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 REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS SEEKING DISMISSAL IN FULL OR IN PART**

Nothing in Marone's Response Brief in Opposition to MATC's Motion for Judgment on the Pleadings (Pl.'s Br.) defeats MATC's motion. Therefore, Marone's complaint must be dismissed.

## REPLY TO PLAINTIFF'S STATEMENT OF FACTS

Marone's "disputes" of fact are either not relevant to MATC's motion or are not actual disputes, and therefore must be disregarded. For example, Marone admits that her dispute as to whether the conditional language is a component of the Conditional Successor Agreements is not directly relevant to MATC's motion. Although this point has no bearing on the Court's decision on the present motion, MATC would note that there are no "actual contracts" yet, as Marone states. (Pl.'s Br. p. 2.) The MATC District Board voted to ratify the agreements based on the "Summary of Proposed Labor Agreement." This document summarizes the tentative agreements

reached with the three bargaining units represented by Local 212 and expressly includes the conditional language, indicating that the validity of the agreements is contingent on Wisconsin law, as Wisconsin appellate courts define it. The agreements themselves have not yet been prepared in final form or signed. (*See* Def.'s Ans. ¶ 1.)

Marone also "disputes" the fact that WILL's February 26, 2013 letter contains no mention of her or any specific claimant, but admits that "taxpayers" are the only claimants identified and that the existence of claimants is "inferred," not directly identified. (Pl.'s Br. p. 2.) Thus, there is no actual dispute that neither Marone nor any other specific person was identified in WILL's February 26, 2013 letter to the MATC District Board. (*See* Compl. Ex. B.)

Finally, although Marone states that she disputes the fact that MATC did not receive any communications regarding the claims alleged in this suit or Marone's individual concerns until MATC was served with the complaint, Marone does not actually identify any basis for disputing this fact. Marone asserts that nothing in the pleadings establishes the *absence* of such communications, but Marone does not refute the statement that none exist. Neither the pleadings, nor Marone's response brief, assert that MATC received a notice of Marone's claims before she filed her complaint. Therefore, Marone's "disputes" should be disregarded for purposes of deciding MATC's motion.

## ARGUMENT

### 1. The Requirements Of Wis. Stat. §893.80 Apply To This Action.

This is not just a simple declaratory judgment action as Marone implies, because she seeks far more than to simply have the Court declare the validity or invalidity of the Conditional Successor Agreements. Instead, Marone claims to be seeking to individually bargain for her terms of employment and to hold MATC liable for costs and attorney fees for alleged restraint of

trade under Wis. Stat. Chapter 133. Nothing in the declaratory judgment statute exempts declaratory judgment actions from the requirements of Wis. Stat. §893.80, and Marone's claims do not warrant a special judicial exception. Similarly, nothing in Chapter 133 exempts actions alleging restraint of trade from the requirements of Wis. Stat. §893.80, nor does Marone dispute that the notice of claim requirements apply to this claim.

Marone's reliance on *Lewis v. Sullivan* for the proposition that Wis. Stat. §893.80 does not apply to claims for declaratory relief is misplaced. (*See* Pl.'s Br. p. 5.) The *Lewis* court specifically limited its holding by noting that "[s]ection 893.80(1) is not in issue in this case." 188 Wis. 2d 157, 169 n.9, 524 N.W.2d 630, 634 n.9 (1994). Contrary to Marone's assertion, the court did distinguish the *Lewis* case from *DNR v. City of Waukesha* on the basis that a different, broader statute than Wis. Stat. § 893.82 was at issue:

> In *Department of Natural Resources v. Waukesha*, 184 Wis.2d 178, 515 N.W.2d 888 (1994), the court held that the state must comply with sec. 893.80(1), the notice of claim statute applicable to claims against specified governmental bodies. The DNR's claim in that case was for money as well as for injunctive relief. The court stated that **sec. 893.80(1) applies to more actions than tort actions for money. Section 893.80(1) is not in issue in this case.**

*Lewis*, 188 Wis. 2d at 169 n.9, 524 N.W.2d at 634 n.9 (emphasis added).

Further, subsequent case law makes it clear that Wis. Stat. §893.80 applies to "all actions," as the statute itself states. In *City of Racine v. Waste Facility Siting Board*, the Wisconsin Supreme Court explained:

> **Except as provided by statute or case law interpreting those statutes, a party must file a notice of claim and follow the statutory procedures set forth in § 893.80(1)(b) before bringing any action against a governmental subdivision**....This court recently held that Wis. Stat. § 893.80(1) "applies to all causes of action, not just those in tort and not just those for money damages." *Waukesha,* 184 Wis.2d at 191, 515 N.W.2d 888. In *Waukesha,* this court found that the plain language of the statute dictates that § 893.80(1) applies to all actions: "no action" may be brought against a governmental subdivision unless the claimant complies with the notice requirements of the statute. *See id.*

> ...Although the court need not look beyond the statute if the language is plain, further review of legislative history supports the sound holding of *Waukesha* that the notice of claim requirements apply to 'all actions.'...**The legislature deleted any language that limited application of the statute to actions where the only relief demandable was a judgment for money.**

216 Wis. 2d 616, 622-24, 575 N.W.2d 712, 714-15 (1998) (emphasis added). Therefore, neither the declaratory judgment statute nor any authoritative case law interpreting this statute[1] exempts declaratory judgment actions from the notice of claim requirements.

Although public policy may permit a court to waive the notice requirements in the case of "urgent" declaratory judgment actions, Marone does not demonstrate "urgency." Marone did not file her complaint until over two months after WILL sent its letter of protest (Compl. Ex. B) to MATC, and did not request immediate injunctive relief. Indeed, the tentative agreements that she challenges in her May 2, 2013 complaint do not go into effect until February 2014 (if at all, depending on the Supreme Court's ruling on the constitutionality of Act 10). Consequently, Marone's own delay shows that this case is not such an urgent matter as to warrant a judicial exception to the clear statutory requirements of Wis. Stat. §893.80.

In addition to Marone's delay, the circumstances of this case show that there is no "urgency" here. Regardless of how pending litigation over Act 10 is decided, MATC has no obligation to bargain individually with Marone or other employees. If the constitutionality of Act 10 is presumed or ultimately upheld, MATC has the authority to implement wages, hours, and

---

[1] Without attaching a transcript of the decision, Marone cites a non-binding Kenosha County Circuit Court opinion for the broad proposition that declaratory judgment actions are not subject to the requirements of Wis. Stat. §893.80. This citation must be disregarded. Marone asks the Court to accept as law the arguments and interpretation of her counsel (who state that they attended the oral ruling) regarding the meaning of the circuit court's decision, and does not include a transcript of the ruling or any pleadings from that case to compare with the pleadings of this case. Moreover, reliance on this circuit court opinion is contrary to assertions that Marone has repeatedly made throughout this case that Judge Colas' Dane County Circuit Court decision on the constitutionality of Act 10 is, essentially, meaningless to anyone other than the parties to that case. In the very brief in which Marone asks this Court to follow the Kenosha County Circuit Court opinion, Marone repeats her position that "[i]t is and has for a long time been the black-letter rule of law that circuit court decisions have no precedential effect and bind only the parties to that decision." (Pl.'s Br. p. 18.)

conditions of employment that are identical to or different from the terms provided under the Conditional Successor Agreements. Therefore, no urgent circumstances warrant an exception to Wis. Stat. §893.80: if Act 10 is unconstitutional, the agreements are valid; if Act 10 is constitutional, MATC does not have to change what it pays Marone unless it wants to do so, on a timetable that it chooses.

As to Marone's second claim, Marone does not dispute that Wis. Stat. §893.80 applies to Chapter 133 claims. Therefore, at a minimum, Marone's restraint of trade claim must be dismissed for failure to comply with the notice of claim requirements. *See 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).

**2. Marone Failed To Substantially Comply With The Requirements Of Wis. Stat. §893.80.**

Marone failed to comply with the notice requirements of Wis. Stat. §893.80 in that she failed to identify a claimant or give notice of injury prior to filing suit. The vague identification of "taxpayers" as claimants and the address of counsel (who may or may not have been retained at the time by any particular taxpayer to pursue the case) are insufficient to provide a government body with a statutory notice of claim. Unless the government entity has actual knowledge of both the person making the claim and his or her claim, the investigation and evaluation envisioned by the notice of claim statute is impossible. *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 220-21, 556 N.W.2d 326, 331 (Ct. App. 1996).

Marone claims that she was deprived of an opportunity to individually bargain for her employment terms. However, Marone does not claim that she communicated her desire to do so to MATC before she filed her complaint, which is the only way that MATC could have

addressed her claim before the costs and attorney's fees that she now seeks began to accrue. MATC was entitled to discuss Marone's claims and consider resolving them in advance of this lawsuit. This, in fact, is a case in which MATC needed to know the identity of the individual claimant and could not possibly be responsive to vague references to "taxpayers" as claimants, particularly when Marone's claims concern her status as an employee, not as a taxpayer. Therefore, Marone's failure to give notice prior to filing suit precludes her from maintaining this action.

### 3. There Is No Dispute Of Fact Regarding The Communications (Or Lack Thereof) That Marone Provided To MATC About Her Claims Before Filing This Suit.

Judgment on the pleadings is appropriate where a notice of claim is fatally defective. *See Kellner v. Christian*, 188 Wis. 2d 525, 527, 525 N.W.2d 286, 287 (Ct. App. 1994) (granting motion for judgment on the pleadings because plaintiffs notices of claim were defective). It is the claimant's burden to prove that she has satisfied the notice requirements. *Moran v. Milwaukee Cnty.*, 2005 WI App 30, ¶ 3, 278 Wis. 2d 747, 693 N.W.2d 121. Marone does not dispute that neither she, nor anyone specifically on her behalf, provided MATC with notice of her claims before serving the complaint. While Marone argues that she complied with the requirements of Wis. Stat. §893.80, she does not dispute the facts taken from the pleadings that show that she was never identified as the claimant before suit was filed.

Marone contends, nevertheless, that she substantially complied with the requirements of Wis. Stat. §893.80. However, this claim cannot be squared with the pleadings. The February 26, 2013 letter sent to MATC by WILL (Compl. Ex. B) is referenced in the complaint and is the only communication that exists and, therefore, that could tenably be treated as WILL's attempt to substantially comply with the notice of claim requirements. (*See* Pl.'s Br. p. 9.) This attempt, as explained above and in MATC's principal brief, was defective. There are no other allegations in

Marone's lengthy, detailed complaint to suggest that any other attempt to comply with the statute was made.

If the facts pleaded by Marone are accepted as true and all reasonable inferences are drawn therefrom, no notice of Marone's claims was provided to MATC before the complaint was served. As there is no dispute of fact about what was provided to MATC before the suit was filed, judgment on the pleadings is appropriate.

**4. Marone Lacks Standing To Sue MATC For The Claims Alleged.**

The alleged right to individually bargain Marone's employment terms is the only basis for Marone's claims against MATC. However, Marone does not dispute that she has neither a statutory right to individually bargain employment terms, nor a constitutional right to individually bargain with a public employer. *See Madison Teachers, Inc. v. Walker*, No. 2012 AP 2067, 2013 WL 1760805, *4 (Ct. App. Apr. 25, 2013.) As stated in MATC's principal brief, on this ground alone, Marone lacks standing to maintain this suit, and the action should be dismissed.

Furthermore, Marone misunderstands MATC's position on standing. Marone could conceivably have the right to challenge the process by which a tentative contract was made for her benefit by an agent, but her right is to lodge a claim against *the agent*, not the third party with whom the authorized agent negotiated. MATC, the third party, had a right to rely on Local 212's actual or apparent authority to negotiate on behalf of its members, including Marone, without being subjected to a lawsuit by one of Local 212's principals for entering into negotiations in response to Local 212's demand to bargain.

Marone attempts to evade this standing problem by contending, more generally, that the tentative agreements negotiated by Local 212 are illegal. (Pl.'s Br. p. 14.) Marone continues to

presume that a tentative agreement, which has expressly been made contingent on the contract being found lawful, is the same as an illegal contract. This is precisely why the contract is legal and Marone has no answer to this obvious, dispositive point.

That said, Marone still would have no standing to attack MATC even if her claim of illegality were viable. No one may be bound by an illegal contract, and the law will leave the parties as it finds them and will not intervene to assist the parties. *See Cornwell v. City of Stevens Point*, 159 Wis. 2d 136, 142-43, 464 N.W.2d 33, 36 (Ct. App. 1990) ("The rule in Wisconsin is that even though contracts that violate the constitution or state law or policy are void, the courts will not intervene in the relationships they have created....[I]llegal contracts 'are void and the courts will not lend their assistance to the parties, but will leave them where they have placed themselves unlawfully.'") (citation omitted); *Hiltpold v. T-Shirts Plus, Inc.*, 98 Wis. 2d 711, 716-17, 298 N.W.2d 217, 220 (Ct. App. 1980) ("A contract is illegal where its formation or performance is expressly forbidden by a civil or criminal statute or where a penalty is imposed for doing the act agreed upon. Such a contract is void and courts will leave the parties where they find them."). Marone has no right to have a court assist her in pursuing claims against MATC, even if the Conditional Successor Agreements are presumed to be illegal for present purposes. Therefore, Marone's complaint against MATC should be dismissed.

**5. At A Minimum, Marone's Claim For Costs And Attorney Fees Under Chapter 133 Claim Must Be Dismissed.**

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

Marone is asking the Court to ignore the plain language of Wis. Stat. § 133.18(1)(b)—"No...costs or attorney fees may be recovered under this chapter from any local governmental unit...."—and to allow her to pursue costs and attorney fees from a local governmental unit on

public policy grounds. Marone cannot appeal to a "public policy" related to fee-shifting statutes when the statute itself establishes a clearly applicable exception to the fee-shifting provision. Moreover, public policy may not be considered if the statutory language is clear and unambiguous, as it is in Wis. Stat. § 133.18(1)(b). *See Providence Catholic Sch. v. Bristol Sch. Dist. No. 1*, 231 Wis. 2d 159, 178, 605 N.W.2d 238, 247 (Ct. App. 1999) ("We first look 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."). Therefore, the public policy established by the legislature is manifest in the language of the statute, not in Marone's proffered exception to it.

In arguing that the statute is ambiguous (such that public policy may be considered), Marone relies on a wholly unrelated case from 1851 to assert that payments made on contracts are "damages" within the meaning of §133.18, and thus subsections (1)(b) and (6) are in conflict. Marone ignores, however, the treatment of "damages" and "recovery of payments" on contracts within the very statute. As explained in MATC's principal brief (and ignored in Marone's response brief), Wis. Stat. §133.18(2) distinguishes between "damages or recovery of payments." Within the context of Wis. Stat. §133.18, then, recovery of payments are not damages.[2] Therefore, there is no ambiguity in the statute, which states that Marone is precluded from recovering costs or attorney fees from MATC under Chapter 133.

**b. MATC Is Entitled To Qualified Immunity From Marone's Claim For Attorney Fees And Costs.**

Marone claims that qualified immunity for local governmental entities was entirely abrogated and then subsumed by the enactment of Wis. Stat. §893.80(4). This is not the case.

---

[2] "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

In *Holytz v. Milwaukee*, the primary case on which Marone relies, the Wisconsin Supreme Court stated that the abrogation of municipal governmental immunity "is not to be interpreted as imposing liability on a governmental body in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions." 17 Wis. 2d 26, 40, 115 N.W.2d 618, 625 (1962); *see also Scarpaci v. Milwaukee Cnty.*, 96 Wis. 2d 663, 681, 292 N.W.2d 816, 825 (1980). In other words, the discretionary actions of municipal entities remain protected by common law immunity, as shown in the *Barnhill* case cited in MATC's principal brief. *Barnhill v. Bd. of Regents of UW System*, 166 Wis. 2d 395, 479 N.W.2d 917 (1992).

The Court need 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 v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (noting that the court need address only dispositive issues). If the Court were to do so, however, the MATC Board's decisions in this matter would clearly fall within common law immunity, or would constitute quasi-legislative action and not the mere execution of ministerial duties. Consequently, qualified immunity would apply to this case if it were necessary to reach that issue.

## CONCLUSION

Marone's arguments in response to MATC's motion do not save her suit from dismissal. Marone's complaint must be dismissed because she failed to properly and timely provide MATC with a statutory notice of claim. Furthermore, Marone's complaint should be dismissed because she lacks standing to sue MATC for the actions of her authorized agent, Local 212.

In addition, Marone's claim for costs and attorney fees must be dismissed pursuant to Wis. Stat. §133.18(1)(b), which unambiguously precludes the recovery of costs and attorney 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.

Dated: December 23, 2013.

DAVIS & KUELTHAU, s.c.
Attorneys for Milwaukee Area Technical College

By: _____
Kirk D. Strang
State Bar No. 1010841
Kathy L. Nusslock
State Bar No. 1014027
Heather K. Gatewood
State Bar No. 1060344

P.O. Address:

111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
(414) 276-0200

Direct contact information:

| | |
|---|---|
| Kirk D. Strang | (414) 225-1495 direct dial<br>(608) 280-3043 direct fax<br>kstrang@dkattorneys.com |
| Kathy L. Nusslock | (414) 225-1447 direct dial<br>(414) 278-3647 direct fax<br>knusslock@dkattorneys.com |
| Heather K. Gatewood | (414) 225-1418 direct dial<br>(414) 278-3618 direct fax<br>hgatewood@dkattorneys.com |