COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-0632

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

BABETTE GRUNOW,

PLAINTIFF-APPELLANT,

V.

THE UWM POST, SACHIN CHHEDA, THERESA FLYNN, ROBIN LICKEL AND JEFFREY ROBB,

DEFENDANTS,

UNIVERSITY OF WISCONSIN-MILWAUKEE AND TOM MCGINNITY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Babette Grunow appeals from the circuit court order dismissing with prejudice her claims against the University of Wisconsin-Milwaukee (UWM) and Tom McGinnity. She contends that the circuit court's decision was "without legal basis or merit" and alleges that "[t]he ruling of the trial court would return the law to a bygone era of fly specking complaints and demurrer and burden the courts with a motion practicing resulting in dismissal of complaints without prejudice and the filing of amended complaints until the complaint has passed a particular literary muster." Grunow further contends that "the error of the [circuit] court was compounded by the arbitrary refusal to allow the plaintiff to file a Second Amended Complaint to cure or attempt to cure the alleged insufficiency." We affirm.

I. BACKGROUND

¶2 UWM Post, Inc., a nonstock corporation, publishes a newspaper entitled THE UWM POST; the newspaper is not an official publication of UWM.[1]

[1] In her amended complaint, Grunow alleges that "[t]he defendant, The UWM Post, is a non-stock corporation." In its answer to the amended complaint, The UWM Post and its four employees "deny that *The UWM Post* is itself a nonstock corporation and allege that it is a student organization registered with the University of Wisconsin-Milwaukee and that, among other activities, it conducts the business of UWM Post, Inc., and publishes a newspaper entitled '*The UWM Post*.'" They also deny that Grunow "was, during relevant times, a duly elected or appointed member of the Board of Directors of *The UWM Post*." However, the record also contains a document entitled "response of defendants the UWM Post, Inc., Chheda, Flynn, Lickel and Robb in support of plaintiff Grunow's motion to stay" which identifies the four named individuals as the corporation's "current and/or former directors." Additionally, in their "memorandum of points and authorities in support of motion to dismiss," UWM and McGinnity state that Grunow "was employed by The UWM Post, a newspaper published by the defendant … in various capacities including Editorial Editor and Office Manager" and that she "was a member of the board of directors of The UWM Post." Construing the documents as a group, it appears that Grunow's claims revolve around both her removal from the corporation's board of directors and her termination as an employee of the newspaper.

Babette Grunow was a member of the corporation's board of directors and was employed by the corporation as the newspaper's editorial editor and office manager.

¶3 Grunow initially filed a complaint against the corporation and four of its employees. She alleged that the individual defendants

> acting in conspiracy and concert against [her], wrongfully and in contravention to the by-laws of The UWM Post wrongfully removed [her] from the Board of Directors of The UWM Post, caused her employment to be wrongfully terminated and caused her to be locked out of the offices of The UWM Post.

She further claimed that "[a]s a direct and proximate result of the wrongful actions of the defendants," she "sustained serious physical injuries including a seizure for which she was hospitalized." Grunow alleged five causes of action: (1) her wrongful removal from the corporation's board of directors; (2) wrongful termination of her employment with the newspaper; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; and (5) outrageous conduct.

¶4 Grunow amended her complaint to add UWM and Tom McGinnity, a UWM employee who was Director of Student Organization Advising and Resources, as defendants. According to Grunow's amended complaint, she "has suffered from a seizure disorder since 1992" and her "seizure disorder condition" was "well known" to McGinnity prior to April 17, 1998, when she was removed from the board of directors and her employment was terminated. The amended complaint also alleged that Grunow "was wrongfully removed from her employment … and as a [board] member … by dissident employees of The UWM Post in contravention of the by-laws made and provided of [sic] The UWM Post." It further claimed that McGinnity "acted in concert with the dissidents to remove

… Grunow from her employment and approved locking her out of The UWM Post offices." In addition to the original five causes of action, Grunow's amended complaint alleged negligence causing permanent physical injury. Grunow claimed that, "[a]s a direct and proximate result of the actions of the defendants," she "suffered a seizure" on UWM's premises, was hospitalized "from April 19, 1998 through April 27, 1998 and was in intensive care for part of that period," and "has suffered serious and permanent emotional injuries."

¶5 UWM and McGinnity moved for their dismissal from the lawsuit for failure to state a claim upon which relief may be granted, alleging that sovereign immunity and qualified immunity barred relief and that Grunow failed to strictly comply with WIS. STAT. § 893.82.[2] At the conclusion of the hearing on the motion, the circuit court noted that although the other defendants opposed the motion for dismissal, they failed to file a brief supporting their position. The court then granted the motion for dismissal, with prejudice. Grunow moved for a stay in the proceedings, pending this appeal.

II. DISCUSSION

¶6 "The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the legal sufficiency of the claim." ***Weber v. City of Cedarburg***, 129 Wis. 2d 57, 64, 384 N.W.2d 333 (1986). In deciding such a motion, "the facts set forth in the complaint are assumed to be true and are the only facts to be considered." *See* ***Larson v. City of Tomah***, 193 Wis. 2d 225, 227,

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

532 N.W.2d 726 (1995) (citation omitted); *see also* WIS. STAT. § 802.06(2).[3] "Since pleadings are to be liberally construed, dismissal of a claim is improper if there are any conditions under which the plaintiffs could recover." ***Hermann v. Town of Delavan***, 215 Wis. 2d 370, 378, 572 N.W.2d 855 (1998). "Whether a complaint states a claim upon which relief can be granted presents a question of law." ***Weber***, 129 Wis. 2d at 64. We decide questions of law independently, giving no deference to the decisions of circuit courts. *See* ***Gloudeman v. City of St. Francis***, 143 Wis. 2d 780, 784, 422 N.W.2d 864 (Ct. App. 1988).

¶7 The circuit court determined that UWM was immune from suit due to sovereign immunity and that McGinnity was immune from suit due to qualified immunity. Grunow's appellate brief-in-chief does not challenge the dismissal of the claims on this basis, and her reply brief contains only this response to the argument of UWM and McGinnity on the issue:

> The defendants-respondents would have the complaint against them dismissed without leave to amend by attacking the theories of law which do not need to be pled at all and invoking immunity doctrines before the submission of any evidence that the defendants are entitled to any immunity, qualified or otherwise. At the point that the trial court ruled there was absolutely no evidence before [the court] concerning the responsibilities and duties of … McGinnity, or his involvement in the matter. It was the duty of the court at that time to accept the facts and all the reasonable inferences therefrom set forth in the complaint as true.

¶8 Wisconsin's doctrine of sovereign immunity is derived from WIS. CONST. art. IV, § 27 which states that "[t]he legislature shall direct by law in what

[3] "Failure to state a claim upon which relief can be granted" is a defense that may be made by motion. *See* WIS. STAT. § 802.06(2)(a)6. "If[,] on a motion … to dismiss for failure of the pleading to state a claim upon which relief can be granted, … matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment …." WISCONSIN STAT. § 802.06(2)(b).

manner and in what courts suits may be brought against the state." The University of Wisconsin system was created by statute. *See* WIS. STAT. ch. 36. As UWM and McGinnity note in their appellate brief: "[t]o hold that [UWM] is not entitled to the protections of sovereign immunity 'would be without merit.'" *See* ***State ex rel. Teaching Assistants Ass'n v. University of Wis.-Madison***, 96 Wis. 2d 492, 512 n.27, 292 N.W.2d 657 (Ct. App. 1980) ("[The plaintiff] does not contend … that the university is not an arm or agency of the state entitled to claim the protection of sovereign immunity. Such a contention would be without merit."). As we have previously noted, "the legislature has the 'exclusive' right to consent to a suit against the state" and "consent [will] not be implied from legislation which [is] less than clear and express." ***Id.*** at 509. Grunow has identified no statutory provision that would destroy UWM's defense of sovereign immunity, and we are unaware of any. Accordingly, on the basis of sovereign immunity, we affirm the circuit court's dismissal of Grunow's claims against UWM.

¶9 Next, we address Grunow's claims against McGinnity in his role as an employee of UWM. In Wisconsin, the general rule is that a state employee "is immune from personal liability for injuries resulting from acts performed within the scope of the individual's public office." *See* ***C.L. v. Olson***, 143 Wis. 2d 701, 710, 422 N.W.2d 614 (1988). The immunity encompasses negligent acts. *See* ***Lister v. Board of Regents***, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976) ("[P]ublic officers are immune from liability for damages resulting from their negligence or unintentional fault in the performance of discretionary functions."). As the supreme court has noted, however:

> [E]xception to the general rule of public officer immunity exists where the public officer's or employee's duty is absolute, certain and imperative, involving merely the performance of a specific task and (1) the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for

> the exercise of judgment or discretion; or (2) there exists a known present danger of such force that the time, mode and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion. Additionally, the doctrine of immunity may be inapplicable where a public officer's challenged decision involves the exercise of discretion but the discretion exercised is not governmental, *i.e.*, does not require the application of statutes to facts nor a subjective evaluation of the law.

Olson, 143 Wis. 2d at 717-18 (citations omitted).

¶10 Grunow's amended complaint identifies McGinnity as an adult "employed by the State of Wisconsin and [UWM] as the Director of Student Organization Advising and Resources" and alleges that Grunow's "seizure disorder condition" was "well known" to McGinnity. It further alleges that McGinnity "acted in concert with the dissidents to remove … Grunow from her employment and approved locking her out of The UWM Post offices." Assuming these allegations are true, it is clear that McGinnity's actions were discretionary and were performed in his role as a state employee. Although the discretion involved in McGinnity's challenged actions may have required neither "the application of statutes to facts nor a subjective evaluation of the law," *see* ***id.*** at 718, Grunow's complaint did not allege this or any other exception to the doctrine of qualified immunity. Accordingly, on the basis of qualified immunity, we affirm the circuit court's dismissal of Grunow's claims against McGinnity. *See* ***id.*** at 725 (holding that "complaint failed to state a claim upon which relief could be granted" since plaintiff "failed to allege circumstances warranting exception to the general rule of public officer or employee immunity").

By the Court.—Order affirmed.[4]

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] Resolving this case by utilizing the doctrines of sovereign immunity and qualified immunity obviates the need to address the other issues raised. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) ("As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged."). We choose, however, to admonish Grunow for criticizing the circuit court's decision not to allow her to file a second amended complaint as being an "arbitrary refusal" that was "clearly and definitively erroneous." As UWM and McGinnity point out in their brief to this court, Grunow had already amended the complaint once within six months of the initial filing and therefore was not entitled to amend it as a matter of right. *See* ***Welzien v. Kape***c, 98 Wis. 2d 660, 661, 298 N.W.2d 98 (Ct. App. 1980) (holding that plaintiff may amend pleadings, "as a matter of right," once within six months of initial filing). Additionally, we note that Grunow failed to request leave to file a second amended complaint prior to the hearing.