

TO: Wisconsin Elections Commission
FROM: Town of Hudson
RE: Response to Complaint of Celeste Koeberl and John Gostovich Filed with Wisconsin Elections Commission
DATE: January 12, 2021

In response to the Complaint filed by Celeste Koeberl and John Gostovich, the Town of Hudson, Town Clerk, Vickie Shaw and Town Chairman, Don Jordan (“Respondents”), by the Town Attorney, Paul Mahler, state as follows:

I. Overview

On December 23, 2020, the Complainants, Celeste Koeberl and John Gostovich, filed a complaint with the Wisconsin Elections Commission alleging that the Town of Hudson made decisions contrary to law and abused their discretion in administering and conducting the Town’s Caucus, which was scheduled for and occurred on January 4, 2021. The Complainants alleged their age, sex, and underlying medical conditions make them more susceptible to becoming ill from COVID-19, and because of this they must have the option to participate in the Town’s Caucus online via Zoom or a similar program. The Complainants made claims under Wisconsin voting laws as well as Title II of the ADA.

The Town of Hudson has made every effort to protect its constituents while keeping the Town Caucus in its designated format. If the Town created an option to participate in the caucus via Zoom or a similar program, it would fundamentally alter the format of the Town’s nomination process. Nevertheless, after consulting with the Wisconsin Town’s Association and the Town Attorney, the Town made many adjustments to the caucus to keep its constituents safe, including finding a larger venue for the caucus so people could safely distance, requiring face masks to be worn by participants, and collecting contact tracing information.

II. The Complainants’ allegations are not supported by Wisconsin’s voting laws.

Complainants are correct in their Complaint that Wis. Stat. 5.25(4)(a) requires each polling place to be accessible to all individuals with disabilities, and under Wis. Stat. § 5.02(15), a polling place is defined as “the actual location wherein the elector’s vote is cast.” Compl. at 2. However, this chapter of Wisconsin’s statutes does not apply to the Town Caucus, as the Town Caucus is neither an election nor primary. An election is defined as “every public primary and election.” Wis. Stat. 5.02(4). Notably, the definition of election does not include caucus. Furthermore, Wis. Stat. § 8.05 describes the caucus as a nomination process, not an election. Candidates are “placed in nomination” and the two candidates with the most votes are “nominated,” not elected.

Wis. Stat. § 8.05(d). If nominated at the caucus, a nominee's name will go on a ballot for the election, assuming they meet other requirements as designated by statute. Wis. Stat. 8.05(1)(j). The legislature's decision to distinguish a caucus from a primary election in Wis. Stat. § 8.05 is further evidence of the difference between a caucus and an election.

Even if the caucus was an election, remote voting would still not be a legal option. While Wisconsin statutes state that the polling place is "the actual location wherein the elector's vote is cast," Wis. Stat. § 5.02(15), that does not mean a polling place can be a voter's home. In fact, polling places are to be public buildings, unless the use of a public building is "impracticable" or a private building would be better for the electorate. Wis. Stat. § 5.25(1). Thus, the statute was not intended to allow a voter's living room to be a polling place. Furthermore, the Town Board has the authority to establish polling places, Wis. Stat. § 5.25(1), (2), and the Town Board decided the Hudson High School building is an appropriate "polling place" for the Town Caucus. The Hudson High School is a new state-of-the-art facility and is fully ADA compliant with a modern air circulation system.

Furthermore, state law does still not permit online voting in an election. Wis. Stat. § 5.02(1e) defines "ballot" as "a ballot label, sheet of paper or envelope on which votes are recorded. The term also includes a sheet or card, filmstrip or other device listing or containing information relative to offices, candidates and referenda which is placed, projected or composed on the board or screen inside a voting machine." This definition of ballot gives no indication an online ballot is permissible. A ballot is either a physical paper ballot or somehow displayed on a voting machine. Zoom or another online program cannot qualify as a "voting machine," because a "voting machine" is a "machine which serves in lieu of voting booth and which mechanically or electronically records the votes cast by electors, who depress levers or buttons located next to the choices listed on a ballot to cast their votes." Wis. Stat. § 5.02(24r). The definition of voting machine indicates that the elector still needs to be in-person to vote via machine, as the voter needs to hit buttons or levers. Moreover, a voting machine is meant to be an electronic voting booth, meaning a voter still needs to be there in-person to use it. Therefore, Wisconsin's statutes do not provide for or permit online voting, and to require the Town to provide such a voting process would be illegal and unprecedented. A change in the voting process to allow on-line voting is for the State to decide through the legislative process and should not be done on a Town by Town basis.

Furthermore, as required by Wis. Stat. § 5.25(4)(a), which requires polling places to be accessible to individuals with disabilities, the Town made the "polling place" accessible to all individuals with disabilities by requiring masks, enforcing social distancing, collecting contact tracing information, changing the venue to a larger room with a better air filtration system, and taking other safety precautions.

The Town of Hudson nominates individuals for official positions via a caucus. The Town could have selected other nominating procedures, such as a primary, but it did not. We understand that the pandemic presents challenging issues, but that does not mean that the Town's due procedures and the law regarding caucuses should not be followed.

III. The Town has fulfilled its responsibilities under the Americans with Disabilities Act (ADA).

Complainants allege that the Town violated Title II of the Americans with Disabilities Act (ADA) by not providing Mr. Gostovich with reasonable accommodations due to his disability. We do not contest, for purposes of this response, that Mr. Gostovich has a qualifying disability under the ADA. However, we argue that his stated disability is not the alleged disability about which the Complainants state their claims, and even if Complainants have a disability, the Town has fulfilled all requirements it would have under the law to make reasonable modifications for the Complainants.

a. Fear of COVID-19 is not a disability for which reasonable modifications are required under the Americans with Disabilities Act (ADA).

Mr. Gostovich alleges that because of his qualifying disability under the ADA, he is entitled to reasonable accommodations. Both Mr. Gostovich and Ms. Koeberl allege that because of their "elevated risks" of becoming ill from COVID-19, they do not want to participate in an in-person caucus and must have the option to participate in the caucus online. Compl. at 1-2. Therefore, though Mr. Gostovich may have a disability under the ADA, the Complainants' assertions indicate it is their fear of COVID-19 that is the disability rather than any other disability they may have. We argue that a generalized fear of catching COVID-19 alone is not a disability as defined by the ADA.

The ADA defines a disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12102(1). Therefore, though "disability" is to be interpreted broadly, 28 CFR 35.108(a)(2)(i), there are three primary requirements a person must meet in order to be deemed to have a disability under the ADA: (1) they must have a mental or physical impairment; (2) this impairment must limit major life activities; and (3) this limitation on major life activities must be substantial.

The Federal Rules implementing the ADA define a physical or mental impairment as "Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems . . . ; or Any mental or psychological disorder such

as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.” 28 CFR 35.108(b)(1). Furthermore, physical or mental impairment “includes, but is not limited to, contagious and noncontagious diseases.” 28 CFR 35.108(b)(2). Fear of COVID-19 alone is not a mental or psychological disorder, and thus is not a physical or mental impairment. If the Complainants became infected with COVID-19 or had a diagnosed mental condition, like anxiety, exacerbated by fear of COVID-19, it is possible those conditions could be physical or mental impairments. However, the Complainants’ generalized fear of becoming infected with COVID-19 because of their alleged “elevated risks” of illness from the virus does not rise to the level of a mental or psychological disorder. Without some kind of physical or mental impairments, the Complainants do not have a disability pursuant to the ADA.

Even if we assume the Complainants have a physical or mental impairment, this physical or mental impairment must substantially limit a major life activity. Major life activities are defined generally as “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working,” but this list is not exhaustive. 28 CFR 35.108(c)(1)(i). Use of the term “major” is not meant to create a demanding standard to be a major life activity, and an activity does not need to be “of central importance to daily life” in order to be considered a major life activity. 28 CFR 35.108(c)(2)(ii). For purposes of this analysis, we will assume that fear of COVID-19 limits major life activities; however, any limitation that fear of COVID-19 has on major life activities is not substantial. The phrase “substantially limits” is to be interpreted broadly. 28 CFR 35.108(d)(1)(i). Regulations state, “An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.” 28 CFR 35.108(d)(1)(v). Everyone in the general population—regardless of age, sex, disability, or health condition—is dealing with concerns and fears for their health and safety during the COVID-19 pandemic; thus, as compared to most people in the general population, the Complainants are no more limited than others by their generalized fear of COVID-19 and are thus not substantially limited.

Complainants’ claimed fear of COVID-19 does not rise to the level of a disability. We acknowledge that “disability” must be interpreted broadly. 42 U.S.C. § 12102(4)(A). However, Complainants’ generalized fears of contracting COVID-19 are not physical or mental impairments that substantially limit a major life activity, and thus Complainants do not have a disability for which reasonable modifications must be made.

b. Even if Complainants have a disability, the Town of Hudson made several reasonable accommodations to the Town Caucus to ensure it was accessible and safe for Complainants and all other constituents.

The ADA mandates that “no qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity.” 42 U.S.C. § 12132. A public entity includes state and local governments, 28 CFR § 35.104, and these entities are tasked with providing “reasonable modifications in policies, practices, or procedures” in order to avoid disability discrimination. 28 CFR § 35.130(b)(7). The Town of Hudson, a public entity, is thus charged with providing reasonable accommodations to individuals with disabilities to ensure those individuals can participate in the Town’s activities, such as the caucus, and with regards to the caucus, the Town made reasonable accommodations to make sure the caucus is accessible to Complainants.

The Town made several modifications to the caucus to protect the health of all its constituents and allow Complainants and other constituents to safely and comfortably participate in the caucus. For example, the Town moved the location of the caucus from the Town Hall to the Hudson High School, a larger venue, so there would be more distance between people attending the caucus. This new venue was also selected because it had a more modern air system which was represented to completely replace the room air every 15 minutes and a large adjacent area separated by glass walls accessible from the room for overflow and waiting where people uncomfortable with being in the room could stay but still participate in the caucus.

In addition to the change in venue, tables in the room where the caucus took place were spaced apart to allow for social distancing, and each table also had Plexiglas barriers mounted on the table for added protection between participants. The Town also made every effort to required individuals participating in the caucus to wear face masks, with exceptions for those with medical conditions, and the Town collected contact tracing information from all attendees. Furthermore, the Town asked that only people eligible to participate attend the caucus to reduce the amount of people at the caucus. A Hudson police officer was also in attendance to assist if necessary.

On December 23, 2020, the Town posted the following information on their website to advise their constituents of the requirements for the caucus and to keep everyone healthy and safe: “Due to the Covid-19 pandemic the Town will be holding the Caucus at the Hudson High School to provide a larger venue for the event. In accordance Hudson School District policies and that of the Town, masks will be required to be worn. Exceptions will be made for those individuals with medical conditions. Contact tracing information will be obtained for individuals attending the Caucus. Attendees will be expected to maintain social distancing between household groups. The Town requests that only eligible electors attend to help minimize the size of the gathering.”

Therefore, if the Complainants do have a disability recognized by the ADA, reasonable modifications to the caucus were made by the Town to ensure the Complainants could safely participate in the Town Caucus.

- c. The Town of Hudson is only required to make reasonable accommodations so long as they do not fundamentally alter the government activity. Permitting constituents to participate in the Town Caucus via Zoom or a similar program would fundamentally alter the caucus.**

The Town of Hudson is required to provide reasonable accommodations to individuals with disabilities; however, these accommodations are not required if “the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” *Id.* According to the U.S. Department of Justice, a fundamental alteration is “a change in the essential nature of the entity’s programs or services.” Department of Justice, *ADA Update: A Primer for State and Local Governments* (June 8, 2015).

Permitting voting by Zoom or similar programs or allowing absentee ballots for the Town Caucus would be a fundamental alteration in the Town’s nomination process and not authorized by statute. The Caucus process is governed by Chapter 8 of the Wisconsin Statutes. The process for a caucus is unique and distinct from a primary election, as outlined in Wis. Stat. § 8.05. For example, officials in a caucus are nominated either by acclamation or ballot, and two tellers canvass the vote for each office. Wis. Stat. § 8.05(1)(c). Nominations are made at a caucus by making a motion from the floor or writing a candidate’s name on a slip of paper that is given to the tellers. Wis. Stat. § 8.05(1)(d). If more than two candidates are nominated the field is reduced to two by ballot. Wis. Stat. 8.05(1)(f) and (g). The two candidates receiving the highest number of votes are nominated to the position. Wis. Stat. § 8.05(1)(e),(h). Thus, caucuses involve an in-person component that if altered would cause the caucus to lose its essential character. In-person attendance is an “indispensable feature” of the Town’s Caucus. While absentee ballots and other remote alternatives may work in a primary, these alternatives do not work for the type of nomination process selected by the Town.

Though Complainants argue voting via Zoom or similar programs would not be a fundamental alteration, their support for this argument is more about the ease of use of the technology than it is about how the nature of the Town Caucus would be altered by online participation. Complainants state that the school has the staff and technological capabilities to make Zoom work; it would not be difficult to verify the ID’s of those attending remotely; it would not be difficult to prevent unqualified voters from voting; and it would not be difficult to provide and conduct secret balloting. However, even assuming this is correct and the technology is easy to use for the Town Caucus (an assumption we disagree with), the essential nature of the caucus would still be

completely transformed by allowing remote participation. Complainants assert that 1/3 of the electors of the Town would qualify for Zoom voting if their request was granted.

Thus, because of the unique attributes of a caucus that require in-person participation, a change that permitted online participation would be a fundamental alteration of the caucus. Therefore, the Complainants' request for voting via Zoom or a similar program is a fundamental alteration of the Town Caucus and the Town is not required to fulfill this request under the ADA.

IV. Use of the technology would not only fundamentally alter the Town Caucus, but it would also create significant privacy and security issues.

It would be difficult for the Town to allow online voting from a practical standpoint. It is possible that hundreds of people would attend the Town Caucus, and the Town is not equipped to handle hundreds of people voting through such a program. While the Town does have experience using Zoom for Town meetings, there is a significant difference between using a program like Zoom in the context of a Town Board meeting and trying to use the program to organize a Town-wide Caucus.

Not only would there be administrative difficulties, but nominating individuals via Zoom or a similar program would have serious impacts on the privacy of those participating in the caucus. The Town would not be able to maintain secret ballots, and this has the potential to hinder participants' participation in the caucus. For example, if participants know that others—such as their boss, co-workers, friends, or family—can see which nominee they are voting for, participants may be less willing to vote as the truly want or may fear repercussions for doing so.

In addition, there are security concerns with voting via Zoom or a similar program, such as the ability to verify that the individuals in the Zoom meeting are actual eligible participants. Even if IDs were checked at the beginning of the caucus, it would be easy for someone on a program like Zoom to leave the room and someone else to take their place; you would not be able to tell who is actually doing the voting. Therefore, online voting has serious potential for fraud.

V. The Circuit Court of St. Croix County heard practically the same exact claims made by Complainants in this WEC complaint in a hearing on January 4, 2021, and the judge ruled in favor of the Town of Hudson.

On December 30, 2020, the Complainants filed Motions of Writ of Mandamus, Temporary Injunction, and Declaratory Judgment against the Town of Hudson on basically the same issues outlined in this complaint. On January 4, 2021, the day of the caucus, a hearing took place before the Honorable Scott J. Nordstrand of the St. Croix

County Circuit Court, at which Judge Nordstrand denied all of Complainants' motions. An audio recording of the hearing is enclosed.

At the hearing, Judge Nordstrand reasoned Wisconsin's election statutes were not applicable to a nomination caucus and were not intended to include online voting. For example, he discussed how the scope of the statutes cited by Complainants, including Wis. Stat. §§ 5.25, 5.36, and 6.02, specifically deal with elections not nomination caucuses, as the definition of election under the statutes is "every public primary and election." Wis. Stat. 5.02(4). In addition, he discussed how Wisconsin's statutes listing the requirements of a polling place, Wis. Stat. § 5.35, includes requirements such as displaying the national flag and having voting booths and ballot boxes; Judge Nordstrand used this statute as an example of how a constituent's home is not meant to be a polling place as a person's home would likely not meet all of these requirements..

With regards to Complainants' ADA claim, Judge Nordstrand held that the Town had made reasonable accommodations for those who were at risk of becoming infected with COVID-19 by changing its venue, distancing tables, and implementing other safety precautions as discussed above. He further held that changing the caucus to require online voting changes the fundamental nature of the caucus and he cannot fundamentally alter this electoral process as an ADA accommodation. Judge Nordstrand specifically pointed to Wis. Stat. § 8.05(g), which says that voting shall be by ballot unless the caucus chairperson dispenses with voting by ballot when only one or two people are nominated, as evidence of how online voting would fundamentally change the caucus process.

For the reasons summarized above, Judge Nordstrand denied the Complainants' motions.

VI. The Town Caucus took place on January 4, 2021, without issues.

The Town Caucus on January 4, 2021, was quick and well organized. The safety precautions were enforced to the best of the Town's ability, and once commenced the whole caucus ended up lasting approximately 15 minutes as no voting took place due to a lack of candidates.

VII. Conclusion

To the extent that the Town of Hudson is required to make reasonable accommodations for Complainants, those requirements were met by changing the location of the caucus, requiring masks to be worn at the caucus, and implementing other safety measures to protect those in attendance. Not every request made by an individual with a disability must be accommodated; the Town must only make reasonable accommodations to allow an individual with a disability to participate in the Town's activities. Requiring

participation in the Town Caucus via Zoom or a similar program with internet voting would fundamentally alter the in-person character of a caucus and mandate a process not authorized by State law; therefore, the Town neither abused its discretion nor violated any laws by refusing to permit Complainants to participate in the caucus via Zoom or a similar program.

For the reasons set forth above, Respondents request the Complaint asserted against them be found to be without merit and dismissed.

[Signature Pages to Follow]

