

FILED
09-23-2022
Clerk of Circuit Court
Waukesha County
2022CV001395

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

NANCY KORMANIK
17445 W. Washington Ave., Unit B
Brookfield, WI 53045

Case No.: 22-CV-_____
Case Code No.: 30701

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION,
201 West Washington Ave., Second Floor
Madison, WI 53707

Defendant.

SUMMONS

THE STATE OF WISCONSIN to each party named above as a Defendant:

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 Wis. Stat. Ch. 802, 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 Waukesha County Circuit Court, 515 West Moreland Boulevard, Waukesha, Wisconsin 53188, and to the Plaintiffs' attorneys, the Law Firm of Conway, Olejniczak & Jerry, S.C., 231 S. Adams Street, Green Bay, Wisconsin 54301. 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.

Dated this 23rd day of September, 2022.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.
Attorneys for Plaintiff, Nancy Kormanik

By: Electronically signed by Kurt A. Goehre

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COMPLAINT

NOW COME the above-named Plaintiff, Nancy Kormanik, by her attorneys, the Law Firm of Conway, Olejniczak & Jerry, S.C., who complains and alleges against the above-named Defendant as follows:

NATURE OF THIS ACTION

1. This is an action against the Wisconsin Elections Commission seeking a declaratory judgment regarding the proper construction of the Wisconsin Statutes that prohibits a municipal clerk from returning a previously completed and returned absentee ballot to an elector, including Wis. Stat. §§ 6.86(5), (6).

PARTIES

2. The Plaintiff, Nancy Kormanik, is an adult individual and citizen of the State of Wisconsin. Plaintiff is a registered voter and resides in Waukesha County and has a mailing address of 17445 W. Washington Ave., Unit B, Brookfield, WI 53045. Plaintiff is a registered voter who has voted via absentee ballot in prior elections in Waukesha County, including the

August 2022 primary, and will vote by absentee ballot in the upcoming election in November 2022 in Waukesha County.

3. The Defendant, Wisconsin Elections Commission (“WEC”), is a governmental agency with the responsibility for the administration of Chapters 5 through 10 and 12 of the Wisconsin Statutes. WEC is located at 201 West Washington Ave., Second Floor, Madison, Wisconsin 53707.

JURISDICTION AND VENUE

4. Jurisdiction is appropriate in the State of Wisconsin as the parties reside within the State of Wisconsin and the conduct challenged herein was carried out in the State of Wisconsin, and the declaratory relief sought can be provided for pursuant to Wis. Stat. §§ 806.04 and/or 227.40.

5. Venue is appropriate in Waukesha County pursuant to Wis. Stat. §§ 227.40(1) and 801.50(3)(b).

BACKGROUND FACTS

6. Wis. Stat. § 6.84(1) provides that while voting is a constitutional right, the vigorous exercise of which should be strongly encouraged, “voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place.” As a result, in § 6.84(1), the Legislature concluded “that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse.”

7. Due to the guarded approach to absentee ballot voting, Wisconsin has implemented various statutes regarding obtaining and voting an absentee ballot.

8. One of those statutes is Wis. Stat. § 6.86(6), which provides that:

Except as authorized in sub. (5) and s. 6.87 (9), if an elector mails or personally delivers an absentee ballot to the municipal clerk, the municipal clerk shall not

return the ballot to the elector. An elector who mails or personally delivers an absentee ballot to the municipal clerk at an election is not permitted to vote in person at the same election on election day.

9. Likewise, Wis. Stat. § 6.86(5) provides that only the voter who was issued an absentee ballot may spoil that absentee ballot and, in the event that occurs, such voter may return the “spoiled or damaged absentee ballot to the municipal clerk” and the clerk “shall issue a new ballot” at the time the spoiled ballot is provided by the voter to the clerk. The clerk shall thereafter “destroy the spoiled or damaged ballot” provided by the voter.

10. Contrary to the above and Wisconsin law, WEC has issued memoranda and other publications indicating that a municipal clerk may return an already voted absentee ballot to the voter and that a municipal clerk may spoil a previously voted absentee ballot.

11. On August 1, 2022, WEC published a memorandum titled “Spoiling Absentee Guidance for the 2022 Partisan Primary,” which WEC sent to all Wisconsin Municipal Clerks, the City of Milwaukee Election Commission, all Wisconsin County Clerks, and the Milwaukee County Election Commission. A copy of the memorandum is attached as “**Exhibit A**”.

12. WEC’s Spoiling Absentee Guidance for the 2022 Partisan Primary provides that, after a voter has returned their absentee ballot to the clerks’ office, “they can request to spoil that ballot and receive a new one in the event the voter makes a mistake or changes their mind” and “voters can request to have their returned absentee ballot spoiled and instead vote in person, either during the in-person absentee period or at their polling place on election day.”

13. On August 2, 2022, WEC published an additional memorandum titled “Rules about ‘Spoiling’ Your Ballot.” WEC, Rules about ‘Spoiling’ Your Ballot located at: <https://elections.wi.gov/news/rules-about-spoiling-your-ballot-0> (attached as “**Exhibit B**”).

14. WEC’s Rules about Spoiling Your Ballot memorandum states that “a voter may

wish to spoil his or her absentee ballot” due to, in part, “the voter changing his or her mind after returning the absentee ballot” and that a municipal clerk can “invalidate” such a “spoiled ballot.”

15. Contrary to WEC’s memoranda and prior publications, a municipal clerk is prohibited from returning a previously completed and submitted absentee ballot to an elector simply because the elector may have changed his or her mind about who to vote for.

16. Furthermore, under Wisconsin law, a municipal clerk has no authority to “spoil” an absentee ballot of an elector—only an elector may spoil his or her ballot and then return that spoiled absentee ballot to the clerk before voting the absentee ballot.

17. The only authority under Wisconsin law for a clerk to provide a new absentee ballot to an elector is when the elector damages an absentee ballot or spoils his or her absentee ballot and, before submitting it to the clerk, the elector or the elector’s agent returns the “spoiled or damaged ballot to the clerk” and the clerk believes that the ballot was issued to or on behalf of the elector prior to the deadlines set forth by statute. Wis. Stat. § 6.86(5).

18. WEC’s memoranda and publications related to spoiling absentee ballots open the door to increased risk of chaos, fraud, or other illegalities in the absentee voting process, which will impact a multitude of voters in the upcoming November 8, 2022 general election.

19. For instance, in the August 2022 primary alone, there were 295,059 absentee ballots returned, either by mail or in person, to municipal clerks across the state and, additionally, there were 63,689 absentee ballots voted in-person during the in-person absentee voting period. See Absentee Ballot Report – August 9, 2022 Partisan Primary located at: <https://elections.wi.gov/resources/statistics/absentee-ballot-report-august-9-2022-partisan-primary-2> (click on “AbsenteeCounts_County_.csv”; also attached as “**Exhibit C**”).

20. By instructing municipal clerks to spoil a previously completed and returned

absentee ballot of an elector, without any requirement that the municipal clerks confirm the identity of the individual requesting the return of an absentee ballot or requesting to spoil an absentee ballot, it creates an increased risk that an elector's votes could be changed by someone other than the elector and without authorization from the elector.

21. Such a process is contrary to the rule that only a voter may spoil his or her ballot, it violates the general prohibition against a clerk returning a previously submitted absentee ballot pursuant to Wis. Stat. § 6.86(6), it flouts the Legislature's directive that "voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse" pursuant to Wis. Stat. § 6.84(1), and presents a significant risk that the process could result in disenfranchisement due to an elector's lawful vote being changed by someone other than the elector.

22. The memorandum titled "Spoiling Absentee Guidance for the 2022 Partisan Primary" ("**Exhibit A**") was sent by WEC to 1,850 municipal clerks in the State of Wisconsin and is currently accessible on WEC's public website, along with the subsequently published "Rules About 'Spoiling' Your Ballot" ("**Exhibit B**") that is also currently accessible, which has led to the incorrect application of Wisconsin law by some municipal clerks in the past, and presents a clear and present risk that municipal clerks and local election officials may incorrectly apply Wisconsin law in the upcoming November 8, 2022 general election. *See* Spoiling Absentee Guidance for the 2022 Partisan Primary located at: <https://elections.wi.gov/memo/spoiling-absentee-guidance-2022-partisan-primary> (click on "Clerk Memo for Spoiling Ballots"); Rules about 'Spoiling' Your Ballot located at: <https://elections.wi.gov/news/rules-about-spoiling-your-ballot-0#:~:text=on%20Election%20Day.-,Wis.,be%20issued%20a%20new%20one>.

23. The requirements of Wis. Stats. § 6.86(5) and (6) are the established policy of the State of Wisconsin as mandated by the Legislature.

24. WEC does not have the power to set aside the policy decisions of the Wisconsin Legislature. Wis. Stat. § 5.05(1); Wis. Const. art. IV, § 1 and art. III, § 2.

25. Moreover, WEC did not promulgate its interpretation of these election statutes as required under Chapter 227, Wis. Stats., despite the fact that Wis. Stat. § 227.10(1) specifically requires that each interpretation of a statute which an agency adopts to govern or enforce its administration of a statute shall be promulgated as a rule.

26. WEC's incorrect interpretation of the election statutes harms the Plaintiff in several ways, including: the Plaintiff is harmed as a voter because she is uncertain as to the lawful method to cast absentee ballots in the future and the risk that an individual may fraudulently spoil their previously completed and submitted absentee ballot; the Plaintiff is harmed by the unequal administration of our election system in the event that local election officials and municipal clerks may comply with WEC's incorrect guidance, while other local election officials and municipal clerks may comply with the express requirements of Wisconsin statutes; and the Plaintiff is harmed by the counting of votes that violate Wisconsin statutes, which dilutes or otherwise diminishes the value of her vote and/or other lawful votes.

27. Plaintiff is entitled to have the elections in which she participates administered properly and in accordance with the law.

28. If WEC is allowed to continue its administration of the 2022 election and future elections in a manner other than that required by law, it will only cast doubt on the administration of our elections and cause a lack of voter confidence in our electoral process.

CLAIM FOR RELIEF: DECLARATORY RELIEF

29. Plaintiff reincorporates by reference the previously alleged paragraphs as if fully set forth herein.

30. The August 1, 2022 memorandum from WEC regarding “Spoiling Absentee Guidance for the 2022 Partisan Primary,” and the August 2, 2022 WEC memorandum titled “Rules about ‘Spoiling’ Your Ballot”, along with similar prior publications by WEC, both explain WEC’s interpretations of election statutes and provide guidance and advice with respect to how WEC will apply the statutes to voters and how WEC directs local election officials concerning the applicability of the statutes.

31. Accordingly, the legal interpretations set forth in these documents are challengeable in an action for declaratory judgment.

32. There exists an actual and justiciable controversy between Plaintiffs, on the one hand, and WEC on the other hand.

33. WEC’s interpretations of these statutes are entitled to no deference by this Court. Wis. Stat. § 227.57(11); *see also Lamar Cent. Outdoor, LLC v. Div. of Hearings & Appeals*, 2019 WI 109, ¶ 9, 389 Wis. 2d 486, 936 N.W.2d 573. Instead, courts follow the plain meaning rule when interpreting statutes. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

34. The parties dispute the validity of the aforementioned documents published by WEC and the legal interpretation offered by WEC in the above-described documents.

35. The interests of Plaintiffs and WEC are adverse.

36. The controversy is ripe for a judicial determination as to whether the legal analysis set forth in WEC’s guidance documents is a correct interpretation of the law.

37. Such judicial determination is necessary to terminate the controversy between the parties, and to clarify Wisconsin law in anticipation of future elections.

RELIEF REQUESTED

The Plaintiff demands Judgment against the Defendant, Wisconsin Election Commission,

as follows:

1. A declaration that municipal clerks are prohibited from spoiling a previously completed and returned absentee ballot by the elector who was issued the absentee ballot.
2. A declaration that municipal clerks are prohibited from returning an absentee ballot after it was previously completed and returned to the clerk by the elector who was issued the absentee ballot.
3. A declaration that any WEC publication that indicates that a municipal clerk may spoil a previously returned absentee ballot, or that a municipal clerk may return a previously submitted absentee ballot, when a voter changes his or her mind is contrary to Wisconsin law and shall be rescinded or otherwise removed from any WEC publication or document available to the public.
4. A declaration that WEC failed to promulgate its interpretations in the August 1, 2022 Spoiling Absentee Guidance for the 2022 Partisan Primary as administrative rules pursuant to, and as required by, Chapter 227, Wis. Stats.
5. A temporary and permanent injunction requiring that WEC cease and desist in offering incorrect guidance concerning the above-described matters, and directing clerks to no longer rely on the above-described guidance and/or documents.
6. An order directing WEC to promptly issue corrected guidance to all Wisconsin municipal clerks and election officials statewide consistent with the relief sought herein.
7. All statutory costs and disbursements incurred in pursuing this action.
8. Judgment for such other and further relief the Court may deem just and equitable.

Dated this 23rd day of September, 2022.

THE LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.
Attorneys for the Plaintiff, Nancy Kormanik

By: Electronically signed by Kurt A. Goehre
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