

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 6, 2007

David R. Schanker
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. 2006AP2922

Cir. Ct. No. 2006SC6431

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOHNNY LACY, JR.,

PLAINTIFF-APPELLANT,

V.

**JOHN RAY, SANDRA HAUTAMAKI, TIMOTHY GILBERG
AND SANDRA GRONDIN,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

¶1 BRIDGE, J.¹ Johnny Lacy, Jr., an inmate, appeals an order granting a motion to dismiss his state and federal claims arising from his allegation that

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

prison officials opened his legal mail outside his presence on several occasions. We conclude that Lacy's complaint does not state a constitutional claim under 42 U.S.C. § 1983, and that, to the extent he raises a state law claim, his claim is barred due to his failure to strictly comply with the notice of claim statute. We therefore affirm the circuit court's order dismissing Lacy's complaint.

BACKGROUND

¶2 Lacy is an inmate confined to the Wisconsin Secure Program Facility in Boscobel, Wisconsin. He filed this action in Dane County Circuit Court, Small Claims Division, alleging that Department of Corrections employee Sandra Grondin repeatedly opened his legal mail, and that DOC employees John Ray, Sandra Hautamaki, and Timothy Gilberg ignored his complaints about Grondin.² The defendants denied these allegations.

¶3 The defendants moved for dismissal, which was granted by a court commissioner. Lacy requested and was granted a trial de novo before a circuit court judge. The defendants moved to dismiss the complaint for failure to state a claim, and the circuit court granted the motion. Lacy appeals.

DISCUSSION

¶4 This court reviews the decision of the circuit court, not the decision of the small claims court. *State v. Trongeau*, 135 Wis. 2d 188, 191-92, 400 N.W.2d 12 (Ct. App. 1986). Whether a complaint states a claim upon which relief

² Lacy's complaint also referred to two additional prison employees, Kelly Trumm and Ellen K. Ray as defendants. However, Lacy did not name them as defendants in the caption of his complaint and the circuit court did not treat them as parties.

can be granted is a question of law, which is reviewed without deference to the circuit court's decision. *Heinritz v. Lawrence Univ.*, 194 Wis. 2d 606, 610, 535 N.W.2d 81 (Ct. App. 1995).

Lacy's State Claims

¶5 It is unclear from Lacy's brief whether he seeks damages on a state law theory. In the interest of completeness, we will assume that he did assert a state law claim in addition to his federal claim under 42 U.S.C. § 1983. The defendants argue that, to the extent Lacy asserts such a claim, the court was without jurisdiction to hear his claim because Lacy failed to comply with Wisconsin's notice of claim statute. WIS. STAT. § 893.82(3). Whether Lacy complied with § 893.82(3) is a question of law which we review de novo. *See Nichols v. Nichols*, 162 Wis. 2d 96, 103, 469 N.W.2d 619 (1991) (citation omitted) ("Application of a statute to an undisputed set of facts is a question of law.")

¶6 Prior to filing suit against a state employee, a claimant must serve a written notice of the claim upon the attorney general's office within 120 days of the incident from which the claim arises. *See* WIS. STAT. § 893.82(3). Whether Lacy complied with § 893.82(3) is a question of law. *Sambs v. Nowak*, 47 Wis. 2d 158, 164, 177 N.W.2d 144 (1970). A claimant must adhere to each and every requirement in the statute. *Kellner v. Christian*, 197 Wis. 2d 183, 195, 539 N.W.2d 685 (1995). The requirements of the statute are not general guidelines; they are rules that must be adhered to with exact care. *Newkirk v. DOT*, 228 Wis. 2d 830, 833, 598 N.W.2d 610 (Ct. App. 1999). Failure to comply with the requirements of § 893.82 is fatal to any claim because its requirements are

jurisdictional. *Riccitelli v. Broekhuizen*, 227 Wis. 2d 100, 116, 595 N.W.2d 392 (1999).

¶7 Lacy filed a notice of claim on February 27, 2006. However, his notice did not conform to the requirements of WIS. STAT. § 893.82(3). In particular, the statute requires that the notice of claim must set forth the time, date, location, and the circumstances of the event giving rise to the claim for the injury or damage and the names of persons involved, including the name of the state officer, employee or agent involved. *See* § 893.82(3). Lacy's notice of claim set forth the relevant date as "Beginning 7-2005 [illegible] at all times relevant hereto." It described the circumstances of the relevant event as follows:

The guard Sandra Grondin, who work[s] in the mail room, routinely open[s] prisoners legal mail, and stamp[s] it 'opened inadvertently.' She has a pattern of doing this, and the Institution Complaint Examiner (ICE), only affirms the complaints with modifications when C/O Sandra Grondin should be removed from that position.

....

My rights under 42 U.S.C. § 1983, and 1983(3), the civil rights statute, and the Ku Klux Klan Act, Wisconsin Statutes 146.82, 146.84(1)(b) and 893.53, 905.04,: Peter Huijbregtse, Ellen K. Ray, Kelly Trumm, Dr. B. Cox, Sandra Huitamaki (sic), John Ray, Cynthia Throp, Capt. John W. Sharpe, C/O's Sandra Grondin, Sergeant Roberts, and Christine Beerkircher, have violated them.

¶8 As the circuit court observed, it was impossible for the attorney general's office to determine from this document whether Lacy complied with 120-day limit on claims. Further, Lacy's notice of claim did not provide the dates upon which his mail was opened, nor did it include any other information that would alert the attorney general as to what events gave rise to Lacy's claims. The only person named in connection with a specific complaint was Sandra Grondin.

As to her, the notice of claim stated that she “routinely” opens prisoners’ mail, but did not specify when. Because Lacy did not comply with the notice of claim requirements of WIS. STAT. § 893.82(3), the circuit court properly dismissed Lacy’s state law claims.³

Lacy’s 42 U.S.C. § 1983 Claim

¶19 In addition to state law claims, Lacy advances a claim under 42 U.S.C. § 1983, in which he asserts that prison officials violated his constitutional rights under the First and Fourteenth Amendments. Section 1983 of Title 42, United States Code, addresses violations of federal law and the United States Constitution; it is not a means to redress violations of state procedures. *Sandin v. Conner*, 515 U.S. 472, 478-83 (1995); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege a violation of a right secured by the Constitution or the laws of the United States and must show that the deprivation of that right was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). The plaintiff must show that the defendant’s conduct was the result of more than gross negligence. *Lewis v. Anderson*, 308 F.3d 768, 773 (7th Cir. 2002). Further, the mere fact that the conduct in question violates DOC regulations does not per se form the basis of § 1983 liability. *Kompare v. Stein*, 801 F.2d 883, 888 (7th Cir. 1986).

³ Lacy argues that the defendants cannot assert lack of compliance with WIS. STAT. § 893.82(3) as a defense because the defendants were represented before the circuit court by corporation counsel rather than by the attorney general. However, § 893.82(3) requires notice to the attorney general whenever a person brings a claim against a state employee. For purposes of compliance with the notice of claim statute, it does not matter who represents the employee.

¶10 In *State v. Steffes*, 2003 WI App 55, 260 Wis. 2d 841, 659 N.W.2d 445, we concluded that WIS. ADMIN. CODE § DOC 309.04(3)(a), the administrative code provision that states that an inmate’s legal mail must be opened in the presence of an inmate—the regulation upon which Lacy relies—does not create a liberty interest protected by the due process clause of the Fourteenth Amendment. *Id.*, ¶24. Accordingly, Lacy’s complaint does not set out a valid basis for his Fourteenth Amendment claim.

¶11 With respect to Lacy’s First Amendment claim, an inmate’s legal mail is afforded protection by the First Amendment right to both send and receive mail, and also to prevent the potential interference with the inmate’s right of access to the court. *See Wolff v. McDonnell*, 418 U.S. 539, 577 (1974), *see also Castillo v. Cook County Mail Room Dept.*, 990 F.2d 304, 305-06 (7th Cir. 1993). An inmate’s legal mail, however, is entitled to greater protections because of the potential for interference with his right of access to the courts. *Rowe v. Shake*, 196 F.3d 778, 782 (7th Cir. 1999). Thus, when a prison receives a letter for an inmate that is marked with an attorney’s name and a warning that the letter is legal mail, officials potentially violate the inmate’s rights if they open the letter outside of the inmate’s presence. *See Wolf*, 418 U.S. at 577.

¶12 Lacy’s complaint referenced seven incidents. Three of the incidents involved mail received from either the Center for Constitutional Rights or the Office of Lawyer Regulation and did not qualify as legal mail under DOC regulations.⁴ A fourth incident involved a person with the initials “T.M.,” who is

⁴ WIS. ADMIN. CODE § DOC 309.04(3) provides:

(continued)

not a defendant. The remaining three incidents involved Grondin's opening Lacy's mail and stamping the envelopes "opened inadvertently." The envelopes were also dated and initialed by Grondin. Lacy does not allege that Grondin or anyone else read his mail or that the mail got to him more slowly. He also does not allege that his mail was opened pursuant to a deliberate policy or practice. Nor does he allege that the opening of his mail impeded his access to the courts. The defendants assert that Lacy has alleged simply that his legal mail was opened by mistake, and contends that, at most, Lacy has alleged negligence. We agree. Mere negligence is not sufficient to establish liability under 42 U.S.C. § 1983. *Kincaid v. Vail*, 969 F.2d 594, 602 (7th Cir. 1992).

¶13 Lacy also raises two other constitutional claims related to his Sixth Amendment right to counsel and the Privileges and Immunities Clause of the

(3) Institution staff may not open or read for inspection mail sent by an inmate to any of the parties listed in pars., (a) to (j), unless the security director has reason to believe that the mail contains contraband. Institution staff may open mail received by an inmate from any of these parties in the presence of the inmate. Staff may inspect the document but only to the extent necessary to determine if the mail contains contraband, or if the purpose is misrepresented. Staff may read the mail if staff has reason to believe it is other than a legal document. The department shall process contraband in accordance with sub. (4)(e) (intro.) and 1., (f) and (g). This subsection applies to mail clearly identifiable as being from one or more of the following parties:

- (a) An attorney.
- (b) The governor of Wisconsin.
- (c) Members of the Wisconsin legislature.
- (d) Members of the United States congress.
- (e) The secretary of the department.
- (f) The administrator of the division.
- (g) The attorney general or an assistant attorney general of Wisconsin.
- (h) An investigative agency of the federal government.
- (i) The clerk or judge of any state or federal court.
- (j) The President of the United States.

Fourteenth Amendment. We conclude that his claims are insufficiently developed to warrant a response. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶14 For the above reasons, we affirm the circuit court's order dismissing Lacy's claims.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

