

FILED
10-27-2023
CIRCUIT COURT
DANE COUNTY, WI
2023CV002428

BY THE COURT:

DATE SIGNED: October 27, 2023

Electronically signed by Ann Peacock
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 12

DANE COUNTY

WISCONSIN ELECTIONS
COMMISSION, et al.,

Plaintiffs,

v.

Case No. 23-CV-2428

DEVIN LEMAHIEU, et al.,

Defendants.

**DECISION AND ORDER
GRANTING PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION**

INTRODUCTION

The Wisconsin Elections Commission ("WEC") and its Administrator, Meagan Wolfe, brought this action seeking a declaratory judgment relating to Wolfe's status and the procedure for appointment of the WEC Administrator. Plaintiffs move for temporary injunctive relief to preserve the status quo until the Court renders a final decision. The Defendants, through their counsel, have made several admissions with respect to the declarations sought by the Plaintiffs. Because of those admissions, the Defendants claim that Plaintiffs' motion for temporary injunctive relief is moot. I conclude that Plaintiffs' motion for an injunction is not moot. Furthermore, I grant the Plaintiffs'

motion because they satisfy each factor for a temporary injunction: they are likely to suffer irreparable harm, they have no other remedy at law, the injunction will preserve the status quo, and they have a reasonable probability of success on the merits. *See Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644.

BACKGROUND

WEC is charged with the administration of Wisconsin's election laws. Answer ¶4, dkt. 21. The Defendants are three members of the Wisconsin Legislature: Senator and Majority Leader Devin LeMahieu, Senator and Co-Chair of the Joint Committee on Legislative Organization ("JCLO"), Chris Kapenga, and Assemblyman and Co-Chair of the JCLO, Robin Vos. Def. Resp. Br, dkt. 40:2.

Meagan Wolfe began as Interim Administrator of WEC in 2018. On May 15, 2019, the Senate confirmed her appointment to a four-year term as WEC's Administrator. Answer ¶7, dkt. 21. Her term expired on July 1, 2023. *Id.* On June 27, 2023, three of the six WEC commissioners voted to appoint Wolfe to a new term. *Id.* ¶9. The remaining three commissioners abstained. *Id.* The next day, June 28, the Senate passed 2023 Senate Resolution 3. *Id.* ¶11. It stated that the Senate "considers Meagan Wolfe to have been nominated" to serve as Administrator. *Id.*

On September 14, 2023, consistent with its June resolution, the Senate voted on *something* related to Wolfe's appointment, although the parties dispute what that vote meant. According to the Defendants, the vote "was symbolic and meant to signal disapproval of Administrator Wolfe's performance." *Id.* ¶15. Plaintiffs, however, contend that the vote was to "(1) deem Administrator Wolfe nominated based on the Senate's June resolution and (2) reject the 'appointment' of Administrator Wolfe." Compl. ¶15.

The same day the Senate held its vote, Plaintiffs commenced this action for declaratory

judgment. As ultimate relief, Plaintiffs ask the Court to declare the following:

1. Wolfe remains a lawful holdover in the appointive office of WEC administrator,
2. WEC's June 27 vote had no legal effect,
3. The Senate's September 14 vote had no legal effect,
4. WEC has no duty to appoint a new administrator, and
5. JCLO has no authority to replace a lawful holdover with an interim administrator.

Compl., dkt. 4:12.

On October 13, the Defendants answered the Complaint and admitted many of the allegations in the Complaint. They have also filed a counterclaim. Defendants, through their counsel, agree with four of the five legal conclusions sought by the Plaintiffs: "[Claim One] Defendants admit that Administrator Wolfe is lawfully holding over; [Claim Two] Defendants admit that the Commission's June 27, 2023, vote did not appoint Administrator Wolfe to a new term; [Claim Three] . . . Defendants' vote on September 14, 2023, was [a] symbolic [vote of no confidence] and thus had no legal effect on Administrator Wolfe's status as a lawful holdover; [Claim Four] Defendants deny that the Commission has no duty to make an appointment while Administrator Wolfe is holding over; and [Claim Five] Defendants admit that [JCLO] has no power to appoint an interim administrator while Administrator Wolfe is holding over." Answer ¶¶6-7, dkt. 21; Def. Resp. Br, dkt. 40:4-5.

After filing his answer, however, Vos has made a series of conflicting statements. On October 15, a television station reported Vos said "the position [of WEC Administrator] in my mind is vacant." Lodahl Aff. ¶3, dkt. 43. Vos continued to say "I certainly think in my mind that the law is crystal clear: The position is vacant, she [Wolfe] was not confirmed, we need a new person selected by WEC, and if they refuse to do that, JCLO is the natural [inaudible]." *Id.*

Vos reportedly spoke to journalists again on October 17. A newspaper article credited Vos as saying that if WEC did not appoint a new administrator, “there’s a process in the law that says this is the exact way JCLO appoint somebody.” *Id.* ¶4. When asked whether he disagreed with the answer filed in this matter, Vos replied: “So the Senate took that position. I don’t necessarily agree with it. But again, it’s their lawsuit with their attorneys.” *Id.* Vos further appeared to disclaim that he was represented by any of the attorneys who filed an Answer on his behalf—he said “I was named in the lawsuit, but the attorneys are not ours,” and “[w]e were not involved in any of that. That’s the Senate’s thing.” *Id.*

LEGAL STANDARD

“Injunctions, whether temporary or permanent, are not to be issued lightly.” *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). To be entitled to a temporary injunction, a movant must demonstrate:

(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.

Milwaukee Deputy Sheriffs’ Ass’n, 2016 WI App 56, ¶20. A movant “must satisfy the trial court that on balance equity favors issuing the injunction.” *Pure Milk Products Co-op v. Nat’l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) (footnote omitted).

DECISION

I. Plaintiffs’ motion for an injunction is not moot.

The Defendants contend that the issues raised in the injunction are not justiciable given the Defendants’ admissions in their Answer. Def. Resp. Br., dkt. 40:6-9. The Defendants cite several cases for their argument, but none of the cases are premised on facts analogous to the facts in this

case.

With the exception of the Plaintiffs' demand for a declaration about WEC's duty to appoint a new Administrator, the Defendants think this action will have no practical effect because their positions are not adverse to the Plaintiffs' positions. Def. Resp. Br., dkt. 40:9. This is important because courts do not give advisory opinions—adversity is a predicate for any declaratory judgment. *Loy v. Bunderson*, 107 Wis. 2d 400, 409, 320 N.W.2d 175 (1982) (“The controversy must be between persons whose interests are adverse.”). The problem with Defendants' argument is that the Plaintiffs now provide the Court with evidence that Vos reportedly does have an adverse opinion. That is, Vos's reported belief that the WEC Administrator is “vacant” is at odds with the contents of the Answer filed on his behalf. His comments also reflect an intent to take action on his contrary beliefs.

But even if Vos had not made those statements, this injunction would still be appropriate: “numerous courts have held that a litigation position doesn't eliminate a threat of enforcement because a litigation position isn't binding, and the relevant parties could change their mind on a whim.” *Carey v. Wisconsin Elections Comm'n*, 624 F. Supp. 3d 1020, 1030 (W.D. Wis. 2022).

II. The Plaintiffs have met the requirements for issuance of a temporary injunction.

With respect to the first requirement for issuance of a temporary injunction, WEC says it is likely to suffer irreparable harm without an injunction because there is no remedy for the unlawful removal of its Administrator. WEC Br., dkt. 10:16. The Defendants respond “that harm will not materialize because ‘Defendants admit that Administrator Wolfe is lawfully holding over’” Def. Resp. Br., dkt. 40:9 (quoting Answer, dkt. 21:6-7). According to the Defendants, threats about unlawfully removing Wolfe “have been superseded by Defendants' official representations

to this Court on the record.” *Id.* at 10. In advancing this argument, the Defendants ignore Vos’s contrary statements on October 15 and 17, which were made after the Defendants made “official representations to this Court on the record” through the papers filed on October 13.

Ultimately, “the requirement of irreparable injury is met by a showing that, without it to preserve the status quo pendent lite, the permanent injunction sought would be rendered futile.” *Werner*, 80 Wis. 2d at 520. Here, any declaratory and injunctive relief the Court might order would be futile if Vos—as he reportedly has told the press—tries to remove WEC’s Administrator. Without an injunction, the damage would already have been done to Wolfe and WEC. Accordingly, Plaintiffs satisfy this factor.

With respect to the second requirement for issuance of a temporary injunction, an injury has no adequate remedy at law if it “cannot be compensated by damages,” *Kohlbeck v. Reliance Const. Co.*, 2002 WI App 142, ¶13, 256 Wis. 2d 235, 647 N.W.2d 277, or where “future damages are difficult or impossible to ascertain” *American Mut. Liability Ins. Co. v. Fisher*, 58 Wis. 2d 299, 306, 206 N.W.2d 152 (1973). Money damages are neither appropriate nor ascertainable for the harm Plaintiffs claim, so they satisfy this factor, too.

With respect to the third requirement for issuance of a temporary injunction, Wolfe has been WEC’s Administrator since 2018. All of the Defendants admit, at least in their Answer, that she lawfully remains WEC’s Administrator as a holdover. *See State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶56, 402 Wis. 2d 539, 976 N.W.2d 821 (“the expiration of Prehn’s term ... does not create a vacancy. Prehn lawfully retains his position ... as a holdover. ... This arrangement complies with the plain language of Wisconsin Statutes and does not raise constitutional concerns.”). An injunction will preserve this status quo.

With respect to the fourth requirement for issuance of a temporary injunction, Plaintiffs

have more than a “reasonable probability” of succeeding on the issues raised in their motion for injunction. As the Defendants concede, “Plaintiffs have *already* succeeded on the merits of Claims One, Two, Three, and Five.” Def. Resp. Br., dkt. 40:7 (emphasis in original). So, having already succeeded, Plaintiffs satisfy this element.

Finally, an injunction is in the public’s interest because maintaining the status quo will avoid confusion and disruption to Wisconsin’s decentralized system of election administration. Simply put, I agree with WEC that the public expects stability in its elections system and this injunction will provide stability pending the Court’s final decision.

ORDER

For the reasons set forth above, the Court grants the Plaintiffs’ motion for a temporary injunction and ORDERS as follows:

1. The Wisconsin Elections Commission is permitted to recognize Meagan Wolfe as the lawful holder of the Administrator position, vested with the full authority of that office and entitled to the privileges thereof, and employ her in that position, subject to a final decision of this Court.

2. The Senate’s vote on September 14, 2023, to reject the appointment of Meagan Wolfe to the position of Wisconsin Elections Commission Administrator, and the Senate’s 2023 Resolution 4, which calls on the Commission to appoint an interim and permanent replacement Administrator, have no legal effect.

3. Further official actions by Defendants to remove or attempt to remove Meagan Wolfe from the Administrator position, including appointing an interim Administrator of the Wisconsin Elections Commission, do not have legal effect, subject to a final decision of this Court.

This is NOT a final order for purpose of appeal.