

No. 19AP559

In The Wisconsin Court of Appeals
DISTRICT III

THE LEAGUE OF WOMEN VOTERS OF WISCONSIN; DISABILITY RIGHTS
WISCONSIN INC.; BLACK LEADERS ORGANIZING FOR COMMUNITIES;
GUILLERMO ACEVES; MICHAEL J. CAIN; JOHN S. GREENE; AND MICHAEL
DOYLE,
PLAINTIFFS-RESPONDENTS,

v.

TONY EVERS,
DEFENDANT,
and
THE WISCONSIN LEGISLATURE,
INTERVENING DEFENDANT-PETITIONER

On Appeal from the Dane County Circuit Court,
The Honorable Richard G. Niess, Presiding,
Case No. 2019CV000084

SUPPLEMENTAL AFFIDAVIT OF ELLEN E. NOWAK

STATE OF WISCONSIN

DANE COUNTY

I, Ellen E. Nowak, being first duly sworn on oath, depose and say:

1. My name is Ellen E. Nowak, and I am an adult resident of the state of Wisconsin.

I make the below statements upon personal knowledge.

2. As noted in my affidavit executed and submitted to this Court on March 25, 2019, I have been a Commissioner on the Wisconsin Public Service Commission (“WPSC”) for the better part of nearly eight years.

3. In early December 2018, following a vacancy on the WPSC, Governor Walker reappointed me to the WPSC to serve a term set to expire on March 1, 2023. The Wisconsin Senate confirmed that appointment in December 2018. A Commissioner on the WPSC can be removed only “for cause.” Wis. Stat. § 17.07(3).

4. On March 21, 2019, the Circuit Court for Dane County (“Circuit Court”) temporarily enjoined the enforcement of the December 2018 confirmation of 82 appointees, including my confirmation. The Circuit Court added that “[t]he appointments are ordered temporarily vacated as a necessary consequence of this temporary injunction.”

5. On March 22, 2019, at approximately 4:20 p.m., I was informed by Randy Sarver, Human Resources Manager for the Bureau of Human Resources – Region 1, that Governor Tony Evers would be rescinding my appointment and that I would no longer be employed by the WPSC.

6. On March 27, 2019, this Court stayed enforcement of the Circuit Court’s injunction pending the outcome of the Legislature’s appeal (the “Order”). This Court explicitly stated that it issued the Order in part because—absent a stay—“irreparable injury” would “result” from the lower court’s “prohibit[ion]” on the “enforcement of potentially valid . . . *appointments*.” Order at 8 (emphasis added). The purpose of the Order was to avoid this “irreparable injury” precisely by lifting the circuit court’s “prohibit[ion]” on the enforcement of certain appointments, including mine, thereby restoring the status quo ante. Order at 8.

7. Following the entry of this Court’s Order, on March 27, 2019, I notified Mr. Sarver and Carrie Templeton, chief of staff to WPSC Chairperson Rebecca Cameron Valcq, that I would return to work the following day. I also stated that I expected that my building access and email access would be restored. Mr. Sarver responded that the Department of Administration had informed him that this Court’s stay did not restore the appointments purportedly withdrawn by

Governor Evers on March 22, 2019, including mine, and thus that this Court's Order had no effect whatsoever on my situation.

8. On Thursday, March 28, 2019, at approximately 8:50 a.m., I attempted to return to work at the WPSC, in light of this Court's Order. But in the lobby, I was stopped by a security guard, as was my policy advisor, Robert Seitz. The guard informed me that he could not permit me to enter the elevators, that he would call the WPSC, and that the Commission would send someone down to talk to me.

9. A few minutes later, Mr. Sarver entered the lobby, and he, Robert Seitz, and I went to a conference room. Mr. Sarver informed us that he was instructed not to allow us to access our offices.


10. Just as *before* this Court issued its stay, I once again face the potential of unemployment for months until a decision is made on the underlying merits of this lawsuit. In the meantime, state law forbids me from "pursu[ing] any other business or vocation." Wis. Stat. § 15.06. This will cause both financial and emotional harm to me. As explained in my previous affidavit, the WPSC job was my sole source of income, and now I am faced with uncertainty regarding future income and insurance coverage. That uncertainty—sown by the Circuit Court's injunction, removed by this Court's written Order staying that injunction, and now reintroduced by the Governor's decision to flout this Court's stay—undercuts the stability of my personal and professional life.

11. Beyond these severe personal consequences, the work of the WPSC—and the utilities more generally—will also be affected if the Court does not grant the Legislature's Motion. The WPSC typically meets weekly in open session to consider proceedings related to the state's approximately 1,100 utilities. Having only two Commissioners at the helm could cause

considerable uncertainty to the entities regulated by and consumers affected by the WPSC's decisions. If there is a tie vote on an issue before the WPSC (for example, a vote on whether to approve a grant for expanding broadband access, to approve a new electric generation resource, or to consider an economic development tariff for utilities and customers), that question will not be resolved. For utilities, this means that projects that they have spent months planning will be stalled. This will not only threaten to stall development and job creation but also will interfere with the needs of the utilities and the interests of their customers in the provision of reliable service.

12. Worse, the prospect that one of the two remaining acting Commissioners might need to recuse in a number of matters imposes on the WPSC even greater hardships. It is foreseeable, for example, that the WPSC's newest member, Chairperson Valcq, will recuse herself from participating in future matters due to her previous work as a private attorney for regulated entities. *See* Recusal Policy for Rebecca Cameron Valcq's Appointment to the Public Service Commission, *available at* <https://perma.cc/BX8N-6A8W> (last visited March 31, 2019). Having only one acting Commissioner would greatly interfere with the mission of the WPSC. Issues that involve substantial money and millions of customers could be stalled, and the resulting uncertainty in the regulatory field would have serious consequences for Wisconsin employers and consumers.

Executed on April 1, 2019.



Ellen E. Nowak

Subscribed and sworn before me this 1st
Day of April, 2019



Notary Public, State of Wisconsin
My commission is permanent