

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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SHERYL ALBERS-ANDERS,

Plaintiff,

v.

MARK POCAN,

Defendant.

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OPINION AND ORDER

11-cv-392-bbc

Plaintiff Sheryl Albers-Anders was a longtime member of the Wisconsin Assembly. After leaving the assembly, she applied for a position as a clerk for a bipartisan joint committee. Defendant Mark Pocan rejected her application because of her partisan history. Plaintiff has sued defendant, contending that he violated the First and Fourteenth Amendments of the United States Constitution by rejecting her application for employment because of her political affiliation. Defendant has filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) based on qualified immunity. Dkt. #9. Defendant relies on a response from the Wisconsin Equal Rights Division in related age discrimination litigation that he wants the court to consider in full. I conclude that it is inappropriate to consider the response in the context of a motion to dismiss because the factual matters included in the

response are not something of which I can take judicial notice. Taking only the pleadings into consideration, I find that defendant has not shown that he is entitled to dismissal of the complaint against him.

Also before the court is plaintiff's motion to disregard new facts and arguments in defendant's reply brief. Dkt. #16. I will grant plaintiff's motion to disregard the additional materials but deny her motion to disregard the arguments. It would be improper to consider arguments raised for the first time in a reply brief, but defendant's arguments do not fall into this category.

In her complaint, plaintiff alleged the following facts.

#### ALLEGATIONS OF FACT

Plaintiff Sheryl Albers-Anders worked from 1987 until 1991 as a policy analyst for the Assembly Republican Caucus. One of her duties was to monitor the proceedings of the Joint Finance Committee and to report on them to Republican legislators. From 1992 until 2009, she was a Republican representative in the assembly, where she served on the Joint Committee on Finance from 1996 until 2000. The Joint Committee on Finance is a joint standing committee of the Wisconsin Legislature created by statute and composed of members of the Wisconsin Senate and Assembly. In 2004, plaintiff graduated from the

University of Wisconsin Law School and received her license to practice law in Wisconsin.

After leaving the assembly, plaintiff learned on August 29, 2009 about an open position as Committee Clerk to the Joint Finance Committee. She applied for this position but did not receive an interview. After hearing that the position had been filled by another applicant, plaintiff requested a copy of the successful applicant's résumé, which showed that he graduated from high school in 1997. Plaintiff presumed he was approximately 30 years of age. He had attended Madison Area Technical College but held no college level degrees or certificates. His work experience included positions as a messenger for the Assembly Sergeant at Arms and as an assistant clerk in the Assembly Clerk's office, a position he held for less than one year. Concluding that her qualifications exceeded his in every respect, plaintiff inferred that the applicant was hired for his youth and filed an age discrimination complaint with the Wisconsin Equal Rights Division.

In its response to plaintiff's complaint, the Equal Rights Division issued its response to plaintiff's age discrimination complaint. The response identified defendant Mark Pocan as the individual who decided to hire the other applicant rather than plaintiff. The Equal Rights Division quoted defendant's counsel as saying that defendant had decided not to interview plaintiff or select her for the clerk position because of her party affiliation, believing it important "that the Committee Clerk not only be, but be perceived as being, non-partisan." Cpt., dkt. #8, at ¶ 416. Counsel added that a primary reason for defendant's

not considering plaintiff was her long history in partisan positions within the Assembly, which “would have made it difficult for her to be, and certainly to be perceived as being, non-partisan by those with she interacted within the Assembly.” Id. at ¶ 417.

## OPINION

### A. The Equal Rights Division’s Response and Motion to Strike

Defendant’s motion to dismiss relies on facts taken from the Equal Rights Division’s Response to plaintiff’s age discrimination complaint, a certified copy of which he attached to his motion. Dkt. #2-2. Defendant contends that, when read in its entirety, the response indicates that he rejected plaintiff’s application because she was overly partisan, not because she maintained a particular political affiliation or engaged in political activities. Additionally, he contends, the response indicates that plaintiff’s partisanship was a proper consideration: although the clerk is officially a member of defendant’s legislative staff, the clerk performs administrative tasks for the Joint Committee, which includes members of both political parties. Accordingly, defendant argues, the clerk should be non-partisan and perceived that way. In defendant’s view, plaintiff’s partisan history would make it difficult for her to perform in this nonpartisan capacity. Plt.’s Supp. Br., dkt. #10, at 37. (Defendant quotes large sections of the Equal Rights Divisions’s response in his brief, including six pages of his own written answers to questions posed by an investigator.)

“The consideration of a 12(b)(6) motion is restricted solely to the pleadings, which consist generally of the complaint, any exhibits attached thereto, and supporting briefs.” Thompson v. Illinois Department of Professional Regulation, 300 F.3d 750, 753 (7th Cir. 2002). In addition, the court may consider documents that are incorporated into the complaint by reference, if they are authentic and central to the plaintiff’s claim. Hecker v. Deere & Co., 556 F.3d 575, 582-583 (7th Cir. 2009). When a plaintiff “relies upon the document to form the basis for a claim or part of a claim, dismissal is appropriate if the document negates the claim.” Thompson, 300 F.3d at 754 (exhibit attached to complaint). The court of appeals has found it appropriate for district courts to consider written instruments to determine the terms of an agreement or the nature of a property interest, e.g. Wright v. Associated Insurance Cos., 29 F.3d 1244, 1248 (7th Cir. 1994); medical records to determine that a plaintiff received treatment, e.g., Farina v. Anglin, 418 Fed. Appx. 539, 542 (7th Cir. 2011); and letters or notices to determine whether a defendant disclosed certain information. E.g., Hecker, 556 F.3d at 583.

Although plaintiff refers to the response in her complaint and she concedes that it is authentic, the response is not central to her claim. The Equal Rights Division reached conclusions about facts central to plaintiff’s claims, but its factual findings are not “the subject of the claim.” Thompson, 300 F.3d at 754. Plaintiff quotes from the response and draws from it her belief about defendant’s political motivations, Plt.’s Opp. Br., dkt. #13,

at 9-10, but the response is not the basis of her claim merely because it is an important piece of evidence.

Ultimately, defendant's real complaint is that plaintiff chose misleading quotations from the response to include in her complaint. Even when a plaintiff attaches an exhibit to its complaint, the plaintiff is not committed to all its factual assertions, especially if it contains potentially self-serving statements by the defendant, as the court of appeals has explained. Northern Indiana Gun & Outdoor Shows v. City of South Bend, 163 F.3d 449, 455 (7th Cir. 1998). It is disingenuous for defendant to assert that the complaint incorporates those sections of the response that quote his answers to the investigator. Plaintiff is entitled to contest the Equal Rights Division's factual findings and the defendant's characterization of those findings.

Defendant's final argument is that I may take judicial notice of the response. "A court may consider judicially noticed documents without converting a motion to dismiss into a motion for summary judgment." Menominee Indian Tribe v. Thompson, 161 F.3d 449, 456 (7th Cir. 1998). Judicial notice of the existence of the response would be proper, as would judicial notice of the fact that the response contains certain statements. Judicial notice of facts contained in the response is not. Defendant asks the court to take notice of facts about his intent in filling the job position in the response, but these facts are not "generally known" and are not from a "source whose accuracy cannot reasonably be questioned." Fed. R. Evid.

201(b). Accordingly, I will exclude the response.

As an additional matter, plaintiff has filed a motion to exclude certain arguments in defendant's reply brief and documents that he submitted with his reply brief. Defendant submitted two image captures from websites as evidence that the Committee Clerk is a political staff position. Dkts. #15-1 and 15-2. The documents fall outside the pleadings yet meet none of the requirements set out in Hecker, 556 F.3d at 582-83, discussed above, so I will not consider them for purposes of the motion to dismiss.

Plaintiff also argues that the defendant's purported distinction between partisan activities and political affiliation was a new argument introduced in the reply brief. However, defendant made this argument explicitly in his opening brief. Dkt. #10, at 36-37, 47. Accordingly, I will disregard the exhibits but not the arguments. Because I have decided to exclude the response and the additional material, I decline to convert defendant's motion to dismiss into a motion for summary judgment under Fed. R. Civ. P. 12(d).

#### B. Qualified Immunity

The doctrine of qualified immunity protects government employees from being sued for monetary relief when they act in a manner that they reasonably believe to be lawful. To defeat the defense, a plaintiff must show that (1) defendant violated plaintiff's federal rights

and (2) the rights at issue were clearly established at the time of the alleged violation. Saucier v. Katz, 533 U.S. 194, 201 (2001). Courts may address the two prongs of the qualified immunity test in whatever order is most expedient. Pearson v. Callahan, 555 U.S. 223, 235 (2009). Beginning with the second prong, the issue is “whether reasonable public officials in their position would have understood that what they were doing was unlawful.” Kerr v. Farrey, 95 F.3d 472, 480 (7th Cir. 1996) (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)). A plaintiff may establish this by citing closely analogous cases that establish the right at issue and that it applies to the factual situation at hand, thus demonstrating that it was “certain” or “apparent” that the defendant’s conduct was unlawful at the time. Doyle v. Camelot Care Centers, Inc., 305 F.3d 603, 620 (7th Cir. 2002)

Defendant argues that plaintiff cannot identify analogous cases that clearly establish that a state legislator violates the First Amendment by considering an applicant’s “partisan activities” when hiring for a historically non-partisan position on his staff. Unfortunately for defendant, this argument rests on his interpretation of the Equal Rights Division’s response, rather than the facts alleged in plaintiff’s complaint. As set forth in the pleadings, plaintiff’s claim is that defendant predicated his hiring decision on her political affiliation and history of political activities. The court cannot assume, as does defendant, that his motive was to find a less divisive applicant. Accordingly, the appropriate question for the second prong is whether it would be apparent to a reasonable public official that he cannot

discriminate against a public employee on the basis of her political affiliation and past political activities. “It is well established that hiring, firing, or transferring government employees based on political motivation violates the First Amendment, with certain exceptions for policy-making positions and for employees having a confidential relationship with a superior.” Hall v. Babb, 389 F.3d 758, 762 (7th Cir. 2004) (citing Rutan v. Republican Party of Illinois, 497 U.S. 62, 65, 71 n.5 (1990); Elrod v. Burns, 427 U.S. 347, 367, 375 (1976)).

Defendant also argues that, even if he had considered plaintiff’s party affiliation, he would not have violated her First Amendment rights because the clerk position is a member of his staff who meets the “policy-making exception.” A public official may make politically motivated employment decisions if political affiliation is necessary to the functions inherent in the position. Tomczak v. Chicago, 765 F.2d 633, 641 (7th Cir. 1985). In this circuit, “the test is whether the position . . . authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation.” Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981); Powers v. Richards, 549 F.3d 505, 509-513 (7th Cir. 2008). Legislators are entitled to consider political affiliation and activities when making employment decisions about their staff members. Gordon v. Griffith, 88 F.Supp2d 38 (E.D.N.Y. 2000).

Defendant’s remaining argument is best understood as a challenge to the first prong

of qualified immunity. The question whether defendant's employment decision violated First Amendment law depends on the nature of the Committee Clerk position, an issue that requires additional factual development and cannot be resolved on the motion to dismiss.

ORDER

IT IS ORDERED that

1. Defendant Mark Pocan's motion to dismiss, dkt. #9, is DENIED.
2. Plaintiff Sheryl Albers-Ander's motion to disregard new facts and arguments in reply submissions, dkt. #16, is GRANTED IN PART and DENIED IN PART. I have disregarded the exhibits in defendant's reply brief but not his arguments.

Entered this 24th day of October, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge