MEMORANDUM DECISION

APPELLANT *PRO SE*[1]

Dale Williamson
New Albany, Indiana

ATTORNEYS FOR APPELLEE

Barry L. Loftus
Lauren A. Binger
Stuart & Branigan LLP
Lafayette, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Dale Williamson,
Appellant-Plaintiff,

v.

Ivy Tech Community College,
Appellee-Defendant.

March 11, 2022

Court of Appeals Case No. 21A-PL-1386

Appeal from the Floyd Superior Court

The Hon. Bradley B. Jacobs, Special Judge

Trial Court Cause No. 22D01-2010-PL-1144

Bradford, Chief Judge.

[1] Williamson was initially represented in this appeal by attorney W. Edward Skees, who submitted a brief and reply brief on his behalf before his request to withdraw was granted.

Case Summary

[1] Dale Williamson, who has been diagnosed with learning disabilities, enrolled at Ivy Tech's Sellersburg location in 2015 and was provided reasonable accommodations for his disabilities. Williamson, however, alleged that a professor had failed to provide him his designated accommodations in 2017, which prompted him to file an internal grievance and then a complaint with the United States Department of Education Office of Civil Rights ("DOE OCR"), which complaint resulted in an agreement between Ivy Tech and DOE OCR in 2018. As it happened, Williamson did not attempt to enroll at Ivy Tech again until 2020, when he approached Ivy Tech and asked if it would abide by its 2018 agreement with DOE OCR, presenting Ivy Tech with a specific list of requested accommodations. When Ivy Tech's response was deemed unsatisfactory, Williamson again filed an internal grievance, followed by a second complaint with DOE OCR.

[2] The DOE OCR procedure was stayed pending an ultimately unsuccessful mediation, and Williamson sued Ivy Tech, alleging violations of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973 ("RA") and that Ivy Tech had breached a contract it had formed with him. Williamson also made several tort claims. Ivy Tech moved to dismiss all of Williamson's claims for failure to state any claim upon which relief may be granted, which motion the trial court granted in full. Williamson contends that the trial court erred in dismissing his ADA and RA claims, his breach-of-contract claim, and his tort claims. Because we disagree with Williamson's third contention, but agree with

his first and second contentions, we affirm in part, reverse in part, and remand for further proceedings.

Facts and Procedural History[2]

[3] Ivy Tech is a community college system and instrumentality of the State of Indiana ("the State"). *See* Ind. Code § 34-6-2-49; *see also* Ind. Code § 34-6-2-110. Williamson enrolled at Ivy Tech in 2015 and was provided reasonable educational accommodations in accordance with his diagnosed learning disabilities. In 2016, however, an Ivy Tech professor allegedly refused to provide Williamson's designated educational accommodations, specifically extra time on the submission of a writing assignment and the opportunity for a faculty member to read over his writing assignment and provide constructive feedback. Williamson also alleged that the professor had refused to give him a letter grade for the writing assignments that he had turned in. Williamson filed an internal grievance with Ivy Tech for its alleged refusal to provide him his educational accommodations in his English 111 course. In response, Ivy Tech refunded Williamson's course fee for English 111 and assured him that Ivy Tech would continue to provide reasonable educational accommodations.

[4] In 2017, Williamson was enrolled in English 112 at Ivy Tech. At some point, Williamson's English professor learned that he had been using his laptop computer during class for purposes other than taking notes. The professor

---

[2] Most of the facts in this section are taken from the allegations in Williamson's complaint and do not seem to be in dispute.

requested a meeting with Williamson to discuss the use of a laptop computer in class. Williamson filed an internal grievance alleging that Ivy Tech had failed to provide his educational accommodations for English 112 and, when the results of the grievance procedure were deemed unsatisfactory, filed a complaint with the DOE OCR. The DOE OCR opened an investigation into Ivy Tech and eventually entered an agreement with it in 2018, pursuant to which the DOE OCR would discontinue its investigation and Ivy Tech would agree to a list of terms without admitting to a violation. One of the terms of the agreement was that Ivy Tech would provide Williamson access to his reasonable educational accommodations in English 112. As it happened, however, Williamson left Ivy Tech in 2017 and has never re-enrolled.

[5] Williamson approached Ivy Tech in 2020 to discuss the possibility of re-enrollment and to see if Ivy Tech would abide by their previous offer to allow him to retake English 112 at no cost. Ivy Tech's Vice Chancellor and Dean of Students responded to Williamson and stated that he would not be charged tuition for English 112. Williamson contacted Ivy Tech's Office of Disability Support Services ("ODSS") to provide his list of chosen educational accommodations. Williamson sought assurances from ODSS that his list of chosen educational accommodations would be available to him in English 112 regardless of professor or assignment. ODSS responded with its internal procedure for obtaining accommodations on assignments and in the classroom. Williamson again filed an internal grievance alleging that Ivy Tech had denied him access to his educational accommodations, followed by a second complaint

with DOE OCR. DOE OCR's investigation was put on hold pending the outcome of a mediation with Williamson and Ivy Tech. Mediation was held on September 12, 2020, but was unsuccessful.

[6] Williamson filed suit against Ivy Tech on October 8, 2020, raising six claims. Williamson's claims arose from an allegation that Ivy Tech and the State had refused to comply with their obligations pursuant to ADA and RA when he approached Ivy Tech on June 2, 2020, to inquire about reenrolling for the Fall 2020 semester and asked how his disabilities would be accommodated. Williamson made claims of ADA and RA violations, a breach-of-contract claim, and tort claims. The State was dismissed as a party to this suit on December 23, 2020.

[7] On January 4, 2021, Ivy Tech filed its motion to dismiss, arguing, *inter alia*, that Williamson had failed to state any claims upon which relief could be granted. A hearing was held on Ivy Tech's motion to dismiss on April 29, 2021. Ivy Tech filed its supplemental brief to its motion to dismiss on May 12, 2021. A hearing on Ivy Tech's supplemental brief to its motion to dismiss was held on May 20, 2021. The trial court granted Ivy Tech's motion to dismiss in full and issued its findings of fact and conclusions thereon on June 3, 2021.

Discussion and Decision

[8] Williamson is appealing from the trial court's grant of Ivy Tech's motion to dismiss, which was made pursuant to Indiana Trial Rule 12(B)(6).

> A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it. *Magic Circle*

> *Corp. v. Crowe Horwath, LLP*, 72 N.E.3d 919, 922 (Ind. Ct. App. 2017). Our review of a trial court's grant or denial of a motion based on Indiana Trial Rule 12(B)(6) is de novo. *Id*. When reviewing a motion to dismiss, we view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in the nonmovant's favor. *Id*. Motions to dismiss are properly granted only "when the allegations present no possible set of facts upon which the complainant can recover." *Id*. at 922–23 (quotations omitted).

CRIT Corp. v. Wilkinson, 92 N.E.3d 662, 666 (Ind. Ct. App. 2018) (footnote omitted). "In a 12(B)(6) motion, the court is required to take as true all allegations upon the face of the complaint, and may only dismiss if plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint." *Dixon v. Siwy*, 661 N.E.2d 600, 603 (Ind. Ct. App. 1996).

I. ADA and RA Claims

[9] Congress enacted the ADA to eliminate discrimination and to create causes of action for qualified persons who have faced discrimination. *See* 42 U.S.C. § 12101(b). The ADA contains three main titles, with Title II addressing public services, including those provided by a state university like Ivy Tech. *See* 42 U.S.C. §§ 12131–65. The ADA provides, in part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The ADA requires that the public entity make "reasonable

accommodation" to allow the disabled person to receive the services or to participate in the public entity's programs. 28 C.F.R. § 35.130(b)(7).

[10] Similarly, Section 504 of the RA provides that "[n]o otherwise qualified individual with a disability […] shall, solely by reason of her or his disability, be excluded from the participation in or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). "[A]lthough there are subtle differences between these disability acts, the standards adopted by Title II of the ADA for state and local government services are generally the same as those required under section 504 of federally assisted programs and activities." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 271 (2nd Cir. 2003).

[11] Ivy Tech contends, as it did below, that Williamson's ADA and/or RA claims are barred by the doctrine of sovereign immunity. It would be premature to address this potential affirmative defense to Williamson's ADA and RA claims at his juncture of the litigation. Affirmative defenses may only be raised in a 12(B)(6) motion to dismiss if they appear on the face of the complaint. *See Middelkamp v. Hanewich*, 173 Ind. App. 571, 576, 364 N.E.2d 1024, 1029 (1977) ("If a defense in bar of plaintiff's claim appears on the face of the complaint, then it is clear beyond doubt that plaintiff can 'prove no set of facts … which would entitle him to relief.'") (citation omitted). In his complaint, Williamson alleges that Ivy Tech failed to satisfy its ADA and RA obligations to him by refusing to provide reasonable accommodations for his disabilities. To the extent that Williamson mentions sovereign immunity, it is to allege that Ivy

Tech does not have it. Because there is nothing on the face of Williamson's complaint that leads to the inescapable conclusion that his ADA and RA complaints are barred by sovereign immunity, we conclude that the trial court erred in granting Ivy Tech's motion to dismiss Williamson's ADA and RA claims for failure to state a claim. *See id.*, 364 N.E.2d at 1029.

II. Breach-of-Contract Claims

[12] In his complaint, Williamson contends that Ivy Tech breached the terms of a contact with him, causing damages. It is well-settled that "[t]o recover for a breach of contract, a plaintiff must prove that: (1) a contract existed, (2) the defendant breached the contract, and (3) the plaintiff suffered damage as a result of the defendant's breach." *Collins v. McKinney*, 871 N.E.2d 363, 370 (Ind. Ct. App. 2007). For its part, Ivy Tech contends that no contract existed between it and Williamson in 2020 and that Williamson failed to adequately plead breach-of-contact claims related to agreements entered into in 2018 and 2016.

[13] Williamson contends that he has alleged a valid breach-of-contract claim against Ivy Tech for its actions in 2020, when it did not agree to his pre-enrollment demands for accommodations. Keeping in mind that we must we view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in that party's favor, *see CRIT Corp.*, 92 N.E.3d at 666, we conclude that Williamson has sufficiently pled a breach-of contact-claim. In Williamson's complaint, he alleged the following:

111. Pursuant to Restatement Second of contracts § 71 Plaintiff and Ivy Tech are parties to a legally binding contract.

a. Plaintiff was required to pay Ivy Tech for the course (which was paid by [Indiana Vocational Rehabilitation Services ("IVRS")] and with other government funds)

b. Among other thing, Ivy Tech was required to provide Plaintiff with curtain [*sic*] reasonable disability academic adjustments under 504 [of the RA] so the Plaintiff could complete course.

112. Ivy tech is required to comply with all parts ADA/504 as it is a[n] implied contract[] written in the law.

113. The 14th amendment "equal protection clause" is automatically a[ ]part of all Ivy Tech's contracts, which protects students' civil rights, including the Plaintiff's disability civil right[s].

114. Once the Plaintiff notified and provided Title II documentation proof to Ivy Tech that otherwise qualified individual with disabilities and taking course under the [RA], the burden shifts to Ivy Tech to prove that the action[s] they took were actions of good faith and not discriminatory.

115. Generally, Section 504 at 34 C.F.R. § 104.41 applies to Ivy Tech once they agree to accept payment from IVRS on behalf [of] the Plaintiff's for fees charged by Ivy Tech for class.

116. Plaintiff performed his obligations under the parties' contract and required by ADA/504.

[….]

121. Generally, restatement (Second) of contracts § 250 allows Plaintiff to take action once an anticipated breach is knowingly about to happen.

122. Ivy Tech breached the parties' contract by failing to perform its 504 obligations under the parties' contract.

> 123. Plaintiff has suffered damages, and will continue to suffer damage, as a result of Ivy Tech's breach of the parties' contract.

Appellant's App. Vol. II pp. 111–13 (citations omitted).

[14] In summary, Williamson has pled the existence of a contract between him and Ivy Tech in 2020, that he fulfilled his obligations thereunder, that Ivy Tech breached the contract by failing to fulfill its contractual obligations to him, and that he suffered damages as a result. To the extent that any of these factual assertions might not be supported by evidence, this is a question not properly addressed at this point of the litigation, at which we are required to assume that they are. *See Dixon*, 661 N.E.2d at 603. We conclude that the trial court erred in dismissing Williamson's breach-of-contract claim for failure to state a case upon which relief may be granted.

III. ITCA Claims

[15] Williamson contends that the trial court improperly dismissed his tort claims against Ivy Tech, while Ivy Tech contends that dismissal was warranted due to Williamson's failure to file the statutorily-required notice. Although Williamson claimed in the trial court he is not prosecuting any tort claims against Ivy Tech, he concedes on appeal (a concession with which we agree) that he is. Specifically, in Williamson's complaint, under Count I he alleged constructive fraud, fraudulent misrepresentation, and negligence; under Count IV, "Hostile Learning (Work) Environment"; under Count V, "Retaliation"; and under Count VI, "Third Party Contract Interference[.]" Appellant's App. Vol. II pp. 113, 114.

[16] That said, compliance with the notice provisions of the ITCA is a condition precedent to filing a tort suit against a qualifying political subdivision, which Williamson acknowledges did not occur in this case. *See Orem v. Ivy Tech State College*, 711 N.E.2d 864, 869 (Ind. Ct. App. 1999) (noting that the "notice provision is […] procedural precedent which must be fulfilled before filing suit"), *trans. denied*. A claimant must tender the statutorily-prescribed notice within 180 days after the alleged loss. *See* Ind. Code §§ 34-13-3-8, -12; *Orem*, 711 N.E.2d at 869 (noting that tort claims brought against a political subdivision "are barred unless the governing body of the political subdivision is given notice of the claim within one hundred and eighty days after the loss occurs."). Once a defendant raises the failure to comply with the ITCA, "the burden shifts to the plaintiff to prove compliance[,]" *Davidson v. Perron*, 716 N.E.2d 29, 34 (Ind. Ct. App. 1999), which Williamson did not even attempt to do in the trial court, insisting, instead, that his tort claims were really contact claims.[3] Indiana courts have consistently held that the failure to comply with the ITCA's notice requirements requires dismissal. *See, e.g.*, *Orem*, 711 N.E.2d at 870. Because Williamson brought several tort claims against Ivy Tech but failed to comply with the notice provisions of the ITCA, the trial court properly dismissed them.

---

[3] Williamson argues for the first time on appeal that his filing of a grievance with the DOE OCR, a copy of which was sent to Ivy Tech, constituted sufficient notice of his intent to bring a tort claim. Even if we were to assume, *arguendo*, that the filing of a grievance with the DOE OCR could constitute sufficient notice pursuant to the ITCA, this argument is waived because it was made for the first time on appeal. *See Smith*, 635 N.E.2d at 1148.

[17] The judgement of the trial court is affirmed in part and reversed in part, and we remand for the dismissal of Williamson's ITCA claims and further proceedings on his ADA, RA, and contract claims.

Crone, J., and Tavitas, J., concur.