



May 1, 2014

VIA OVERNIGHT MAIL

Honorable David M. Bastianelli
Kenosha County Circuit Court
Courthouse Branch 1
912 56th Street, Room 205
Kenosha, WI 53140

RE: *Kristi LaCroix, et al. v. Kenosha Unified School District Board of Education, et al.*
Case No. 13-CV-1899

Dear Judge Bastianelli:

Enclosed for filing please find Defendants Kenosha Unified School District and Kenosha Unified School District Board of Education's Notice of Motion and Motion to Dismiss and Brief in Support of Motion to Dismiss Cross Claims in the referenced matter. A copy has been served upon all parties by first class mail sent today, and by electronic mail.

Thank you for your attention to this matter.

Very truly yours,

BOARDMAN & CLARK LLP


JoAnn M. Hart

Enclosure

cc: Attorney Richard M. Esenberg
Attorney Thomas C. Kamenick
Attorney Nathan J. McGrath
Attorney Milton L. Chappell
Attorney Lester Pines
Attorney Jeffrey P. Sweetland

Attorney Aaron N. Halstead
Ms. Rebecca Stevens
Ms. JoAnn Taube
Mr. Carl Bryan
Mr. Kyle Flood

Kenosha Unified School District
Board of Education
Kenosha Unified School District,
Ms. Sheronda Glass

JMH:bas

STATE EX REL. KRISTI
LACROIX, KRISTI
LACROIX and
CARRIEANN GLEMBOCKI,

Plaintiffs,

Case No.: 13-CV-1899

v.

REBECCA STEVENS, JO ANN TAUBE, CARL BRYAN,
KYLE FLOOD, KENOSHA UNIFIED SCHOOL DISTRICT
BOARD OF EDUCATION, KENOSHA UNIFIED SCHOOL
DISTRICT, KENOSHA EDUCATION ASSOCIATION,
SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 168 and AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2383,

Defendants.

NOTICE OF MOTION AND MOTION TO DISMISS

TO: Attorney Lester Pines
Cullen Weston Pines & Bach LLP
122 W. Washington, #900
Madison, WI 53703

Attorney Richard M. Esenberg
President and General Counsel
Wisconsin Institute for Law & Liberty, Inc.
1139 East Knapp Street
Milwaukee, WI 53202-2828

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National Right to Work Foundation, Inc.
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Attorney Aaron N. Halstead
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222 W. Washington Ave., Ste. 450
P.O. Box 2155
Madison, WI 53701-2155

PLEASE TAKE NOTICE that the Kenosha Unified School District Board of Education and Kenosha Unified School District, by their attorneys, Boardman & Clark LLP, will appear before the Honorable David M. Bastianelli, Kenosha County Circuit Court Judge, Branch 1, on _____ at _____, in courtroom 205 at 912 56th Street, Kenosha, Wisconsin, on the following motion:

Defendants Kenosha Unified School District Board of Education and Kenosha Unified School District's motion to dismiss the cross claim filed by Kenosha Education Association for failure to comply with the notice requirements of Wis. Stat. § 893.80.

Dated this 1st day of May, 2014.

Respectfully submitted,

BOARDMAN & CLARK LLP



JoAnn M. Hart, State Bar Number 1008827
David E. Rohrer, State Bar Number 1015834
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Madison, WI 53701-0927
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*Attorneys for Kenosha Unified School District,
Rebecca Stevens, JoAnn Taube, Carl Bryan, Kyle
Flood and Kenosha Unified School District Board
of Education*

STATE EX REL. KRISTI
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SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 168 and AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2383,

Defendants.

DEFENDANTS KENOSHA UNIFIED SCHOOL DISTRICT AND KENOSHA UNIFIED
SCHOOL DISTRICT BOARD OF EDUCATION'S
BRIEF IN SUPPORT OF MOTION TO DISMISS CROSS CLAIM

Defendants Kenosha Unified School District and Kenosha Unified School District Board of Education, by their attorneys Boardman & Clark LLP, by Attorney JoAnn Hart, move to dismiss the breach of contract cross claim filed by Kenosha Education Association ("KEA"). KEA filed the cross claim before the School District disallowed KEA's notice of claim and before the expiration of the 120-day disallowance period set by the notice-of-claim statute, Wis. Stat. § 893.80(1g). Therefore, KEA's claim is premature and must be dismissed.

ARGUMENT

Before a party may sue a governmental subdivision, it must comply with the notice requirements specified in Wis. Stat. § 893.80. *See Elkhorn Sch. Dist. v. East Troy Sch. Dist.*, 110

Wis. 2d 1, 327 N.W.2d 206 (Ct. App. 1982). Under that statute, the claimant must provide (1) a written notice of the circumstances of the claims, and (2) a written claim containing an itemized statement of relief sought. Wis. Stat. § 893.80(1d).¹ The governmental subdivision then has 120 days to respond to the claim before it is deemed disallowed. *Id.* § 893.80(1g).² A suit may not be commenced until either the 120 days have expired or the claim is formally disallowed under the procedures specified in § 893.80(1g), whichever comes first. *Id.* 893.80(1d)(b). *See also Colby v. Columbia County*, 202 Wis. 2d 342, 357-58, 362-64, 550 N.W.2d 124 (1996). Formal disallowance requires a written notice from the governmental subdivision to the claimant filed by registered or certified mail. Wis. Stat. § 893.80(1g).

¹ Wis. Stat. § 893.80(1d) provides in full:

Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action 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 volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, 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 fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee; 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 fire company, corporation, subdivision or agency and the claim is disallowed.

² Wis. Stat. § 893.80(1g) provides in full:

(1g) Notice of disallowance of the claim submitted under sub. (1d) shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. Failure of the appropriate body to disallow a claim within 120 days after presentation of the written notice of the claim is a disallowance. No action on a claim under this section against any defendant fire company, corporation, subdivision or agency nor against any defendant officer, official, agent or employee, may be brought after 6 months from the date of service of the notice of disallowance, and the notice of disallowance shall contain a statement to that effect.

The purpose of the notice of claim statute is to "(1) to give the governmental entities the opportunity to investigate and evaluate potential claims, and (2) to afford governmental entities the opportunity to compromise and budget for potential settlement or litigation." *E-Z Roll Off, LLC v. County of Oneida*, 2011 WI 71, ¶ 34, 335 Wis.2d 720, 800 N.W.2d 421. See also *City of Racine v. Waste Facility Siting Bd.*, 216 Wis. 2d 616, 622, 575 N.W.2d 712 (1998). As a general rule, § 893.80(1d) applies to all causes of action, not just those in tort and not just those for money damages. See *Oak Creek Citizen's Action Comm. v. City of Oak Creek*, 2007 WI App 196, ¶ 6, 304 Wis. 2d 702, 738 N.W.2d 168 (discussing limited exceptions in which notice of claim would not apply, not including a breach of contract claim).

KEA contends that the School District breached the collective bargaining agreements between the School District and KEA's bargaining units. KEA Cross Claim, ¶¶ 5, 6. Compliance with § 893.80(1d) is a necessary prerequisite to KEA's breach of contract claim. *City of Racine*, 216 Wis. 2d at 621-22 (notice statute applies to counter claims and cross claims). KEA alleges in its cross claim that it filed a notice of claim relating to its breach of contract claim with the School District on March 7, 2014. KEA Cross Claim, ¶ 7. However, KEA does not allege that the School District has disallowed the claim in accordance with the procedures in Wis. Stat. § 893.80(1g). In fact, the School District has not disallowed the claim. *Aff. of Sheronda Glass* ¶¶ 6-8.³ Additionally, it has not been 120 days since KEA filed its notice of claim. The 120 days will expire on July 5, 2014.

³ The court may consider the Affidavit of Sheronda Glass in resolving the motion to dismiss because KEA's failure to comply with Wis. Stat. 893.80 affects the competency of the court, *Village of Trempealeau v. Mikrut*, 2004 WI 79, n.5, 321 Wis.2d 125, 772 N.W.2d 718, which "speaks to the power of a court to exercise its subject matter jurisdiction in a particular case." *State v. Starks*, 2013 WI 69, ¶ 36, 349 Wis.2d 274, 833 N.W.2d 146 (citations omitted).

Because KEA filed its cross claim before the School District had formally disallowed its claim and before the 120-day disallowance period, the claim is premature and must be dismissed. *Colby*, 202 Wis. 2d at 358. As the court of appeals explained in *Selerski v. Village of West Milwaukee*, 212 Wis. 2d 10, 20-21, 568 N.W.2d 9 (Ct. App. 1997), litigants cannot short-circuit the 120-day period by filing a claim prematurely and then attempting to amend it after the requisite 120 days have passed. Rather, "an action that is filed prematurely must be dismissed." *Id.* at 21.

CONCLUSION

The Kenosha Unified School District and Kenosha Unified School District Board of Education respectfully request that Kenosha Education Association's cross claim be dismissed for failure to comply with the requirements of Wis. Stat. § 893.80.

Dated this 1st day of May, 2014.

Respectfully submitted,

BOARDMAN & CLARK LLP



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Flood and Kenosha Unified School District Board
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STATE EX REL. KRISTI
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DISTRICT, KENOSHA EDUCATION ASSOCIATION,
SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 168 and AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2383,

Defendants.

AFFIDAVIT OF SHERONDA GLASS

STATE OF WISCONSIN)
) ss.
KENOSHA COUNTY)

I, Sheronda Glass, upon being first duly sworn on oath, depose and state as follows:

1. I am an employee of the Kenosha Unified School District (School District), serving in the capacity of the District's Executive Director of Business Services, and I make this affidavit on personal knowledge.
2. I am aware of and familiar with the complaint filed by Kristi Lacroix and CarrieAnn Glembocki with the Circuit Court for Kenosha County on November 21, 2013 in the above-captioned matter.
3. I am also aware of the cross claim filed by the Kenosha Education Association against the School District on April 14, 2014 in the above-captioned matter.
4. In my capacity as the District's Executive Director of Business Services, I am responsible for maintaining the records of, and presenting to the School Board, any notice of claim

and/or itemized statement of damages claimed or relief sought that is served on the District under WISCONSIN STATUTES § 893.80.

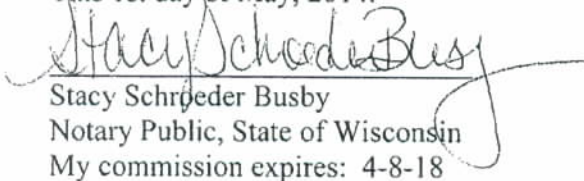
5. I am also responsible for maintaining records of any formal disallowance of claim served by the School Board or School District in response to any notice of claim that is served on the District under WIS. STAT. § 893.80.
6. The School District was served with a notice of claim from Kenosha Education Association (KEA) on March 7, 2014. In that notice, the KEA contends that the School District breached the collective bargaining agreements between KEA bargaining units and the School District.
7. The notice of claim received by the School District on March 7, 2014 is the only notice of claim that the School District has received from KEA related to an alleged breach of the current collective bargaining agreements. That notice of claim is attached as Exhibit A.
8. The School District has not formally disallowed the notice of claim filed by KEA. The School District has not responded to the notice of claim in any way.

Dated this 1st day of May, 2014.



Sheronda Glass

Subscribed and sworn to before me
This 1st day of May, 2014.



Stacy Schroeder Busby
Notary Public, State of Wisconsin
My commission expires: 4-8-18

Process Server: Jy Ke
Time: 12:05 Date: 3-7-14
318 STAFF ST #210

Personal (13)
1160

NOTICE OF CLAIM AND CLAIM PURSUANT TO §893.80, WIS. STATS.

NOTICE IS HEREBY GIVEN that the Kenosha Education Association ("KEA"), 5610 55th Street, Kenosha, Wisconsin 53144, has claims for damages and specific performance against the School Board of the Kenosha Unified School District, Wisconsin ("the District"), 3600 52nd Street, Kenosha, Wisconsin 53144, resulting from the District's repeated and ongoing breaches of contracts between the District and the KEA on December 11, 2013, January 8, 2014, and February 5, 2014. The Kenosha Education Association is the collective bargaining agent for 5 different bargaining units: (1) all regular full-time and all regular part-time certified teaching personnel employed by the District, (2) all regular full-time and regular part-time Education Support Professionals employed by the District, (3) all substitute teachers employed by the District, (4) all regular licensed full-time and part-time educational interpreters employed by the District, and (5) all carpenters and painters employed by the District (collectively, the "KEA bargaining units"). Each of the KEA bargaining units ratified a collective bargaining agreement with the District on or about November 12, 2013, and the District ratified those same contracts on or about November 15, 2013. The contracts between the parties require the District to make payroll deductions of member dues and non-member fair share contributions (for their share of the cost of collective bargaining process and contract administration) from the paychecks of the employees in the KEA collective bargaining units once per month on the first payroll check of each month. The contracts further require the District to pay the withheld amounts to KEA within ten days of the deduction. The District has failed to do so. It has further informed KEA



that is does not intend to withhold and pay to KEA the amounts required under the contracts.

The total amount of member dues and fair share contributions that the District has failed to pay to KEA through today's date is \$739,688.68. Additional estimated amounts of \$147,937.74 on each of March 5, 2014, April 2, 2014, May 14, 2014 and June 11, 2014, will accrue until and unless the District complies with the contracts.

Lester A. Pines of Cullen Weston Pines & Bach LLP, 122 West Washington Avenue, Suite 900, Madison, Wisconsin 53703, is the attorney for the Kenosha Education Association with regard to this notice of claim and is authorized by the Kenosha Education Association to file and serve it on its behalf.

Dated this 5th day of March, 2014.

CULLEN WESTON PINES & BACH LLP



Lester A. Pines, SBN 01016543
Attorney for Kenosha Education Association