

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 28, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**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.

**Appeal No. 2012AP1586**

**Cir. Ct. No. 2010CV4677**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STEVEN F. KINZEL,**

**PLAINTIFF-APPELLANT,**

**v.**

**BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Dane County:  
RICHARD G. NIESS, Judge. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Steven Kinzel appeals from a circuit court's order granting summary judgment in favor of the Board of Regents of the University of Wisconsin System and dismissing Kinzel's amended complaint on the merits. Kinzel argues that the content of an e-mail that Kinzel sent to his

co-workers and superiors was “lawfully disclosing information” and thus met the threshold requirements for bringing a whistleblower action under WIS. STAT. § 230.90(2) (2011-12).<sup>1</sup> Because we conclude that the content of Kinzel’s e-mail does not meet the definition of “information” under WIS. STAT. § 230.90(1)(d), we affirm the circuit court’s order granting summary judgment.

## **BACKGROUND**

¶2 The relevant facts, taken from the parties’ summary judgment submissions, are undisputed. The UW-Extension hired Kinzel in July 1988 as the 4-H State Program Leader in the UW-Extension’s Cooperative Extension Division. Kinzel was involuntarily removed from that role in 1992 and then began serving as a faculty member working as a state 4-H Youth Development Specialist in natural resources, primarily in the area of shooting sports. From about 1996 to August 2009, Kinzel was responsible for coordinating the Wisconsin 4-H Shooting Sports Program.

¶3 One of Kinzel’s responsibilities was to facilitate state-level training to certify county volunteers in various shooting disciplines. Volunteer issues, including decisions to suspend or terminate volunteers, were handled by the county 4-H Youth Development Agent, subsequent to consultation and input from the 4-H Youth Development State Program Director, the 4-H Youth Development District Liaison, and other UW-Extension administrators, including Kinzel. Issues relating to county volunteers were routinely discussed with state coordinating staff, including Kinzel.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 Over the years, the Bayfield County 4-H Shooting Sports Program had experienced issues relating to equipment accountability involving several volunteers. In 2008, Ian Meeker (the 4-H Youth Development Educator for Bayfield County) terminated volunteer Allan Pribnow, following discussions with Kinzel, Gregory Hutchins (at that time, Kinzel's supervisor and the 4-H Youth Development State Program Director), and Susan Pleskac (the Northern District Liaison and the 4-H Youth Development Volunteer Leadership Specialist located in Centuria, Wisconsin).

¶5 On May 14, 2009, Meeker, the county educator responsible for volunteer discipline, sent a letter to two 4-H volunteer leaders, Connie Pribnow (Allan Pribnow's wife) and Troy Kavajecz, requesting that they provide an accurate inventory of purchased and donated shooting sports equipment. Due to a discrepancy between the two volunteers' submitted shooting sports inventory and the 4-H Leaders Association's financial records, Meeker notified Connie Pribnow and Troy Kavajecz by a letter dated June 8, 2009, that they were suspended as volunteers in the shooting sports program.

¶6 Kinzel personally knew and had previously worked with Allan and Connie Pribnow as part of the state shooting sports training team. Meeker e-mailed a copy of the June 8, 2009 suspension letter to Kinzel on that date. Kinzel was kept informed about the actions, but had not been consulted in advance of the decision to suspend the two volunteers. Kinzel did not agree with that decision.

¶7 At a shooting sports management team meeting on July 22, 2009, Kinzel and Hutchins announced that Kinzel would leave the shooting sports program at the end of September 2009, and Doug Thompson would take over

Kinzel's shooting sports duties. Kinzel continued with programming duties as a natural resources specialist. Hutchins also assigned Kinzel a temporary fundraising project, for which Kinzel received a temporary annualized salary augmentation effective July 1, 2009, and ending June 30, 2010.

¶8 On August 1, 2009, Hutchins left his role as the 4-H Youth Development Program Director, and became Secretary of the Faculty and Academic Staff and Assistant Vice Chancellor. Donna Menart assumed the role as Interim State Program Director for 4-H Youth Development and became Kinzel's supervisor.

¶9 On August 26, 2009, at Pleskac's direction, County Educator Meeker sent an e-mail to Kinzel, Northern District Liaison Pleskac, and new Shooting Sports Program Coordinator Thompson (with copies to Interim Program Director Menart and Annette Bjorklund<sup>2</sup>), stating that Connie Pribnow remained suspended and "formally requesting the immediate transfer of all State 4-H Shooting Sports equipment which is currently in the possession of Allan and Connie Pribnow." Kinzel replied to Meeker's e-mail as follows:

Hi Ian,

I'm sorry but I cannot support your decision to terminate two 4-H Shooting Sports leaders in Bayfield County (Connie and Troy). I do understand your action to terminate Allan Pribnow, but to terminate the other two volunteers in the program is reprehensible, in my opinion.

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<sup>2</sup> The record does not include a title for Annette Bjorklund. It is, however, undisputed that Meeker sent his e-mail to members of the Shooting Sports Management Team and 4-H Leaders Association Executive Board and that Kinzel's reply e-mail copied all original recipients, including Dean Klemme. Therefore, it appears Bjorklund is a member of one or both of those groups.

It would be like taking action against any volunteer's spouse due to the action of the other spouse.

Since the State 4-H Shooting Sports equipment has been signed out by me, I will take care of any redistribution that needs to occur.

I believe Connie and Troy should be reinstated immediately and an apology given to them by you. I also agree that the lack of accountability and fair treatment of all volunteers in the Bayfield County 4-H Program by you is a very, very poor reflection on 4-H Youth Development and UW-Extension. I am requesting a full review by UW-Extension regarding how you have handled this situation.

Sincerely,

Steve

¶10 In addition to Meeker, Kinzel sent this e-mail to the original recipients of Meeker's initial e-mail (Pleskac, Thompson, Menart, and Bjorklund) and also copied it to two new recipients, Allan Pribnow and Richard Klemme (Dean and Director of UW-Extension's Cooperative Extension and Menart's superior). Kinzel then sent an additional e-mail solely to Connie Pribnow instructing her not to release state shooting sports equipment to anyone without talking to him about the actions taken to suspend her.

¶11 Kinzel's behavior distressed and angered Pleskac. In an e-mail sent to Menart and Dean Klemme later on August 26, 2009, Pleskac expressed concerns that Kinzel's e-mail contained inaccurate information, included clientele in its distribution, and could potentially hurt the credibility and reputation of Meeker and the 4-H program in Bayfield County.

¶12 Associate Dean Yvonne Horton and Menart met with Kinzel on August 31, 2009, to discuss his actions and the UW-Extension's concerns. At this meeting, Horton and Menart presented Kinzel with a letter dated August 31, 2009,

which constituted official notice that the UW-Extension was placing Kinzel on temporary paid administrative leave due to concerns with his job performance, including his recent actions related to the Bayfield County 4-H Shooting Sports Program. Effective immediately, Kinzel's leadership and involvement with the 4-H Shooting Sports Program were permanently terminated and, during his administrative leave, Kinzel was prohibited from communicating with any individuals associated with his former 4-H youth development responsibilities.

¶13 Kinzel was on paid administrative leave for approximately one month. He returned to work at the end of September 2009, with reassigned duties as a 4-H Youth Development Specialist, tasked with developing curriculum in the area of natural resources. Because Kinzel's reassigned duties did not include the additional assignment relating to fundraising, Menart suspended the salary augmentation associated with that assignment. Effective September 2, 2010, Kinzel retired from the UW-Extension.

¶14 On September 1, 2010, Kinzel filed a whistleblower action under WIS. STAT. § 230.90 against the Board of Regents of the University of Wisconsin System, claiming that his employer retaliated against him after he sent the e-mail on August 26, 2009. The Board moved for summary judgment, arguing that Kinzel's August 26, 2009 e-mail criticizing the decision to suspend the volunteers did not "disclos[e] information" within the meaning of § 230.90(2). The circuit court granted the Board's motion for summary judgment. Kinzel now appeals.

## DISCUSSION

¶15 We review a circuit court's grant of summary judgment de novo. *Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶8, 319 Wis. 2d 622, 769 N.W.2d 1. In other words, we review the grant of summary judgment independently, employing

the same methodology as the circuit court. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate in cases in which there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶16 Kinzel offers three arguments on appeal. First, Kinzel urges this court not to follow *Kmetz v. State Historical Society*, 304 F. Supp. 2d 1108, 1141 (W.D. Wis. 2004)<sup>3</sup> which held that a plaintiff is not entitled to protection under WIS. STAT. § 230.90<sup>4</sup> if a disclosure does not “make ‘secret information known.’” Kinzel asserts that this rule requires a “would-be whistleblower,” who has no way of knowing the extent of a recipient’s knowledge, to guess whether he or she will be protected from retaliation. Second, Kinzel argues that even if this court applies the *Kmetz* rule, his August 26, 2009 e-mail conveyed facts to Dean Klemme that he did not already know: specifically, the names of the two volunteers that were suspended and that “there was no evidence of any wrongdoing on the part of Connie Pribnow and Troy Kavajecz.” Finally, Kinzel asserts that his August 26, 2009 e-mail contained “information” concerning an abuse of authority within the meaning of WIS. STAT. § 230.90(1)(d).

¶17 We will not address Kinzel’s first and second arguments regarding the definition of “disclosure” under *Kmetz*, the *Kmetz* rule’s policy implications, and whether the e-mail conveyed information to Dean Klemme that he did not

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<sup>3</sup> *Kmetz v. State Historical Society*, 304 F. Supp. 2d 1108 (W.D. Wis. 2004) was reversed in part on other grounds on reconsideration by *Kmetz v. Vogt*, No. 03-C-107-C, 2004 WL 298102 (W.D. Wis. Feb. 11, 2004).

<sup>4</sup> At the time of *Kmetz*, the relevant whistleblower statute was numbered WIS. STAT. § 895.65 but the statute was renumbered § 230.90, effective April 5, 2006. *See* 2005 Wis. Act 155, § 60.

already know, because the simple application of the statutory definition of “information” demonstrates that no such “information” was lawfully disclosed in Kinzel’s August 26, 2009 e-mail and thus Kinzel may not seek protection under WIS. STAT. § 230.90(2). We elaborate below.

¶18 WISCONSIN STAT. § 230.90 is one of Wisconsin’s whistleblower provisions.<sup>5</sup> It prohibits state employers from disciplining public employees for disclosing certain information. *Kmetz*, 304 F. Supp. 2d at 1141. A public employee may bring a whistleblower action in circuit court against his or her state employer if:

the employer or employer’s agent retaliates, by engaging in a disciplinary action, against the employee because the *employee exercised his or her rights under the first amendment* to the U.S. constitution or article I, section 3, of the Wisconsin constitution *by lawfully disclosing information* or because the employer or employer’s agent believes the employee so exercised his or her rights.

WIS. STAT. § 230.90(2) (emphasis added).

¶19 The scope of an employee’s protection under WIS. STAT. § 230.90 is narrower than the protection afforded by the First Amendment. *Kmetz*, 304 F. Supp. 2d at 1141. Although Wisconsin’s whistleblower statutes are to be liberally construed, “only certain disclosures made a particular way and regarding

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<sup>5</sup> See, e.g., WIS. STAT. §§ 46.90(4)(b)2.b. (protection from retaliation for reporting elder abuse); 101.055(8) (protection from retaliation for reporting actual or potential safety hazards); 103.10(11) (protection from retaliation under the Family and Medical Leave Act); 111.322(2m) (protection from retaliation under the Fair Employment Law); 111.31-111.395 (protection from retaliation for reporting lack of compliance with state’s labor laws); 146.997(2) (protection from retaliation for health care workers reporting potential legal violations by other workers or health care facilities); 230.83 (protection from retaliation for state employees, distinct from § 230.90 which concerns the exercise of free speech).



a subject matter covered in the statute will qualify for protection.” *Hutson v. State of Wisconsin Pers. Comm.*, 2003 WI 97, ¶37, 263 Wis. 2d 612, 665 N.W.2d 212. WISCONSIN STAT. § 230.90 does not cover employee statements that merely voice opinions or offer criticism. *Kmetz*, 304 F. Supp. 2d at 1115. Rather, a whistleblower action against a state employer has the threshold requirement that the employee be “lawfully disclosing *information*.” WIS. STAT. § 230.90(2) (emphasis added).

¶20 WISCONSIN STAT. § 230.90(1)(d) defines “[i]nformation” as “information gained by the employee which the employee reasonably believes demonstrates ... [a] violation of any state or federal law, rule or regulation [or] [m]ismanagement or abuse of authority in state government, a substantial waste of public funds or a danger to public health and safety.” Here, Kinzel contends that he disclosed “information” about an “abuse of authority.” We disagree. Instead, as we explain, Kinzel merely gives his opinion and criticizes.

¶21 Reviewing the e-mail’s content (as set forth in paragraph nine of this opinion), it is apparent that Kinzel’s e-mail constitutes nothing more than an expression of his opinion of disagreement with the suspension of Connie Pribnow and Troy Kavajecz. Kinzel does not set forth specific facts regarding the events associated with the suspension.

¶22 Kinzel asserts that the e-mail’s sentence “[i]t would be like taking action against any volunteer’s spouse due to the action of the other spouse” constitutes information about an abuse of authority. Kinzel argues that “[t]here could be no clearer statement that Connie Pribnow and Troy Kavajecz had not been ‘negligent’ and in fact were guilty of nothing more blameworthy than having been Alan [sic] Pribnow’s wife and friend.” However, the statement in the e-mail

is nothing more than Kinzel’s conclusory assertion that Connie and Troy did nothing wrong. Kinzel does not present any information supporting his opinion that these people are blameless. While our review is de novo, we agree with the circuit court’s characterization of this sentence: it “merely sets forth an analogy in the form of a simile, which is a rhetorical tool for inference, not a revelation of fact” and “simply constitutes an interpretation of the underlying facts, and thus constitutes an argument or expression of opinion.” WISCONSIN STAT. § 230.90 “protects public employees against retaliation only for disclosures of certain types of information; it does not protect employees that voice their opinions and offer criticism.” *Kmetz*, 304 F. Supp. 2d at 1115. We conclude that Kinzel’s August 26, 2009 e-mail, the content of which was an expression of opinion, does not satisfy the requirements for a protected disclosure of information under the applicable whistleblower statute.

### CONCLUSION

¶23 For the reasons stated, we affirm the circuit court’s order granting summary judgment in favor of the Board of Regents of the University of Wisconsin System and dismissing Kinzel’s amended complaint on the merits.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

