Supreme Court of Wisconsin

ABBOTSFORD EDUCATION ASSOCIATION, et al.,
Plaintiffs-Respondents-Petitioners,
v.
WISCONSIN EMPLOYMENT RELATIONS COMMISSION, et al.,
Defendants, Co-Appellants.

No. 2024AP2429
Filed February 12, 2025

Justice Janet C. Protasiewicz entered the following order on this date:

¶1 Petitioners Abbotsford Education Association et al. petition to bypass the court of appeals in a case where they challenge the constitutionality of 2011 Wis. Act 10. They allege that Act 10 draws distinctions between the state's public safety employees and general employees, which violate equal protection under the Wisconsin Constitution.

¶2 The Legislature moves for my recusal from this appeal pursuant to WIS. STAT. § 757.19(2)(f), § 757.19(2)(g), SCR 60.04(4), SCR 60.04(4)(f), and the Due Process Clause of the 14th Amendment. Having carefully reviewed the motion papers and all relevant legal authorities, I determine that neither the facts nor the law support the Legislature's motion for recusal. I therefore deny it.

I. BACKGROUND

¶3 The Legislature enacted Act 10 in 2011. At the time, I was a Milwaukee County District Attorney and a member of the Association of State Prosecutors. I participated in the protests of Act 10 at the Capitol, and I signed a petition to recall Governor Scott Walker. Three years after the protests, I became a circuit court judge. Eleven years after the protests, I announced my candidacy for the Wisconsin Supreme Court.

¶4 The Legislature highlights two interviews[1] from my year-long campaign where I was asked about Act 10. First, in an interview with *Pod Save America* I acknowledged that I came from a union family, that I had been a union member, that 12 years earlier I had joined the protests against Act 10, and that I had signed the Walker recall petition.[2] I also referred to an earlier case where, in a split decision, the court rejected numerous challenges to Act 10. *See Madison Teachers, Inc. v. Walker*, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337.[3] I said that "I agree with the dissent in that case where the author said Act 10 is unconstitutional."

¶5 Second, in an interview with the *Milwaukee Journal Sentinel*, I repeated my agreement with the dissent in *Madison Teachers*.[4] I was then asked whether I would recuse myself if Act 10 came before this court. I replied "maybe" but I didn't know. "I don't know how the issues would be

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[1] While the Legislature cites multiple articles, at bottom they reference two interviews.

[2] *Pod Save America: Mugshots and Milk Shots (Live from Wisconsin!)*, CROOKED MEDIA (Mar. 20, 2023), https://crooked.com/podcast/mugshots-and-milk-shots-live-from-wisconsin.

[3] In *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶15, 358 Wis. 2d 1, 851 N.W.2d 337, the plaintiffs alleged that Act 10: (1) impermissibly infringed on the associational rights of the state's general employees; (2) impermissibly infringed on the equal protection rights of represented general employees compared to non-represented general employees; (3) violated the Wisconsin Constitution's home rule amendment; and (4) violated the Wisconsin Constitution's Contract Clause.

[4] Milwaukee J. Sentinel, *Wisconsin Supreme Court Candidate Janet Protasiewicz Talks to the Journal Sentinel Editorial Board*, YOUTUBE (Mar. 20, 2023), https://www.youtube.com/watch?v=3Zwt5n_H6dw.

framed, if they're framed at all. I don't know if that's going to come in front of the court again, quite, frankly—I have no idea. So it's a maybe, it's a solid maybe."

¶6 Finally, the Legislature notes that in March 2023, my campaign received a $1,500 contribution from the Wisconsin Education Association Council Region 5 Political Action Committee ("WEAC"). The Legislature alleges that one of the plaintiffs in this lawsuit, the Beaver Dam Education Association, is an affiliate of WEAC.[5]

II. ANALYSIS

¶7 The Legislature claims that WIS. STAT. § 757.19(2)(f) requires my recusal. Section 757.19(2)(f) provides that a judge shall disqualify herself from a case when she "has a significant financial or personal interest in the outcome of the matter." This provision requires the judge to make an objective determination that she has or does not have significant personal interest in the outcome of a case as established by evidence and reasonable inferences. *State ex rel. Dressler v. Cir. Ct. for Racine Cnty.*, 163 Wis. 2d 622, 643, 472 N.W.2d 532 (Ct. App. 1991). If the evidence and inferences establish that the judge does have a significant personal interest in a case, she must recuse. *See State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 183, 443 N.W.2d 662 (1989).

¶8 The Legislature does not claim that I have a financial interest in the outcome of this case. And it fails to cite a single case holding that a judge's family background and/or past activities can amount to a "significant personal interest" that disqualify her from participating in a proceeding. There is no such case. If that were the rule, then a justice related to a doctor could be disqualified from medical malpractice cases. Former NRA members could be disqualified from Second Amendment cases. Participants in free speech rallies could be disqualified from First Amendment cases. Justices who voted in elections could be disqualified from cases challenging the election results. Where would it end?

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[5] The Legislature mentions this donation in passing but never argues that it requires my recusal. To be clear, it does not require my recusal. Under SCR 60.04(7), "[a] judge shall not be required to recuse himself or herself in a proceeding based solely on . . . the judge's campaign committee's receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding."

¶9 The reality is, judges are human. They all have personal experiences. Some experiences may pertain to cases that come before the court. Judges come to the bench after practicing law for many years. During their legal careers, they form opinions about the law and the constitution. That does not prove that they are biased. *See Laird v. Tatum*, 409 U.S. 824, 835 (1972) (Memorandum of Rehnquist, J.). In fact, to safeguard the right to a fair tribunal, judges must swear a sacred oath of office to "faithfully and impartially discharge the duties of [the] office." *See* WIS. STAT. § 757.02(1). I adhered to my oath as a circuit court judge, and I adhere to it now as a supreme court justice.

¶10 Nor does my agreement with the dissent in *Madison Teachers* create a disqualifying personal interest. In this case, the petitioners challenge how Act 10 treats general employees versus public safety employees. In contrast, *Madison Teachers* concerned how Act 10 treats represented general employees versus unrepresented general employees. *See* 358 Wis. 2d 1, ¶15. *Madison Teachers* did not involve or decide the general employee versus public safety employee distinction at issue in this case. In fact, it declined to address the issue. *Id.*, ¶4 n.4. So, by agreeing with the dissent in *Madison Teachers*, I in no way committed myself to a position in this case. Furthermore, the United States Supreme Court repudiated the premise of the Legislature's argument here in *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). While § 757.19(2)(f) was not at issue in *Republican Party*, the Supreme Court flatly rejected the idea that a judge's statement of his views on the law during an election creates a "'direct, personal, substantial, and pecuniary interest' in ruling consistently with his previously announced view." *Id.* at 782.

¶11 Importantly, when asked whether I would recuse myself from a future Act 10 case, I replied that I had no idea; "it's a solid maybe." By keeping an open mind about recusal, I showed that I had not yet formed an opinion on the merits of any hypothetical, future Act 10 case. Neither the law, the facts, nor the reasonable inferences drawn from the facts suggest that I have a "significant personal interest" in the outcome of this case. Therefore, § 757.19(2)(f) does not require my recusal.

¶12 Next, the Legislature argues that § 757.19(2)(g) requires my recusal. Section 757.19(2)(g) provides that "[a]ny judge shall disqualify himself or herself from any civil or criminal action or proceeding . . . [w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." This determination is purely subjective. *Donohoo v. Action Wis. Inc.*, 2008 WI 110, ¶24, 314 Wis. 2d 510,

754 N.W.2d 480. The judge alone decides whether she can be impartial, and whether there is an appearance of partiality. *Id.* Having reviewed the facts, the arguments, and the relevant law, I am confident that I can, in fact and appearance, act in an impartial manner in this case. Therefore, § 757.19(2)(g) does not require my recusal.

¶13 The Legislature also cites SCR 60.04(4) and specifically paragraph (f) as grounds for my recusal. Supreme Court Rule Chapter 60 is the Code of Judicial Conduct. It governs ethical conduct. Judges may be disciplined for violating the Code, but it is not a basis for removing a judge from a pending case. *American TV*, 151 Wis. 2d at 185.

¶14 The Legislature references SCR 60.04(4) in passing without developing an argument based upon it. This rule requires a judge to recuse herself from a case when "reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial." The only reasonable inference that a well-informed person could draw from my campaign statements is that I was transparent about my pre-judicial activities and that I firmly refused to make a commitment about recusal, and hence the merits, of any future Act 10 case.

¶15 The Legislature specifically highlights SCR 60.04(4)(f), which provides that a judge shall recuse herself from a proceeding when "[t]he judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to . . . [a]n issue in the proceeding." The Legislature does not allege that I have actually committed to ruling one way or another in this case. Instead, the Legislature's concern is that my campaign statements create the appearance that I have already made up my mind. That argument has two major flaws. First, to the extent SCR 60.04(4)(f) bars a judge from announcing her views on the law during an election, it has been declared unconstitutional based on *Republican Party*. *See Duwe v. Alexander*, 490 F. Supp.2d 968, 977 (W.D. Wis. 2007). Second, my "solid maybe" demonstrated an open mind about recusal and, by definition, the merits of any future Act 10 case, not the appearance that I would rule a certain way in an Act 10 case. Therefore, SCR 60.04(4)(f) does not require my recusal.

¶16 Lastly, the Legislature argues that the 14th Amendment's Due Process Clause requires my recusal in this case. Allegedly, my campaign statements show that I have prejudged this case and thus create a "serious

risk of actual bias" under *Caperton v. A.T. Massey Coal Company, Inc.*, 556 U.S. 868 (2009) and *Williams v. Pennsylvania*, 579 U.S. 1 (2016).

¶17 Like the Legislature's other claims, this one fails on the facts. To repeat, after noting my background and stating my view on *Madison Teachers*, saying that recusing myself from a hypothetical future case about Act 10 was a "solid maybe" showed an open mind about recusal and Act 10, not a serious risk of actual bias on these matters.

¶18 This claim also fails on the law. Neither *Caperton* nor *Williams* involved a claim that a judge's campaign speech created a serious risk of actual bias. In fact, "[n]o Supreme Court case has ever held that due process required a judge to recuse because of the judge's expression of views, whether on the campaign trail or elsewhere."[6] To the contrary, the Supreme Court has held that "[no] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law." *FTC v. Cement Inst.*, 333 U.S. 683, 702–03 (1948); *see also Republican Party*, 536 U.S. 765, 775–76 (the due process right to a fair tribunal requires the lack of bias for or against either *party*; it does not require a lack of opinion on the law). Therefore, the 14th Amendment Due Process Clause does not require my recusal.

III. CONCLUSION

¶19 Neither the facts nor the law support the Legislature's motion for recusal. I therefore deny the motion.

IT IS ORDERED that the Motion to Recuse Justice Protasiewicz filed by the Wisconsin State Legislature is denied.

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[6] Derek Clinger & Robert Yablon, *Explainer: Judicial Recusal in Wisconsin and Beyond*, STATE DEMOCRACY RSCH. INITIATIVE 10 (Sept. 5, 2023), https://uwmadison.app.box.com/s/k2bx0l2b9vwsgiqfl4sfoiwt8m3j43qc.

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