("Conditional Successor Agreements") were made expressly contingent on all applicable laws and regulations, as well as all appellate court rulings regarding the constitutionality of Act 10. It is MATC's position that if the relevant portions of Act 10 are found constitutional on appeal, the Conditional Successor Agreements have no effect.[4] If Act 10 is declared unconstitutional, however, the Conditional Successor Agreements will be enforceable and MATC will have achieved important fiscal bargaining objectives in its contract with Local 212.

Although it is not clear whether the Conditional Successor Agreements will even come into being, plaintiff Victoria Marone ("Marone") filed suit claiming that the Conditional Successor Agreements are void and in violation of Wisconsin's antitrust laws. While the Wisconsin Supreme Court's decision in *Madison Teachers* will determine the validity of the Conditional Successor Agreements, the Court should dismiss this action for reasons that are

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[2] *Madison Teachers, Inc. v. Walker*, Case No. 2012AP2067, 2013 WL 1760805, *3 (Wis. Ct. App. Apr. 25, 2013).
[3] The Wisconsin Supreme Court heard oral argument on November 11, 2013. In the interim, on October 25, 2013, Judge Colas found the Commissioners for the Wisconsin Employment Relations Commission ("WERC") in contempt for continuing to enforce those parts of Act 10 previously declared unconstitutional. *Madison Teachers, Inc. v. Scott Walker*, No. 11CV3774, (Dane Co. Cir. Ct. Oct. 25, 2013).
[4] Local 212 has taken the position that the Conditional Successor Agreements will be enforceable regardless of the Wisconsin Supreme Court's decision. This issue is not before the Court at this time.

independent of the issue of the constitutionality of Act 10. First, Marone was required to comply with the requirements of the notice of claim statute before filing a lawsuit against MATC, but failed to do so. MATC had no idea that Marone was contemplating suit, and thus had no actual knowledge of the claimant or her individual claims until this suit was filed in May 2013. Second, Marone lacks the requisite standing to bring suit against MATC. She relies on Act 10, but Act 10 was not enacted to protect Marone's claimed interest in individually negotiating with MATC. Further, Marone is not merely in a Local 212 bargaining unit; she is a full dues-paying member of Local 212. As a member of the union itself, Marone delegated to Local 212 the authority to negotiate on her behalf, and Marone has no standing to attack MATC for negotiating with her authorized agent.

Regardless of the Court's decision on notice and standing, MATC is entitled to dismissal of Marone's claim for costs and attorney fees under Chapter 133 for two, additional independent reasons. First, Wis. Stat. §133.18(1)(b) clearly and unambiguously precludes recovery of costs or attorney fees from any local governmental unit, including MATC. Second, Marone is not entitled to any monetary relief from MATC under the doctrine of qualified immunity.

STATEMENT OF UNDISPUTED FACTS

1. The Parties.

Marone is employed by MATC as a part-time English as a Second Language teacher, and has been an MATC employee since 1984. (Compl. ¶ 3.) She is a dues-paying active member of Local 212. (*See* Compl. ¶ 1; O'Connor's Affirmative Defenses ¶ 9.)

MATC is a technical college located in Milwaukee that is part of the Wisconsin Technical College System established under Chapter 38 of the Wisconsin Statutes. (Compl. ¶ 4.)

Local 212 is a labor organization representing Marone and certain other employees of

MATC. Local 212 "is the legally authorized bargaining agent for teachers, counselors, outreach specialists, school nurses, accountants and the professional staff at MATC." LOCAL 212, http://local212.org/historymission.htm (last visited Nov. 15, 2013). Local 212 is a party to the Conditional Successor Agreements that Marone seeks to invalidate. (Local 212's Ans. ¶¶ 17, 21.)

2. Litigation Challenging The Constitutionality Of Act 10.

In 2011, the Wisconsin Legislature enacted 2011 Act 10 ("Act 10") and 2011 Act 32 ("Act 32"), which amended and modified portions of MERA, Wis. Stat. §111.70, *et seq*. These are statutes that govern collective bargaining between municipal employers and representatives of municipal employees in a collective bargaining unit. (Compl. ¶ 8.) The statutory effective dates of Act 10 and Act 32 were June 29, 2011 and July 1, 2011, respectively. (Compl. ¶ 7.)

Litigation challenging the constitutionality of Act 10 ensued shortly after the effective dates of the revised statutes. (Compl. ¶ 14.) Of particular significance here is the action brought by the Madison teachers' union in which the plaintiffs sought declaratory and injunctive relief, contending that specific provisions of the MERA, as amended by Act 10 and Act 32, are unconstitutional. *Madison Teachers*, 2013 WL 1760805, *1, 3. One of the challenged provisions prohibits collective bargaining between municipal employers and certified representatives for municipal general employee bargaining units on all subjects except base wages. *Madison Teachers*, 2013 WL 1760805, *1.

On September 14, 2012, the circuit court (Judge Juan Colas) issued an order declaring the challenged statutory provisions unconstitutional. *Madison Teachers*, 2013 WL 1760805, *3. On September 18, 2012, state officials filed both a notice of appeal and a motion seeking a stay of the circuit court's order pending appeal. *Madison Teachers*, 2013 WL 1760805, *3. On March 12, 2013, the Court of Appeals denied the motion for stay. The Court of Appeals did not directly

address whether the circuit court decision had statewide effect, but "reject[ed] out of hand" the notion that a circuit court opinion has the statewide import of a Court of Appeals or Supreme Court decision. *Madison Teachers, Inc. v. Walker*, No. 12AP2067, p. 14 n.1 (Wis. Ct. App. Mar. 12, 2013).[5]

On June 14, 2013 the Wisconsin Supreme Court accepted certification of the appeal from the Court of Appeals. In certifying the appeal, the Court of Appeals reasoned:

> With respect to the public employee collective bargaining rights issue in this appeal, **it is hard to imagine a dispute with greater statewide effect** or with a greater need for a final resolution by the supreme court. Although the parties do not address the topic, news accounts suggest that several municipal employers are engaged in legal disputes relating to this topic, and **many more are left in limbo wondering whether they are better off engaging in some type of tentative bargaining or refusing to engage with employee representatives**. We urge the supreme court to accept this certification and put these legal issues to rest.

Madison Teachers, 2013 WL 1760805, *12 (bold added).

More litigation in the *Madison Teachers* case followed. In September of 2013, the unions sought injunctive relief to prevent the Wisconsin Employment Relations Commission ("WERC") from holding recertification elections around the state. Judge Colas concluded that the WERC could not enforce Act 10 against "anyone," but held, at the same time, that the court lacked authority over parties that were not directly involved in the case. *Madison Teachers, Inc. v. Scott Walker*, No. 11CV3774 (Dane Co. Cir. Ct., Sept. 17, 2013). In response, six unions asked that Judge Colas find the WERC in contempt for enforcing Act 10. Judge Colas agreed with the unions' arguments, orally ruling, "I think that is contempt - that is an intentional disregard of the court's order." Judge Colas added that the court's original judgment "plainly has statewide effect with respect to the actions of the Commission." *See Madison Teachers*, No. 11CV3774 (Dane

[5] Pursuant to L.R. 3.18, copies of authorities other than the Wisconsin Statutes or a decision of the Wisconsin Supreme Court or the Wisconsin Court of Appeals are attached to the Appendix filed in conjunction with this brief.

Co. Cir. Ct. Oct. 25, 2013). As a result, the state of "limbo" continues, not just for the parties involved in the *Madison Teachers* case, but for municipal employers statewide.

3. Collective Bargaining Of The Conditional Successor Agreements.

While the parties to *Madison Teachers* litigated the issue of whether the circuit court's decision would be stayed, the MATC District Board found itself in the "limbo" identified by the Court of Appeals. On November 12, 2012, the MATC District Board voted 5–4 to approve a motion to enter into negotiations with Local 212 to initiate successor agreements to the current agreements that will expire in February 2014. (Compl. ¶ 17.) On February 26, 2013, after months of negotiations, the MATC District Board voted to ratify a "Summary of Proposed Labor Agreement," which summarizes tentative agreements reached with the three bargaining units represented by Local 212, to commence on February 16, 2014 (Conditional Successor Agreements). (Compl. ¶¶ 20, 22, Ex. D.) Marone is a member of the Part-time Faculty bargaining unit. (*See* Compl. ¶¶ 1, 3.)

The Conditional Successor Agreements include subjects other than total base wages, which Act 10 intended to prohibit in collective bargaining (Compl. ¶ 22), but which are lawfully subjects of bargaining under state statutes prior to Act 10 and under the circuit court decision in *Madison Teachers*. Further, a key component of these Conditional Successor Agreements, found at the top of the "Summary of Proposed Labor Agreement" in bold print, is that they are subject to all applicable laws and regulations, and conditioned on Judge Colas' decision in *Madison Teachers* being upheld by Wisconsin's appellate courts. (Compl. Ex. D.) This provision further states that "[i]f Judge Colas' decision were to be overturned or invalidated, fully or in part, all obligations to bargain or resulting agreements are to be contingent on relevant Wisconsin appellate courts' rulings and applicable laws." (Compl. Ex. D.) In other words, MATC struggled

with the same uncertainty explicitly acknowledged by the Court of Appeals in certifying *Madison Teachers* to the Wisconsin Supreme Court. *See Madison Teachers*, 2013 WL 1760805, *12.

4. Marone's Claims.

On February 26, 2013, the Wisconsin Institute for Law and Liberty ("WILL") mailed a letter to the Chair of the MATC District Board to "remind" the Board that Act 10 prohibits collective bargaining of terms other than base wages. (Compl. Ex. B.) WILL threatened that "if MATC renegotiates, reopens, or extends a union contract that violates Act 10, it does so at great risk of an immediate legal challenge." (Compl. Ex. B.) There is no mention whatsoever of Marone or any other potential claimant in this letter. (*See* Compl. Ex. B.) MATC received no communications regarding the claims alleged in this suit or Marone's individual concerns until MATC was served with the complaint.

Marone claims only one right in her May 2, 2013 complaint, which she alleges is rooted in Act 10: a right to individually negotiate with MATC over the factors and conditions of her employment other than total base wages. (*See* Compl. ¶ 5.) Marone attempts to assert two causes of action based on this alleged right. First, she requests a declaration that the Conditional Successor Agreements violate Act 10 and, therefore, are invalid. (*See* Compl. ¶¶ 24-33.) Second, she seeks a declaration that the Conditional Successor Agreements illegally restrain trade in violation of Wis. Stat. Ch. 133 and, therefore, are invalid. (*See* Compl. ¶¶ 34-43.) Marone also requests costs and attorney fees under Wis. Stat. §133.18. (*See* Compl. ¶ 44.) MATC is entitled to judgment on the pleadings dismissing Marone's complaint.

LEGAL STANDARD

A judgment on the pleadings is essentially a summary judgment without affidavits and other supporting documents. *Jares v. Ullrich*, 2003 WI App 156, ¶ 8, 266 Wis. 2d 322, 667 N.W.2d 843; *see* Wis. Stat. §802.06(3). Whether a claim is capable of surviving a motion for judgment on the pleadings is a question of law. *DeBraska v. Quad Graphics, Inc.*, 2009 WI App 23, ¶ 12, 316 Wis. 2d 386, 763 N.W.2d 219.The court first examines the complaint to determine whether a claim has been stated. *Helnore v. Dep't of Natural Res.*, 2005 WI App 46, ¶ 2, 280 Wis. 2d 211, 694 N.W.2d 730. In doing so, the court construes the complaint liberally, accepting as true all facts alleged and drawing all reasonable inferences from those facts in the plaintiff's favor. *Helnore*, 2005 WI App 46, ¶ 2. If the complaint states a claim, the court then looks to the responsive pleading to ascertain whether a material factual issue exists. *DeBraska*, 2009 WI App 23, ¶ 12.

ARGUMENT

MATC seeks dismissal of Marone's complaint in its entirety. First, Marone failed to comply with the mandates of Wis. Stat. §893.80, which required Marone to provide MATC with a notice of injury and notice of claim, and MATC to disallow the claims, *before* Marone filed suit. Second, Marone does not have standing to bring this suit.

MATC also seeks dismissal of Marone's claim for costs and attorney fees under Chapter 133 on the separate and additional grounds that Wis. Stat. §133.18(1)(b) expressly prohibits the recovery of costs and attorneys' fees from local governmental entities such as MATC, and because MATC is qualifiedly immune from suits for "damages" arising out of litigation over Act 10.

1. Marone Failed To Comply With The Requirements Of Wis. Stat. §893.80.

Section 893.80, Wis. Stats., establishes conditions that must be satisfied before a lawsuit can be filed against a governmental body. The statute establishes a condition precedent that limits the time for a claimant to take prescribed actions if the claimant wishes to preserve and initiate a cause of action against a governmental body. *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶ 19, 302 Wis. 2d 358, 735 N.W.2d 30. A claimant's failure to satisfy the condition precedent set forth in Wis. Stat. §893.80 results in a loss of the right to proceed with the action. *Rouse*, 2007 WI 87, ¶ 19.

Section 893.80(1d), Wis. Stats., contains two notice provisions. Each provision must be satisfied since each serves a different purpose. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 22, 235 Wis. 2d 610, 612 N.W.2d 59. Specifically, Wis. Stat. §893.80(1d) required Marone to serve written notice of the circumstances of the claim (or notice of injury) on MATC[6] within 120 days of the event giving rise to the claim, as well as a claim containing an itemized statement of the relief sought. *See Ecker Bros. v. Calumet Cnty.*, 2009 WI App 112, ¶ 5, 321 Wis. 2d 51, 772 N.W.2d 240 (holding that Wis. Stat. §893.80 applies to declaratory judgment actions); *E-Z Roll Off, LLC v. Cnty. of Oneida*, 2011 WI 71, ¶ 39, 335 Wis. 2d 720, 800 N.W.2d 421 (holding that Wis. Stat. §133.18 antitrust actions are not exempt from the Wis. Stat. §893.80 notice of claim requirements). The burden is on the plaintiff, Marone, to prove that the notice requirements were met. *Moran v. Milwaukee Cnty.*, 2005 WI App 30, ¶ 3, 278 Wis. 2d 747, 693 N.W.2d 121.

a. Marone Failed To Satisfy The Notice Of Injury Provision.

A claimant must submit a signed "written notice of the circumstances of the claim" within 120 days, which allows governmental bodies time to "investigate and evaluate" potential

[6] Wis. Stat. §893.80 applies to MATC. *See Powell v. Milwaukee Area Technical Coll. Dist. Bd.*, 225 Wis. 2d 794, 814, 594 N.W.2d 403 (Ct. App. 1999) (applying Wis. Stat. §893.80 to MATC); *see also* Wis. Stat. §38.001(1) (referring to technical colleges and "*other* governmental bodies" (emphasis added)).

claims before they are filed in court. *Thorp*, 2000 WI 60, ¶ 23; Wis. Stat. §893.80(1d)(a). Marone served nothing on MATC before commencing this action that could be construed as a notice of injury.

MATC acknowledges that a claimant may overcome this deficit by showing that the governmental entity had actual notice of the claim and was not prejudiced by the claimant's failure to give the requisite notice. Wis. Stat. §893.80(1d)(a). However, Marone cannot prove either element. The term "actual notice" in Wis. Stat. §893.80(1d)(a) "is the equivalent of actual knowledge." *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 220, 556 N.W.2d 326, 331 (Ct. App. 1996). "Thus, the provision 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....Nor could the rule be otherwise, given the statute's purpose: unless the government entity has 'actual knowledge' of *both the claimant and his or her claim*, the investigation and evaluation envisioned by the statute is impossible." *Markweise*, 205 Wis. 2d at 220-21 (emphasis added).

MATC had no knowledge of Marone's individual claim before this suit was commenced and the complaint was served on MATC. Neither Marone nor WILL told MATC that Marone was planning to file a claim based on the Conditional Successor Agreements. The only writing that might be considered a "notice" of any sort is the February 26, 2013 letter sent to MATC by WILL. (*See* Compl. ¶ 19, Ex. B.) This letter advised MATC of *WILL*'s position that it would be unlawful for MATC to enter into a collective bargaining agreement in violation of Act 10, but does not identify Marone (or any other potential claimant). (Compl. ¶ 19, Ex. B.) The vague threat that "if MATC renegotiates, reopens, or extends a union contract that violates Act 10, it does so at great risk of an immediate legal challenge" is insufficient to give MATC actual

knowledge of the claims that Marone would bring two months later. Thus, Marone cannot show that MATC had actual knowledge of Marone's claims (or that Marone opposed the actions of her own union) before this action was commenced.

Absent actual notice, the court does not reach the issue of prejudice. *See* Wis. Stat. §893.80(1d)(a) (requiring both notice and prejudice to overcome written notice requirement); *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (noting that the court need address only dispositive issues). However, Marone cannot prove that MATC was not prejudiced by Marone's failure to comply with Wis. Stat. §893.80. One of the purposes of the notice of claim statute is to ensure that governmental bodies have sufficient opportunity to escape prejudice by promptly investigating claims. *E-Z Roll Off*, 2011 WI 71, ¶ 49. Since Marone chose to ignore the notice of claim statute and file suit, MATC was not afforded an opportunity to adjust budgets to account for potential litigation, or to discuss Marone's individual contract with her as she claims should have occurred. *See E-Z Roll Off*, 2011 WI 71, ¶ 38. Given this obvious prejudice and lack of actual notice prior to Marone filing suit, Marone cannot satisfy the notice of injury requirement.

b. Marone Failed To Satisfy The Notice Of Claim Provision.

Marone also failed to satisfy the notice of claim provision of Wis. Stat. §893.80(1d). This provision affords a governmental body the opportunity to compromise and settle a claim. *Thorp*, 2000 WI 60, ¶ 28. A notice must substantially comply with each of the four requirements listed in subsection (1d)(b): (1) state a claimant's address; (2) include an itemized statement of the relief sought; (3) be presented to the appropriate clerk; and (4) be disallowed by the governmental body. Wis. Stat. §893.80(1d)(b). The governmental entity must have enough information about the potential claim "so that it can budget accordingly for either a settlement or

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

The filing of a complaint before the disallowance of the claim compels dismissal of the complaint because Wis. Stat. §893.80(1d) provides that an action may not be "brought" before the claim is disallowed or deemed disallowed. *See Zimke v. Milwaukee Transp. Servs., Inc.*, 99 Wis. 2d 506, 512-13, 299 N.W.2d 600 (Ct. App. 1980); Wis. Stat. §893.80(1d)(b) ("[N]o action may be brought...unless...the claim is disallowed."). Actual notice and lack of prejudice do not justify commencing an action before the governmental body has disallowed the claim or the claim is deemed disallowed under Wis. Stat. §893.80(1d)(b). *See Zimke*, 99 Wis. 2d at 512-13.

2. Marone Lacks Standing To Sue MATC For The Claims Alleged.

Marone has standing to maintain this action only if she has suffered or been threatened with an injury to an interest that is legally protectable, meaning that the interest must be within the zone of interests that Act 10 seeks to protect. *See Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, ¶ 16, 275 Wis. 2d 533, 685 N.W.2d 573. Act 10, also known as the Wisconsin Budget Repair Bill, was legislation proposed by Governor Walker and passed by the Wisconsin Legislature to address a projected budget deficit. Its stated purpose has nothing to do with protecting individual bargaining rights. In fact, there is neither a statutory right to individually bargain employment terms, nor a constitutional right to individually bargain with a public employer. *Madison Teachers*, 2013 WL 1760805, *4. As a result, on this ground alone, Marone lacks standing to maintain this suit, and the action should be dismissed.

Moreover, as a dues-paying member of Local 212, Marone has delegated authority to her union to negotiate employment terms on her behalf. *See Moriarty v. Glueckert Funeral Home,*

Ltd., 925 F. Supp. 1389, 1393 (N.D. Ill. 1996). Having granted this authority to her union, Marone has no standing to sue MATC over that negotiation.

An employee will be found to have granted a labor union actual authority, if the employee performed an act evidencing an "unequivocal intention to be bound." *See Moriarty*, 925 F. Supp. at 1393. Mere membership in a labor union, without more, does not necessarily evidence an unequivocal intention to be bound by the collective agreements the union negotiates. *See Trustees of UIU Health & Welfare Fund v. New York Flame Proofing Co.*, 828 F.2d 79, 83 (2nd Cir. 1987); *see also Moriarty*, 925 F. Supp. at 1393-94. However, if the "principal, if not virtually sole activity" of the union is to negotiate collective bargaining agreements on behalf of its members and if the longstanding, universally observed and universally known custom is that members are bound by such agreements, acquiring membership in that organization does constitute an unequivocal statement as to its actual authority to bind the new member. *See New York Flame Proofing Co.*, 828 F.2d at 83; *see also Moriarty*, 925 F. Supp. at 1393-94.

The "unequivocal intention" test does not render other rules of the law of agency, and in particular the doctrine of apparent authority, inapplicable. *New York Flame Proofing Co.*, 828 F.2d at 83. The doctrine of apparent authority comes into play when a party (here, MATC) reasonably believes that another party (here, Marone) has delegated authority to enter into an agreement on her behalf to an agent (here, Local 212). *See New York Flame Proofing Co.*, 828 F.2d at 83. The acts that create the appearance of actual authority must be acts of the principal (Marone), not those of the agent (Local 212). *See New York Flame Proofing Co.*, 828 F.2d at 84.

Regardless of the outcome of *Madison Teachers*, Marone delegated to Local 212 the authority to negotiate base wages on her behalf if Act 10 is found constitutional and all terms of

employment if Judge Colas' decision is upheld.[7] Marone cannot, after granting such authority, attack the third party (MATC) with whom her agent negotiated and executed a conditional future agreement. She has chosen voluntarily to be a dues-paying active member of Local 212, not merely a fair share employee. (*See* Compl. ¶ 1; O'Connor's Affirmative Defenses ¶ 9.) Local 212's "principal, if not virtually sole activity" is to negotiate collective bargaining agreements on behalf of its members, and the longstanding, universally observed and universally known custom is that members are bound by such agreements. *See* LOCAL 212, http://local212.org/historymission.htm (last visited Nov. 15, 2013). Thus, Marone's membership in Local 212 does constitute an unequivocal statement of Local 212's actual authority to bind Marone to the contracts it negotiates. Even if the authority were not actual, it is at least apparent. By virtue of Marone joining Local 212, MATC reasonably believed that Marone had delegated authority to enter into an agreement on her behalf to Local 212. Therefore, Local 212 had authority to negotiate the Conditional Successor Agreements on Marone's behalf, and Marone has no rights to assert against MATC based on its negotiation of the Conditional Successor Agreements.

3. Marone's Claim For Costs And Attorney Fees Under Chapter 133 Claim Must Be Dismissed.

a. Wis. Stat. §133.18(1)(b) Bars Recovery Of Costs Or Attorney Fees From Any Local Governmental Unit.

The plain language of the statutory chapter under which Marone seeks to recover her costs for bringing this suit bars the recovery of costs and attorney fees from MATC. The goal of statutory construction is to ascertain the legislature's intent. *Providence Catholic Sch. v. Bristol Sch. Dist. No. 1*, 231 Wis. 2d 159, 178, 605 N.W.2d 238 (Ct. App. 1999).

[7] Significantly, Act 10 does not make collective bargaining illegal; it limits the subjects upon which the parties may bargain.

The court first looks to the statute's language and, if the language is clear and unambiguous, the statute's terms will be applied in accordance with the statute's plain language. *Providence*, 231 Wis. 2d at 178. The language of Wis. Stat. §133.18(1)(b) is clear and unambiguous: "No...costs or attorney fees may be recovered under this chapter from any local governmental unit...." Marone is seeking costs and attorney fees (Compl. ¶ 44) from a local governmental unit, MATC. *See Powell v. Milwaukee Area Technical Coll. Dist. Bd.*, 225 Wis. 2d 794, 814, 594 N.W.2d 403 (Ct. App. 1999); *see also* Wis. Stat. §38.001(1) (referring to technical colleges and "*other* governmental bodies" (emphasis added)). MATC submits that the court's inquiry need go no further, and that this portion of Marone's claim is barred.

However, MATC acknowledges that in the only Wisconsin appellate decision to discuss Wis. Stat. §133.18, *E-Z Roll Off, LLC v. County of Oneida*, the Wisconsin Supreme Court noted that Wis. Stat. §133.18(1)(b) is seemingly in tension with Wis. Stat. §133.18(6), which caps the amount that a plaintiff may recover against a governmental entity to the amount stated in Wis. Stat. §893.80(3). *E-Z Roll Off*, 2011 WI 71, ¶ 28 n.13. The *E-Z Roll Off* circuit court, relying on subsection (1)(b), had struck E-Z's request for damages, costs, and attorney fees under Wis. Stat. §133.18(1)(a). *E-Z Roll Off*, 2011 WI 71, ¶ 28 n.13. However, the court did not decide whether subsection (1)(b) precludes recovery of any monetary damages against the county for violations alleged under any provision of Chapter 133. *E-Z Roll Off*, 2011 WI 71, ¶ 28 n.13. Since the case was decided on other grounds (for failure to comply with notice of claim statute, as this case should be), the tension was not resolved. *E-Z Roll Off*, 2011 WI 71, ¶ 28 n.13.

If this court finds this tension creates an ambiguity (and only if the court finds an ambiguity), the court may resort to rules of construction, including resort to legislative history, in an effort to determine legislative intent. *Providence*, 231 Wis. 2d at 178. When construing a

statute, the court considers the entire section and the related sections and construes them together. *Town of Hallie v. City of Eau Claire*, 173 Wis. 2d 450, 456, 496 N.W.2d 656 (Ct. App. 1992). When confronted with an apparent or alleged statutory inconsistency on a subject, the court must, if possible, read similar-subject statutes as interrelated and harmonize them in order to give each full force and effect. *Providence*, 231 Wis. 2d at 179.

A reading of Chapter 133 as a whole resolves any apparent tension. The relief that is *precluded* under Wis. Stat. §133.18(1)(b) is "damages, interest on damages, costs or attorney fees," while the relief that is simply *limited* under Wis. Stat. §133.18(6) is the "amount recovered." Thus, the question is, what amounts may be "recovered" in a civil action under Chapter 133 that are not "damages, interest on damages, costs or attorney fees"?

Looking to Wis. Stat. §§133.18(1)(a), 133.18(2) and 133.14, the answer becomes clear: *payments made on contracts* that violate these subsections do not constitute "damages, interest on damages, costs or attorney fees." Section 133.18(1)(a), Wis. Stats., provides that treble damages must be reduced by any payments actually recovered under Wis. Stat. §133.14 (which permits recovery of any payment made upon, under or pursuant to a prohibited contract or agreement). Further, Wis. Stat. §133.18(2) distinguishes between "damages or recovery of payments." Thus, in an action against a local governmental entity for recovery of payments made on a contract that is prohibited by these subsections, the plaintiff's recovery would be limited pursuant to Wis. Stat. §893.80(3)—not barred altogether. In sum, while damages, interest on damages, costs and attorney fees are entirely precluded against a local governmental unit, payments actually made on the contracts prohibited by this section at least could be recoverable but—if they are found to be recoverable—are still capped by the limits set forth in Wis. Stat. §893.80(3).

Legislative history confirms that Wis. Stat. §133.18(1)(b) imposes an absolute bar to recovery of costs and attorney fees against MATC. At one time, "damages, interest on damages, costs or attorney fees" *were* limited by Wis. Stat. §133.18(6). However, subsection (1)(b) was later added to carve out these specific categories of amounts recoverable against governmental entities. With the enactment of the federal Local Government Antitrust Act of 1984[8] ("LGAA"), Congress established an absolute prohibition against the collection of monetary damages in suits against local units of government brought under federal antitrust laws. 1987 Wisconsin Act 377, Comments. The LGAA was enacted in response to the voluminous antitrust litigation against local governments. *Wee Care Child Ctr., Inc. v. Lumpkin*, 680 F.3d 841, 848 (6th Cir. 2012). Based on the LGAA, 1987 Wisconsin Act 377 was enacted "to renumber and amend...133.18 (1)...*relating to*...prohibiting damages in antitrust suits against municipalities." 1987 Wisconsin Act 377; 1987 Wisconsin Act 377, Comments. "This bill create[d] *the same prohibition* against the collection of monetary damages from municipalities under Wisconsin's antitrust law that is now provided under the federal law." 1987 Wisconsin Act 377, Prefatory Note (emphasis added).

After Wis. Stat. §133.18(1)(b) was added, the limitation in Wis. Stat. §133.18(6) was left unchanged. There was, as noted, no need to change it because Wis. Stat. §133.18(1)(b) did not bar recovery of all amounts a plaintiff might seek against a governmental entity for violation of Chapter 133.

Here, Marone is not seeking recovery of any payments made on the Conditional Successor Agreements (indeed, there have been none and those agreements are not in force). Therefore, her claim for monetary relief must be dismissed under Wis. Stat. §133.18(1)(b).

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[8] 15 U.S.C. §§ 34-36.

b. MATC Is Immune From Suits For Monetary Relief For Bargaining Over The Conditional Successor Agreements Because the Law Governing Collective Bargaining Was Unclear.

Although the Court should not reach this issue because Wis. Stat. §133.18(1)(b) is dispositive with regard to MATC's immunity from suits for attorney fees or costs, *see Gross*, 227 Wis. at 300, the doctrine of qualified immunity also requires dismissal of Marone's claim for monetary relief.[9]

Whether a government unit, acting through its officials, may be protected by qualified immunity turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time the action was taken. *See Barnhill v. Bd. of Regents of UW Sys.*, 166 Wis. 2d 395, 407, 479 N.W.2d 917 (1992). If the law was not clearly established on the subject of the action when it occurred, then the public official cannot be held to know or anticipate that the conduct was unlawful. *Barnhill*, 166 Wis. 2d at 407. "'The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Barnhill*, 166 Wis. 2d at 408 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The relevant, objective inquiry is whether a reasonable public official could have, though mistakenly, believed his or her actions were lawful in light of the existing law, not whether—in hindsight—the public official's actions were found to be lawful or unlawful. *Barnhill*, 166 Wis. 2d at 408. The plaintiff bears the burden of establishing the existence of the allegedly "clearly established" right. *Barnhill*, 166 Wis. 2d at 409.

The doctrine of qualified immunity provides immunity from suit rather than a defense to liability. *Barnhill*, 166 Wis. 2d at 415. Thus, it is most appropriately addressed and resolved on a

[9] Although the common law doctrine of qualified immunity is most often applied to protect individual public officials sued under federal law for acts done in the exercise of discretionary functions, *see, e.g., Barnhill*, 166 Wis. 2d at 401, the doctrine is equally applicable to governmental entities (such as MATC) sued under state law for acts done in the exercise of discretionary functions. *See* Wis. Stat. §893.80(4); *DeFever v. City of Waukesha*, 2007 WI App 266, ¶ 7 (discussing discretionary-acts immunity against governmental subdivisions).

dispositive motion before extensive measures are taken to defend the public official. *Barnhill*, 166 Wis. 2d at 415. Otherwise, the primary benefit of qualified immunity is lost once the case proceeds to trial. *Barnhill*, 166 Wis. 2d at 415. Although qualified immunity does not protect governmental defendants from suits seeking injunctions, it does bar suits seeking monetary relief. *Moss v. Martin*, 614 F.3d 707, 712 (7th Cir. 2010).

Here, when MATC and Local 212 collectively bargained for the terms in the Conditional Successor Agreements, the prohibition against collective bargaining beyond base wages was not clearly established by law. First, whether Judge Colas' decision was binding on anyone other than the parties in *Madison Teachers* was uncertain at the time of bargaining and ratification, and has not been decided by our appellate courts. Between November 2012 and February 2013, when collective bargaining and ratification occurred, it was unclear whether such a significant decision was applicable outside of the parties to the suit and outside of Dane County.

Marone relies on the Court of Appeals' decision denying a stay in asserting that the circuit court's decision was not binding outside of Dane County (Compl. ¶ 15), but that appellate decision was issued on March 12, 2013—two weeks *after* the Conditional Successor Agreements were ratified by the MATC District Board. *Madison Teachers*, 2012AP2067. Moreover, the Court of Appeals' decision is not clear on this point; the court did not specifically answer the question of whether the circuit court decision was confined to Dane County. Indeed, Judge Colas recently concluded that the WERC could not enforce Act 10 against "anyone," and that the court's original judgment "plainly has statewide effect with respect to the actions of the Commission." *See Madison Teachers*, No. 11CV3774. (Dane Co. Cir. Ct. Oct. 25, 2013).The Court of Appeals underscored the fact that this issue has not been clearly resolved in its November 4, 2013 decision in *Madison Teachers*, when it reviewed the State's more recent

request for a stay of Judge Colas' contempt order. *See Madison Teachers, Inc. v. Walker*, No. 13AP2405, p. 15 (Wis. Ct. App. Nov. 4, 2013).[10]

Second, whether Act 10 constitutionally prohibits collective bargaining of contract terms other than total base wages was uncertain at the time of collective bargaining and ratification. Until the Wisconsin Supreme Court issues its decision, the legality of collective bargaining will remain uncertain. In certifying the appeal to the Wisconsin Supreme Court, the Court of Appeals explicitly recognized the uncertainty of the law regarding Act 10. *Madison Teachers*, 2013 WL 1760805, *1, 12. This explicit recognition demonstrates that the status of Wisconsin's collective bargaining laws are anything but clear and, more importantly, were unclear when MATC and Local 212 were bargaining over the Conditional Successor Agreements.[11]

MATC's potential liability for monetary relief does not depend on whether the Conditional Successor Agreements are determined to be valid or not. *See Barnhill*, 166 Wis. 2d at 408. At the time of collective bargaining, there was a reasonable question about the legality of doing so. This question is recognized by MATC in the bold introductory language to the "Summary of Proposed Labor Agreement" that its Board ratified, (Compl. Ex. D) making the Conditional Successor Agreements contingent on the Wisconsin appellate courts' final resolution of this issue. That lack of clarity is particularly compelling in this context, where one understanding of the law prohibits collective bargaining over most issues, while the competing understanding mandates or permits negotiations over those same issues and treats refusal to bargain as unlawful.

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[10] The Court of Appeals' previous determination that a circuit court opinion does not have "the same effect as a published opinion of this court or the supreme Court" concerns whether the circuit court decision is binding on other courts and did not address the question of whether the circuit court decision had statewide effect.

[11] Although the Seventh Circuit Court of Appeals has reached its own conclusions about the constitutionality of certain parts of Act 10, the law has not been clarified by the highest court of this state with regard to Act 10's validity under the Wisconsin Constitution. *See Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013).

One thing is clear under current Wisconsin law: Marone has no constitutional right to individually bargain her employment contract with MATC. *See Madison Teachers*, 2013 WL 1760805, *4. However, when MATC collectively bargained with Local 212 for the Conditional Successor Agreements, it was *not* clear whether collective bargaining was prohibited or mandated by statute. Accordingly, MATC is entitled to qualified immunity from any suit for damages because collective bargaining was not clearly in violation of any rights or laws.

CONCLUSION

In sum, Marone's complaint must be dismissed because she failed to properly and timely provide MATC with a statutory notice of claim, and the exception for actual notice and lack of prejudice does not apply. Furthermore, Marone's complaint should be dismissed because she lacks standing to sue MATC for the actions of her authorized agent, Local 212.

Alternatively, and on grounds independent of the notice and standing issues, Marone's claim for costs and attorney fees must be dismissed pursuant to Wis. Stat. §133.18(1)(b), which expressly precludes the recovery of costs and attorneys' fees from local governmental units like MATC. MATC also is entitled to qualified immunity from suits for monetary relief. Therefore, at a minimum, Marone's request for costs and attorney fees must be dismissed.

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