

FILED
07-22-2024
Clerk of Circuit Court
Waukesha County
2024CV001199

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

JANEL BRANDTJEN
N52 W16632 Oak Ridge Trail
Menomonee Falls, WI 53051,

Relator,

v.

WISCONSIN ETHICS COMMISSION,
Andrew Weininger, Gerald Ptacek,
Maryann Sumi, Carousel Bayrd,
Pat Strachota., Paul Higginbotham,
Commissioners
101 E. Wilson Street,
Suite 127,
Madison, WI 53703,

Case No. _____

Case Code: 30701

Respondent.

SUMMONS

STATE OF WISCONSIN:

To the above-named Defendants:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this Summons, you must respond with a written Answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an Answer that does not follow the requirements of the statutes. The Answer must be sent or delivered to the Court, whose address is: **Clerk of Circuit Court, Monica Paz, Waukesha County Courthouse, 515 W. Moreland Boulevard, Waukesha, Wisconsin 53188**, and to Plaintiff's attorneys,

whose address is **The Law Office of Kevin M. Scott LLC, 2665 S. Moorland Road, Suite 200, New Berlin, Wisconsin 53151.** You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future and may also be enforced by garnishment or seizure of property.

If you require assistance or auxiliary aids or services because of a disability, call **608-266-4311 (TDD 608-266-4625)**, and ask for the Court ADA Coordinator.

Dated at New Berlin, Wisconsin, this 22nd day of July, 2024.

Electronically signed by Kevin M. Scott, Esq.

Kevin M. Scott (SBN 1036825)

THE LAW OFFICE OF KEVIN M. SCOTT LLC

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Attorneys for Plaintiff

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COMPLAINT FOR DECLARATORY JUDGMENT

This action seeks to prevent defendant Wisconsin Ethics Commission ("WEC") from taking any further enforcement action pursuant to Wis. Stat. § 19.49 *et seq* against plaintiff Janel Brandtjen.

Wis. Stat. § 19.49(2)(b) creates an unconstitutional enforcement scheme in relation to alleged campaign finance violations. The district attorney of a county is the executive officer with the general power to determine whether to charge and prosecute crime. In performing this function, the district attorney has broad discretion. Section 19.49(2)(b) is unconstitutional in that allows the legislature, through the members of WEC's commission it appoints, to encroach upon this executive function by interfering with the decision of the district attorney as to whether or not to prosecute a crime involving campaign financing laws.

Even if the scheme created by Wis. Stat. § 19.49(2)(b) is constitutional, WEC has failed to follow that process in seeking to impose criminal charges against Plaintiff. As a result, Plaintiff's due process rights have been violated, and WEC must be prevented from taking further action to charge and prosecute Plaintiff for that reason as well.

A complaint was filed with WEC on December 2, 2022 alleging violation of campaign finance laws by a political candidate in Racine County—Adam Steen—in collusion with certain individuals (the "December Complaint"). Plaintiff was not named in the December Complaint as a respondent.

A second complaint was filed on May 2, 2023, specifically alleging that a political group "Friends of Adam Steen, with the help of [Plaintiff] 'Friends of Janel,' Republican Party of Langlade County, Chippewa County Republican Party, and Florence County Republican Party directed donations to county parties to then be re-distributed back to Friends of Adam Steen in monetary (sic) and in-kind donations" (the "May Complaint").

On February 21, 2024, despite never receiving a copy of either the May or the December Complaint, or any notice whatsoever that she was being investigated (in clear violation of Wisconsin statutes governing such proceedings), WEC referred Plaintiff to the Waukesha County District Attorney for criminal prosecution. WEC also failed to provide the Waukesha County District Attorney any notice of the fact it hired a special investigator to investigate Plaintiff prior to making the referral—again in violation of its duties under the law.

On April 19, 2024 the Waukesha County District Attorney issued a letter declining prosecution of Plaintiff based on insufficient evidence, and closing the matter. The District Attorney noted that Plaintiff had never been provided notice of the Complaints, and that the District Attorney had never been provided notice of WEC's hiring of a special

investigator as required by Wisconsin law. The District Attorney closed the matter nolle prosequi.

Despite the Waukesha County District Attorney refusing to prosecute, WEC continued to seek criminal charges against Plaintiff, referring the matter to the Washington County District Attorney on May 14, 2024. On June 14 the Washington County District Attorney declined to prosecute, in part because Plaintiff was not provided proper notice of the investigation, and he believed that the Washington County District Attorney's office did not have jurisdiction over the matter.

It is Plaintiff's belief that WEC will not stop with two District Attorneys telling WEC that, in their prosecutorial discretion, Plaintiff should not be charged and prosecuted criminally. Instead, WEC will be meeting on July 23, 2024 and will be discussing in closed session whether to refer Plaintiff's matter to the Attorney General.

WEC is improperly stepping into the shoes of the District Attorney, and the executive branch, in regard to the exercise of prosecutorial discretion. While WEC is nominally an agency within the executive branch as defined by statute, WEC is headed by four members appointed by the legislature. The legislature has no authority to direct or influence executive branch discretionary decision making and WEC's encroachment on this area violates separation of powers.

Further, WEC has violated its own governing statute in proceeding against Plaintiff. It failed to provide notice of the complaints to Plaintiff, it failed to provide Plaintiff an opportunity to demonstrate that WEC should take no action on the complaints, it failed to provide the proper notice to the District Attorney, and it failed to properly appoint the special prosecutor it hired as it apparently did so without an affirmative vote of two-thirds of the commissioners.

Plaintiff is in the midst of a contested political campaign for her seat in the Wisconsin Assembly. The statute setting out the complaint process for WEC specifically contemplates that complaints will not be accepted against a candidate if they are filed within 120 days of a general or spring election in which the respondent is a declared candidate. WEC is about to take action that will materially, and irreparably harm Plaintiff if it continues to act in an unconstitutional manner and refers the matter to the Attorney General.

Plaintiff seeks from this Court a declaration that the statutory enforcement scheme set out by Wis. Stat. § 19.49(2)(b)9., 12., 13., and 14. is unconstitutional and the attempted prosecution of Plaintiff must cease immediately. Or in the alternative, that WEC to cease its prosecution efforts as it has failed to follow applicable law in doing so, and Plaintiff's due process rights have been violated. To that end, Plaintiff Janel Brandtjen by and through her attorney, and as and for a Complaint against Defendants WEC, Andrew Weininger, Gerald Ptacek, Maryann Sumi, Carousel Bayrd, Pat Strachota, and Paul Higginbotham, alleges and states as follows:

PARTIES

1. Plaintiff Janel Brandtjen ("Plaintiff") is an adult resident of the State of Wisconsin, Waukesha County. Relator currently serves as the representative for Wisconsin Assembly District 22.
2. Defendant Wisconsin Ethics Commission ("WEC") is an independent agency created under Subchapter III of Wisconsin Statutes Chapter 15.
3. Andrew Weininger, Gerald Ptacek, Maryann Sumi, Carousel Bayrd, Pat Strachota, and Paul Higginbotham are WEC's commissioners (the "Commissioners").

APPLICABLE LAW

1. WEC was created pursuant to Wis. Stat. § 15.62.
2. WEC Commissioners are appointed under § 15.62(1)(a).
3. The Commissioners consist of—
 1. One member appointed by the senate majority leader.
 2. One member appointed by the senate minority leader.
 3. One member appointed by the speaker of the assembly.
 4. One member appointed by the assembly minority leader.
 5. Two individuals who formerly served as judges for a court of record in this state, who were elected to the positions in which they served, and who are nominated by the governor, and with the advice and consent of a majority of the members of the senate confirmed. The legislative leadership of the 2 major political parties that received the largest number of votes for president shall prepare a list of 3 individuals such that each major political party has prepared one list. The governor shall choose one nominee from each list.
 6. For each political party, other than the 2 major political parties, qualifying for a separate ballot under s. 5.62 (1) (b) or (2) whose candidate for governor received at least 10 percent of the vote in the most recent gubernatorial election, one member, nominated by the governor from a list of 3 individuals selected by the chief officer of that political party, and with the advice and consent of a majority of the members of the senate confirmed.

Wis. Stat. § 15.61(1)(a).

4. In sum, two of WEC's Commissioners are appointed by the Governor, while four members are appointed by members of the legislature.
5. The Commissioners are WEC's "Head" per Wis. Stat. § 15.01(8).
6. Wis. Stat. § 19.47(2) provides—
 - (4) Action. Any action by the commission, except an action relating to procedure of the commission, **requires the affirmative vote of at least two-thirds of its members.**
7. In other words, for the "head" of WEC to take any action, except one related to internal procedure, at least two members of the commission appointed by members of the legislature must agree to do so.

8. WEC is statutorily charged with the duty of administration and enforcement of laws related to campaign financing. Wis. Stat. § 19.49(1).

9. Pursuant to its enforcement authority, WEC “shall investigate violations of laws administered by the commission...” Wis. Stat. § 19.49(2)(a).

10. Wis. Stat. § 19.49(2)(b) provides that WEC “may only initiate an investigation of an alleged violation of [campaign financing laws]...**based on a sworn complaint filed with the commission.**” (emphasis added)

11. If a sworn complaint is filed with WEC alleging a violation of campaign financing laws, Wis. Stat. § 19.49(2)(b)1. requires that—

No later than 5 days after receiving a complaint, **the commission shall notify each person who or which the complaint alleges committed such a violation.** Before voting on whether to take any action regarding the complaint, other than to dismiss, **the commission shall give each person receiving a notice under this subdivision an opportunity to demonstrate to the commission, in writing and within 15 days after receiving the notice, that the commission should take no action against the person on the basis of the complaint.**

(emphasis added)

12. Wis. Stat. § 19.49(2)(b)3. provides in part that—

If the commission reviews a complaint and fails to find that there is a reasonable suspicion that a violation under subd. 1. has occurred or is occurring, the commission shall dismiss the complaint. **If the commission believes that there is reasonable suspicion that a violation under subd. 1. has occurred or is occurring, the commission may by resolution authorize the commencement of an investigation. The resolution shall specifically set forth any matter that is authorized to be investigated. To assist in the investigation, the commission may elect to retain a special investigator.** If the commission elects to retain a special investigator, the administrator shall submit to the commission the names of 3 qualified individuals to serve as a special investigator. The commission may retain one or more of the individuals. **If the commission retains a special investigator to investigate a complaint against a person who is a resident of this state, the commission shall provide to the district attorney for the county in which the person resides a copy of the complaint and shall**

notify the district attorney that it has retained a special investigator to investigate the complaint.

13. Wis. Stat. § 19.49(2)(b)9. provides—

If the commission finds that there is probable cause to believe that a violation under subd. 1. has occurred or is occurring, the commission may, in lieu of civil prosecution of any matter by **the commission, refer the matter to the district attorney for the county in which the alleged violator resides, or if the alleged violator is a nonresident, to the district attorney for the county where the matter arises, or if par. (h) applies, to the attorney general or a special prosecutor.** For purposes of this subdivision, a person other than an individual resides within a county if the person's principal place of operation is located within that county.

(emphasis added)

14. In relevant part, pursuant to Wis. Stat. § 19.49(2)(a), prosecution of alleged criminal violations of campaign finance law “may be brought only as provided in” Wis. Stat. § 19.49(2)(b)9., 12., 13., and 14.

15. Wis. Stat. § 19.49(2)(b)12. provides—

12. If a special investigator or the administrator, in the course of an investigation authorized by the commission, discovers evidence of a potential violation of a law that is not administered by the commission arising from or in relation to the official functions of the subject of the investigation or any matter that involves campaign finance, ethics, or lobbying regulation, the special investigator or the administrator may present that evidence to the commission. **The commission may thereupon refer the matter to the appropriate district attorney specified in subd. 9. or may refer the matter to the attorney general. The attorney general may then commence a civil or criminal prosecution relating to the matter.**

(emphasis added)

16. Wis. Stat. § 19.49(2)(b)13. provides—

13. Except as provided in subd. 15., if the commission refers a matter to the district attorney specified in subd. 9. for prosecution of a potential violation under subd. 1. or 12. **and the district attorney informs the commission that he or she declines to prosecute any alleged civil or criminal violation related to any matter referred to the district attorney by the commission, or the district attorney fails to commence a prosecution of any civil**

or criminal violation related to any matter referred to the district attorney by the commission within 60 days of the date of the commission's referral, the commission may refer the matter to the district attorney for another prosecutorial unit that is contiguous to the prosecutorial unit of the district attorney to whom the matter was originally referred. If there is more than one such prosecutorial unit, the chairperson of the commission shall determine the district attorney to whom the matter shall be referred by publicly drawing lots at a meeting of the commission. The district attorney may then commence a civil or criminal prosecution relating to the matter.

(emphasis added)

17. Wis. Stat. § 19.49(2)(b)13. provides—

14. Except as provided in subd. 15., if the commission refers a matter to a district attorney under subd. 13. for prosecution of a potential violation under subd. 1. or 12. **and the district attorney informs the commission that he or she declines to prosecute any alleged civil or criminal violation related to any matter referred to the district attorney by the commission, or the district attorney fails to commence a prosecution of any civil or criminal violation related to any matter referred to the district attorney by the commission within 60 days of the date of the commission's referral, the commission may refer the matter to the attorney general.** The attorney general may then commence a civil or criminal prosecution relating to the matter.

(emphasis added)

18. In sum, the statutory scheme of Wis. Stat. § 19.49(2)(b) set out above provides—

- WEC may only initiate an investigation of an alleged violation of campaign financing laws based on a "sworn complaint." Wis. Stat. § 19.49(2)(a);
- Once a sworn complaint is filed, within 5 days WEC "shall" give notice to anyone alleged to have committed a violation, and give that person 15 days to demonstrate why WEC should take no action on the complaint. Wis. Stat. § 19.49(2)(b)1.;

- If WEC finds that “reasonable suspicion” a violation has occurred, it may authorize an investigation. Wis. Stat. § 19.49(2)(b)3.;
- If it does so, it may retain a “special investigator.” *Id.*;
- If it retains a special investigator, it “shall provide to the district attorney for the county in which the person resides a copy of the complaint and shall notify the district attorney that it has retained a special investigator to investigate the complaint.” *Id.*;
- If, after investigation, WEC finds that “probable cause” exists that a violation of campaign financing laws has been committed by a Wisconsin resident, it then may refer the matter to the District Attorney for the county in which the alleged violator resides or the attorney general. Wis. Stat. § 19.49(2)(b)9.;
- If that District Attorney declines to prosecute, or fails to do so within 60 days of referral, WEC “may” refer the matter to another district attorney for a neighboring jurisdiction. Wis. Stat. § 19.49(2)(b)12.;
- If that district attorney then declines to prosecute or does not do so within 60 days, WEC “may” then refer the matter to the attorney general. Wis. Stat. § 19.49(2)(b)13.

JURISDICTION AND VENUE

2. This Court has jurisdiction to hear this case pursuant to Wis. Stat. §§ 806.04 (1) and (2).

3. Venue in this Court is proper pursuant to Wis. Stat. §§ 801.50 (2) and (3).

FACTS

4. Plaintiff is currently running in a primary campaign for her seat as incumbent Representative for Assembly District 22.

5. The primary election is to be held on August 13, 2024.

6. A complaint was filed with WEC on December 2, 2022 alleging violation of campaign finance laws by a political candidate in Racine County—Adam Steen—in collusion with certain individuals (the “December Complaint”).

7. 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 whatsoever.

8. A true and correct copy of the December Complaint is attached as **Exhibit A**.

9. A second complaint was filed on May 2, 2023, specifically alleging that a political group “Friends of Adam Steen, with the help of [Relator]” “Friends of Janel”, Republican Party of Langlade County, Chippewa County Republican Party, and Florence County Republican Party directed donations to county parties to then be re-distributed back to Friends of Adam Steen in monetary (sic) and in-kind donations” (the “May Complaint”).

10. A true and correct copy of the May Complaint is attached as **Exhibit B**.

11. Plaintiff was never given any notice of the filing of either the December Complaint or the May Complaint.

12. Plaintiff was never given any opportunity to demonstrate why WEC should take no action on either the December or the May Complaint.

13. Upon information and belief, 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.

14. Upon information and belief, WEC has never made any finding that reasonable suspicion exists that the May Complaint demonstrates that any violation of campaign financing laws has occurred.

15. Regardless, WEC has pursued an investigation into the allegations of the May Complaint.

16. Upon information and belief on August 3, 2023 WEC hired a special investigator to investigate the allegations of the December and May Complaints.

17. Upon information belief, WEC never held any vote in regard to hiring a special investigator.

18. WEC did not notify the Waukesha County District Attorney when it hired a special investigator.

19. On February 21, 2024, WEC made an electronic referral of the Complaints to the Waukesha County District Attorney("WCDA")(the "Referral").

20. A true and correct copy of the Referral is attached as **Exhibit C**.

21. The Referral contained only the Findings of Fact and a Final Order issued by the Commission.

22. In the Referral the WCDA was tasked 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."

23. The Referral was made pursuant to Wis. Stat. § 19.49(2)(b)9. and 13.

24. 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."

25. On April 19, 2024 the WCDA issued a letter informing WEC that she was declining to prosecute Plaintiff based on the Referral (the "WCDA Letter").

26. A true and correct copy of the WCDA Letter is attached as **Exhibit D**.

27. In the WCDA Letter, the WCDA informs WEC that the "file is being closed at this time as a No Pros."

28. Despite the WCDA's decision not to prosecute, on May 14, 2024 WEC referred the matter to the Washington County District Attorney.

29. On June 14, 2024, the Washington County District Attorney declined to prosecute as well, issuing a letter stating that he declined to prosecute in part because Plaintiff was not provided proper notice of the investigation, and he believed that the Washington County District Attorney's office did not have jurisdiction over the matter.

30. A true and correct copy of the letter issued by the Washington County District Attorney is attached as **Exhibit E**.

31. Upon information and belief, at its scheduled July 23, 2024 meeting, WEC will deliberate and vote to refer Plaintiff to the Wisconsin Attorney General for prosecution based on the allegations of the Complaints.

COUNT I: DECLARATORY JUDGMENT

Wis. Stat. § 19.49(2)(B) et seq.

Violation of Separation of Powers

32. Plaintiff realleges and incorporates the allegations of this complaint as if fully set forth herein.

19. While WEC is charged with the duty of administration and enforcement of laws related to campaign financing, the scheme set out in Wis. Stat. §§ 19.49(2)(b), (b)9., 12., 13., and 14. is unconstitutional as it violates separation of powers.

33. The WCDA in this matter was the party with the authority to exercise prosecutorial discretion.

34. The WCDA closed the matter as nolle prosequi.

35. That decision is not constitutionally subject to review by the legislature.

36. When WEC refused to accept the decision of the WCDA, and voted to refer the matter again to the Washington County District Attorney, at least two WEC commissioners that were appointed by the legislature were required to move that action forward.

37. This is because any action by WEC requires an affirmative vote of two-thirds of its commissioners, with four of the six being appointed by the legislature.

20. As a result, through Wis. Stat. §§ 19.49(2)(b)9., 12., 13., and 14., the legislature has impermissibly delegated the executive function of the district attorney to itself.

21. Accordingly, Wis. Stat. Wis. Stat. §§ 19.49(2)(b)9., 12., 13., and 14. should be declared unconstitutional and the enforcement action against Plaintiff prohibited.

COUNT II: DECLARATORY JUDGMENT
Violation of Due Process

38. Even if constitutional, WEC has failed to adhere to the process set forth under Wis. Stat. § 19.49(2)(b) in its attempted prosecution of Plaintiff.

39. In the Referral, WEC explicitly acknowledges that the matter is being referred pursuant to Wis. Stat. § 19.49(2)(b)9. and 13.

40. A referral pursuant to Wis. Stat. § 19.49(2)(b)9. can only be made if a violation is found in relation to a complaint filed under Wis. Stat. § 19.49(2)(b)1.

41. Therefore, the Referral of Plaintiff was based on either or both the December or May Complaint.

42. However, WEC failed to provide any notice to Plaintiff of either Complaint as required by Wis. Stat. § 19.49(2)(b)1.

43. WEC never allowed Plaintiff the opportunity to demonstrate why WEC should take no action on either of the Complaints in violation of Wis. Stat. § 19.49(2)(b)1.

44. Upon information and belief, WEC never approved a resolution authorizing any investigation into Plaintiff via a two-thirds vote of its commissioners in violation of 19.49(2)(b)3.

45. Upon information and belief, WEC never approved a resolution authorizing the hiring of a special investigator into Plaintiff via a two-thirds vote of its commissioners in violation of 19.49(2)(b)3.

46. WEC did not provide notice to the Waukesha County District Attorney that it retained a special investigator in violation of 19.49(2)(b)3.

47. WEC did not provide a copy of any Complaint to the Waukesha County District Attorney when it hired a special investigator in violation of 19.49(2)(b)3.

48. Upon information and belief there has been no finding of probable cause that Plaintiff committed any criminal offense by a legally-conducted two-thirds vote of WEC commissioners.

49. Because WEC has not followed its own statutorily-prescribed procedure in attempting to prosecute Plaintiff, it has violated Plaintiff's substantive and procedural due process rights.

50. Accordingly, any enforcement action against Plaintiff must be declared invalid and any further action on the part of WEC prohibited.

WHEREFORE, Plaintiff respectfully requests that this Court issue:

- A. Enter a declaratory judgment that Wis. Stat. §§ 19.49(2)(b), (b)9., 12., 13., and 14. is unconstitutional as it violates separation of powers;
- B. Enter a declaratory judgment that WEC has not followed its own statutorily-prescribed procedure in attempting to prosecute Plaintiff, and as a result it has violated Plaintiff's substantive and procedural due process rights;
- C. Enter an order temporarily and permanently enjoining WEC, and its officers and agents, from pursuing any further enforcement action against Plaintiff; and
- D. Grant such further relief as the court deems appropriate, including costs of this action.

Dated at Brookfield, Wisconsin, this 22nd day of July, 2022.

Electronically signed by Kevin M. Scott, Esq.

Kevin M. Scott (SBN 1036825)

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