COURT OF APPEALS
DECISION
DATED AND RELEASED

June 29, 1995

No. 94-2496

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

DOUGLAS DIETZEN,

Plaintiff-Appellant,

v.

DIANE HARDT, LYNN WILLIAMSON, GREGG T. FRAZIER, DALE J. HUTTER, MICHAEL D. RAY,

Defendants-Respondents.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Sundby, JJ.

DYKMAN, J. Douglas Dietzen sued a number of employees of the Department of Revenue (DOR) who, he asserted, were instrumental in firing him from his job with DOR. The State moved to dismiss his complaint because Dietzen had failed to file a notice of claim with the attorney general, as required

by § 893.82(3), STATS.[1] The State filed affidavits in support of its motion, and also asserted that Dietzen's complaint failed to state a claim.

The trial court granted the State's motion, concluding that Dietzen's failure to file a notice of claim was fatal as to his claim for damages, and that his claim for an injunction failed to state a claim upon which relief might be granted. We affirm for the same reasons.

Because the State attached affidavits to its motion to dismiss, and the trial court did not exclude them, we treat the State's motion to dismiss as a motion for summary judgment. Section 802.06(3), STATS. Our review of the trial court's decision to grant summary judgment is *de novo*. ***Stann v. Waukesha County***, 161 Wis.2d 808, 814, 468 N.W.2d 775, 778 (Ct. App. 1991). We follow the same methodology as the trial court. ***Universal Die & Stampings, Inc. v. Justus***, 174 Wis.2d 556, 560, 497 N.W.2d 797, 799 (Ct. App. 1993). We first examine the complaint to determine if it states a claim, and then the answer to ascertain whether it presents a material issue of fact. ***Id***. If they do, we then look to the moving party's affidavits to determine if a *prima facie* case for summary judgment has been established. ***Id***. If it has, we then examine the

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[1] Section 893.82(3), STATS., provides:

> Except as provided in sub. (5m), no civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employe's or agent's duties, and no civil action or civil proceeding may be brought against any nonprofit corporation operating a museum under a lease agreement with the state historical society, unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved. A specific denial by the attorney general is not a condition precedent to bringing the civil action or civil proceeding.

opposing party's affidavits to determine whether there are any material facts in dispute which would entitle the opposing party to a trial. ***Id***.

Expansively construed, Dietzen's complaint asserts that he was fired without statutory authority. He also asserts that all defendants are state employees. But he fails to assert that he complied with § 893.82(3), STATS. Dietzen's failure to do so bars his right to bring an action for damages under state law. ***Casteel v. McCaughtry***, 168 Wis.2d 758, 771, 484 N.W.2d 579, 584 (Ct. App. 1992), *modified*, 176 Wis.2d 571, 500 N.W.2d 277, *cert. denied*, 114 S. Ct. 327 (1993). Because our examination of Dietzen's complaint reveals that he has not stated a claim for damages, he fails the first step of summary judgment methodology. We conclude that the trial court correctly dismissed Dietzen's claim for damages.

Dietzen also requests relief which can best be described as an injunction. He wants the trial court to order the defendants not to disseminate any document, record or other paper prepared during a review of his work performance. He also wants the defendants to be enjoined from maintaining records except in a manner authorized by the Department of Employment Relations (DER). He also asks that his co-workers be enjoined from reviewing his work performance and that all defendants be enjoined from using any document prepared which pertains to his work performance.

Section 893.82(3), STATS., does not apply to claims for injunctive relief. ***Lewis v. Sullivan***, 188 Wis.2d 157, 169, 524 N.W.2d 630, 634 (1994). We conclude that Dietzen's complaint states a claim. The State's answer denies that the defendants' actions were improper. Issue is joined.

Insofar as Dietzen is seeking an injunction preventing his termination, his cause of action is moot. A case is moot when a determination is sought which, if rendered, could have no practical effect upon a then-existing controversy. ***State ex rel. McDonald v. Circuit Court***, 100 Wis.2d 569, 572, 302 N.W.2d 462, 463 (1981). Dietzen has already been fired. Thus, we will not address his request for an injunction preventing his co-workers from reviewing his work. Nor will we address his request that the defendants be enjoined from internally using any document pertaining to his work performance.

Consequently, we are left with Dietzen's claim for an injunction to prevent the defendants from disseminating to the public documents prepared during their review of his work performance and for an injunction preventing the defendants from maintaining a system of records except as authorized by DER. Both of these requests are founded upon Dietzen's belief that DOR's use of an employee's peers to review his or her work is improper.

We will address Dietzen's arguments concerning "peer review" serially. First, he argues that a DER Bulletin and a DOR policy directive do not authorize the use of peer review. But these documents are not of record. An appellate court cannot consider facts outside the record even though stated as such in the briefs. ***Keplin v. Hardware Mut. Casualty Co.***, 24 Wis.2d 319, 326, 129 N.W.2d 321, 324 (1964). Nor do we consider the newspaper articles that Dietzen has cited as authority for his contention that peer review is a prohibited practice. Newspapers have no authority as law in Wisconsin.

Next, Dietzen argues that the defendants were acting outside of their scope of employment. In this way, he hopes to avoid the § 893.82(3), STATS., requirement that he serve a notice of his claim on the attorney general. But the plaintiff in ***Elm Park Iowa, Inc. v. Denniston***, 92 Wis.2d 723, 732, 286 N.W.2d 5, 9-10 (1979), made the same argument and we rejected it:

> A careful reading of the complaint necessitates the conclusion that all these acts of continuing conspiracy alleged were accomplished while D.R.& S. were working on an annual inspection of Elm Row in 1974. There are no other factual allegations in the complaint dealing with the acts of D.R.& S. other than the conclusion that the conspiracy continues from 1974 to date. *Just because a complaint states that these "acts are beyond the scope of their employment and authorization"* does not take a case beyond the notice of claim requirements .... This is especially true when the complaint alleges that the acts involved were done while making an annual inspection of Elm Row in 1974.

(Emphasis added.)

Dietzen focuses on the part of § 893.82(3), STATS., requiring that the act be committed "in the course of" an employee's duties. But the statute also includes acts "growing out of" an employee's duties. ***Elm Park*** dictates that when we undertake a review of an assertion that an act is outside of an employee's duties, we are to look at the complaint to determine whether the acts alleged grew out of an employee's duties or were committed in the course of those duties. Section 893.82(3) is broad enough to include any act of an employee that arises from intentional tortious conduct. ***Elm Park***, 92 Wis.2d at 734, 286 N.W.2d at 10.

Dietzen's complaint asserts that the defendants were DOR employees. The relevant portions of the complaint allege that they took part in an extensive review of Dietzen's work performance. Dale J. Hutter directed the review and Michael D. Ray conducted it. Hutter, Gregg T. Frazier and Diane L. Hardt were DOR employees to whom Dietzen complained that personnel records were not being kept confidential. Hutter and Hardt rejected Dietzen's grievances.

We conclude, as we did in ***Elm Park***, that the acts of which Dietzen complains were acts growing out of the defendants' duties. Hutter is alleged to be a revenue audit supervisor. The nature of a supervisor's work is to direct other employees. Dietzen asserts that Hutter supervised him in an improper way. But that allegedly improper behavior grew out of Hutter's duties. Dietzen also asserts that Ray allegedly reviewed Dietzen's work performance because Hutter told him to do so. It is absurd to contend that an employee has no duty to follow the instructions of his or her supervisor. Ray's acts grew out of his duties as dictated by Hutter.

Frazier and Hardt allegedly did not respond to Dietzen's complaints. But inherent in Dietzen's assertion that they did nothing is the assumption that they were empowered or required to do something. Once we grant Dietzen that assumption, it inevitably follows that their failure to act grew out of their duties. And if they were not empowered or required to do something, then their failure to act is irrelevant.

Dietzen does not explain what Williamson did or failed to do. Consequently, we do not explore her asserted liability further.

Next, Dietzen argues that peer reviews are inherently "prohibitive." The gist of this argument is that peer review damages a person's reputation. But we have explained that Dietzen's failure to comply with § 893.82(3), STATS., prevents him from recovering damages, and enjoining DOR from conducting further peer reviews of his work would be futile because Dietzen no longer works for DOR.

Dietzen's next argument is that the Wisconsin Open Records Law, §§ 19.31-.39, STATS., prohibits the disclosure of his work performance records. The Open Records Law is designed to force government to reveal records, not to permit it to hide them. An exception to the open records law permits a record custodian to deny access to personnel files. ***Village of Butler v. Cohen***, 163 Wis.2d 819, 831, 472 N.W.2d 579, 584 (1991). But permitting a custodian to deny access to a personnel file is a long way from requiring that a custodian must deny such access. Dietzen cites nothing in the Open Records Law which requires a custodian to deny access to personnel files. We fail to see how the development or making of a personnel file mandates the release of those files.

Dietzen again asserts that the Open Records Law required that his personnel records be kept secret. But this time he couples that argument with an assertion that § 230.13(1)(c), STATS., requires that disciplinary records be kept secret. The legislature, however, has not required that these records be kept secret. Section 230.13(1)(c) reads in pertinent part:

> Except as provided in s. 103.13, the secretary and the administrator *may* keep records of the following personnel matters closed to the public: ....

(Emphasis added.)

"May" is generally construed as permissive while "shall" is generally construed as mandatory especially when the word "shall" appears in close juxtaposition. ***Estate of Warner***, 161 Wis.2d 644, 652, 468 N.W.2d 736, 739 (Ct. App. 1991). That is true in the instant case. Section 230.13(2), STATS., reads,

"Unless the name of an applicant is certified under s. 230.25, the secretary and the administrator *shall* keep records of the identity of an applicant for a position closed to the public." (Emphasis added.) We conclude that § 230.13(1)(c) does not require that Dietzen's personnel records be kept closed to the public.

Next, Dietzen contends that the Open Meetings Law, §§ 19.81-.88, STATS., provides a basis for injunctive relief. But the purpose of the Open Meetings Law is to require that government business be done in public, unless matters such as personnel records are being discussed. Section 19.85(1)(f). This statute permits, but does not require, personnel matters to be discussed in secret. Section 19.85(1) notes that some meetings of governmental bodies *may* be convened in closed session, not that they *must* be held in closed session. The Open Meetings Law is inapplicable to Dietzen's request for injunctive relief.

Dietzen terms his last issue, "The Wisconsin Personnel Commission Does Not Have Jurisdiction To Review Employer Conduct During a Performance Evaluation." He does so because if that is true, he could argue that he was deprived of due process of law and seek damages. His failure to comply with § 893.82(3), STATS., would not bar his suit. But he still would have to show that he was not provided an adequate state remedy before the commission. He asserts that his commission remedy is inadequate because he could not be awarded back pay. He cites ***Seep v. State Personnel Comm'n.***, 140 Wis.2d 32, 42, 409 N.W.2d 142, 145 (Ct. App. 1987), for this proposition.

Dietzen misinterprets ***Seep***. ***Seep*** is limited to the proposition that back pay is not available in reinstatement cases. ***Id.*** In ***Seep***, we approved the commission's interpretation of § 230.43(4), STATS., which permitted back pay when an employee was unlawfully removed from his or her position. ***Id.*** Seep was unlawfully denied reinstatement, and we affirmed the commission's denial of back pay. ***Id.*** Dietzen was never entitled to reinstatement because he was fired. Had Dietzen been unlawfully fired, he would have been entitled to back pay. He therefore had an adequate state remedy before the commission and he cannot bring a suit alleging denial of due process.

By the Court.—Order affirmed.

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