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04-07-2025

Clerk of Circuit Court

Waukesha County

2024CV001199

BY THE COURT:**DATE SIGNED: April 7, 2025**

Electronically signed by Michael P. Maxwell
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT- BRANCH 8

WAUKESHA COUNTY

JANEL BRANDTJEN,

Petitioner,

Case No: 24-CV-1199

vs.

WISCONSIN ETHICS COMMISSION,
ANDREW WEININGER, GERALD PTACEK,
MARYANN SUMI, CAROUSAL BAYRD,
PAT STRACHOTA, PAUL HIGGINBOTHAM,
in their official capacities as
Commissioners,

Respondents.

DECISION AND ORDER – MOTION TO DISMISS

BACKGROUND

Plaintiff Janel Brandtjen (“Plaintiff”) is an adult resident of the State of Wisconsin, Waukesha County. (*Dkt. 2, ¶ 1.*) At the time the action was filed, she served as the Representative for Wisconsin Assembly District 22. (*Id.*) At the time the action was filed, there were six commissioners that govern WEC – Andrew Weininger, Gerald Ptacek, Maryann Sumi,

Carousel Bayrd, Pat Strachota, and Paul Higginbotham. (*Id.*, ¶ 3.) The membership of WEC's commissioners are drawn two from the Executive Branch via appointment by the Governor, and four from the Legislative Branch via appointment by members of the Legislature.¹ (*Id.*, p. 8.)

A complaint was filed with WEC on December 2, 2022 (the "December Complaint") alleging violation of campaign finance laws by a political candidate in Racine County—Adam Steen—in collusion with certain individuals. (*Id.*, p. 13.) Plaintiff was not named in the December Complaint as a respondent, nor was there any allegation in the December Complaint that Plaintiff engaged in any wrongdoing. (*Id.*) A second complaint was filed on May 2, 2023, (the "May Complaint") specifically alleging that a political group, Friends of Adam Steen, with the help of the Plaintiff's campaign committee, Republican Party of Langlade County, Chippewa County Republican Party, and Florence County Republican Party directed donations to county parties to then be redistributed back to Friends of Adam Steen. (*Id.*)

On February 22, 2023, WEC made findings that there was reasonable suspicion that the December Complaint demonstrated that a violation of campaign financing laws had occurred and authorized an investigation into those allegations. (*Id.*) Although WEC has never made any finding that reasonable suspicion exists that the May Complaint demonstrates that any violation of campaign financing laws has occurred, WEC pursued an investigation into the allegations of the May Complaint. (*Id.*, p. 14.) On August 3, 2023, WEC hired a special investigator to investigate the allegations of the December and May Complaints. (*Id.*) WEC never held any vote in regard to hiring a special investigator. (*Id.*) WEC did not notify the Waukesha County District

¹ The Court would note that Dkt. 2 contains a nearly indecipherable numbering scheme, so where it is clear, the Court references a particular paragraph number, but other times, the Court simply references a page number. The Plaintiff attempted to remedy this mistake by attaching a correctly numbered complaint to a subsequent declaration, but did not file it as an amended complaint.

Attorney when it hired a special investigator. (*Id.*) On February 21, 2024, WEC made an electronic referral (the “Referral”) of the Complaints to the Waukesha County District Attorney. (*Id.*) The Referral contained only the Findings of Fact and a Final Order issued by the Commission. (*Id.*) In the Referral, WEC purported to task the Waukesha County District Attorney with “investigation and prosecution of Representative Brandtjen and any other person the District Attorney deems appropriate for the contributions to the Republican Party of Langlade County.” (*Id.*) The Referral was made pursuant to *Wis. Stat. § 19.49(2)(b)9.* and 13. (*Id.*) In the Referral, WEC purports to “reserve() the right to refer the matter to another district attorney or the Wisconsin Department of Justice as provided in *Wis. Stat. § 19.49(2)(b)13.* and 14.” (*Id.*)

DISCUSSION

Plaintiff brings two causes of action. First, Plaintiff asks for declaratory judgment that *Wis. Stat. § 19.49* violates the separation of powers doctrine. Second, Plaintiff asks for declaratory judgment that Defendant has violated her due process rights. Defendant argues that this is no separation of powers issue under the enacted statute. Further, Defendant argues that Plaintiff’s due process rights have not be violated by its investigative process.

Wisconsin's pleading standard mandates that all pleadings include: "a short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief," and "a demand for judgment for relief the pleader seeks." *Wis. Stat. § 802.02(1)* (2023-2024); see also Fed. R. Civ. P. 8(a).

"A motion to dismiss tests the legal sufficiency of the complaint." *Ladd v. Uecker*, 2010 WI App 28, ¶ 7, 323 Wis. 2d 798, 780 N.W.2d 216. In evaluating such motions, the Court must

accept as true "all facts well-pleaded in the complaint and the reasonable inferences therefrom."

Data Key Partners v. Permira Advisers LLC, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d

693. The complaint is liberally construed in favor of the plaintiff and in favor of stating a claim.

Jenkins v. Sabourin, 104 Wis. 2d 309, 313, 311 N.W.2d 600 (1981). However, the Court may not consider facts outside the complaint "in the process of liberally construing the complaint." *Doe*

67C v. Archdiocese of Milwaukee, 2005 WI 123, ¶19, 284 Wis. 2d 307, 700 N.W.2d 180.

Additionally, legal conclusions alone are inadequate to withstand a motion to dismiss. *Data Key*, 2014 WI 86, ¶ 19. A motion to dismiss should only be granted if it is certain "that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations." *Morgan v. Pa. Gen. Ins. Co.*, 87 Wis. 2d 723, 732, 275 N.W.2d 660 (1979).

The Wisconsin Supreme Court adopted the heightened plausibility pleadings standard, where a plaintiff must "allege facts that, if true, plausibly suggest a violation of applicable law." *Data Key*, 2014 WI 86, ¶ 21. The sufficiency of a complaint depends on the substantive law of the claims, which dictates the necessary facts to plead. *Data Key*, 2014 WI 86, ¶ 31 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The facts must be "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Data Key*, 2014 WI 86, ¶ 25 (citing *Twombly*, 550 U.S. 544, 555). Factual assertions describe the "who, what, where, when, why, and how" of the claim. *Data Key*, 2014 WI 86, ¶ 173 n.9 (citing *State v. Allen*, 2004 WI 106, ¶ 23). For example, in *Voters with Facts v. City of Eau Claire*, the Wisconsin Supreme Court held that when the complaint only establishes the possibility of entitlement to relief and lacks any further evidence, the complaint fails to meet the plausibility required to survive a motion to dismiss. 2018 WI 63, ¶ 55, 382 Wis. 2d 1, 913 N.W.2d 131. Additionally, whether a complaint raises a justiciable controversy is appropriately

determined on a motion to dismiss. *See In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d 403, 410, 466 N.W.2d 227, 230 (Ct. App. 1991).

I. Does *Wis. Stat. § 19.49* violate the separation of powers doctrine?

To determine whether *Wis. Stat. § 19.49* violates the separation of powers doctrine, first the Court must determine which branches of government are affected. Clearly, WEC is an executive branch agency. Chapter 15 of the Wisconsin Statutes speaks to both departments within the executive branch and to independent agencies. An “[i]ndependent agency” “means an administrative agency within the executive branch created under subch. III.” *Wis. Stat. § 15.01(9)*. WEC is one such independent agency within the executive branch. *Wis. Stat. § 15.62*. Defendant concedes as much. (Dkt. 2, ¶ 2.) Further, no members of the legislature can serve as commissioners on the commission. *Wis. Stat. § 15.62(2)*.

Members of WEC “shall be appointed and serve terms as provided under s. 15.62.” *Wis. Stat. § 15.06(1)(e)*. WEC is comprised of six members, appointed for five-year terms. *Wis. Stat. § 15.62(1)*. Four of the members are appointed by particular legislative leaders—one by each of the senate majority leader, senate minority leader, assembly speaker, and assembly minority leader – providing an equal partisan split for these appointments. *Wis. Stat. § 15.62(1)(a)1–4*. Two members are former elected judges, nominated by the governor with the advice and consent of the majority of the members of the Senate. *Wis. Stat. § 15.62(1)(a)5*.

Plaintiff argues that because the legislature reserved the appointment of four of the six members of the commission, the legislature is improperly invades the executive authority in that commission members by their very votes on matters before it are exercising executive power – in particular, the power of prosecutorial discretion. This argument fails as the statutory structure of

the commission provides for appointment authority by certain legislative leaders – not authority to usurp commission powers provided for under statute. The power of members of one co-equal branch to appoint members of another co-equal branch is not in-and-of-itself evidence of a separation of powers violation under the Wisconsin Constitution. As the Defendant rightly points out, the governor having the power to appoint judges where the statute provides for it in the event of a vacancy would be a similar separation of powers violation (executive controlling the judicial) under the Plaintiff's logic. Clearly, this is the wrong analysis.

The Wisconsin Constitution expressly provides for the governor's appointment of judicial vacancies. *Wis. Const. art. VII, § 9*. The Wisconsin Constitution has long recognized, and state statutes have long reflected, that legislative members can play a role in the appointment of certain executive branch positions. *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶ 50, 402 Wis. 2d 539, 976 N.W.2d 821; see also, e.g., *Wis. Stat. § 15.07(1)* (providing general requirement of senate confirmation for members of executive boards that direct and supervise executive agencies). In fact, this interplay between the co-equal branches of government on appointments was recently reaffirmed once again by a unanimous Wisconsin Supreme Court. *See Wis. Elections Comm'n v. LeMahieu*, 2025 WI 4, 16 N.W.3d 469. The statutes enabling WEC to have a structure where members of the commission come from an appointment process that includes the Executive and Legislative branches does not violate the separation of powers doctrine.

II. Did WEC violate the Plaintiff's substantive and procedural due process rights?

The Plaintiff raises both substantive and procedural due process violations in how the WEC conducted its investigation. In short, the Plaintiff alleges that the WEC is attempting to

investigate and potentially prosecute the Plaintiff without having a “sworn complaint” within the meaning of *Wis. Stat. § 19.49(2)(a)*. Plaintiff argues that if there was a “sworn complaint” then she would have been entitled to notice of the complaint within five days of it being filed and she received no notice. See *Wis. Stat. § 19.49(2)(b)1*.

To “establish a violation of procedural due process, a plaintiff must demonstrate both: (1) the deprivation of a protected liberty interest—‘life, liberty, or property’—by state action and (2) that the process he received before that deprivation fell short of the minimum the Constitution requires.” *Miller v. Zoning Bd. of Appeals of Vill. of Lyndon Station*, 2023 WI 46, ¶ 11, 407 Wis. 2d 678, 991 N.W.2d 380. Procedural due process basically requires that the State afford the opportunity to be heard at a meaningful time in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

WEC argues that the analysis should end with the first prong in that none of the actions taken by them affected a liberty or property interest of the Plaintiff. In effect, WEC argues that because they do not prosecute criminal or civil violations, there is virtually no procedural protections that Plaintiff enjoys. WEC’s view is somewhat akin to a law enforcement officer arguing procedural due process does not come into play, because during this investigatory phase, there is no possibility of a deprivation of a protected liberty interest, until the complaint is filed by the district attorney. This is simply wrong. WEC initiating an investigation is the State acting against one of its citizens and thus procedural due process protections apply to that citizen the minute the State begins to act. The Plaintiff “clearly must have more than an abstract need or desire for [due process]. [S]he must have more than a unilateral expectation of it. [S]he must, instead, have a legitimate claim of entitlement to it.” *S.D.R. v. State (In re S.D.R.)*, 109 Wis. 2d 567, 573, 326 N.W.2d 762 (1982).

As Plaintiff has alleged in her complaint, she was never provided notice or an opportunity to address the allegations against her (within the meaning of *Wis. Stat. § 19.49(2)(b)1*) before WEC referred the matter to the District Attorney offices. (Dkt. 2 p. 5-6.) Liberally construing the complaint and any inferences therefrom establishes that Plaintiff has pled a claim for violation of due process that is sufficient to survive a motion to dismiss.

IT IS HEREBY ORDERED,

- 1) Defendant's Motion to Dismiss is GRANTED in part and DENIED in PART.
 - a. Defendant's Motion to Dismiss COUNT 1 is GRANTED.
 - b. Defendant's Motion to Dismiss COUNT 2 is DENIED.
- 2) Defendant has thirty (30) days from the date of this ORDER to file an ANSWER.
- 3) Due to the numbering errors throughout the original Complaint, if the parties wish to stipulate to the operative Complaint for purposes of filing an answer by the Defendants being Dkt. 15, then the parties should file a separate order to that effect. If the parties so choose, then the time period to answer will begin to run on the date the Court signs the stipulated Order.
- 4) The Clerk shall issue a Meet and Confer Order and set a scheduling conference.