

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UTILITY WORKERS UNION OF AMERICA, LOCAL
369, AFL-CIO,

PLAINTIFF,

v.

FEDERAL ELECTION COMMISSION,

DEFENDANT.

Civil Action No. 09-cv-01022-JDB

**MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO FEDERAL ELECTION COMMISSION'S
MOTION TO DISMISS AND CONDITIONAL MOTION
FOR LEAVE TO AMEND COMPLAINT**

1. Pursuant to Rule 7(b) of the Local Rules of this Court, Plaintiff Utility Workers Union of America, Local 369 ("Local 369") responds in opposition to the July 31, 2009, Motion of Defendant Federal Election Commission ("FEC") to Dismiss Local 369's June 1, 2009, "Complaint and Petition for Review" ("Complaint") initiating this matter. For the reasons stated here, the FEC's motion ("FEC Motion"), submitted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, should be denied.

2. Local 369 further requests leave, to the extent this Court deems necessary, to amend its Complaint, as discussed below.

3. Rule 12(b)(6) of the Federal Rules of Civil Procedure is invoked in instances in which a complainant has failed to state a claim upon which relief can be granted. The FEC has not contended that Local 369 has failed to state a claim upon which relief can be granted; instead, the FEC urges that the Complaint be dismissed because the FEC disagrees with Local 369's positions concerning the factual matters at issue. This disagreement, made plain by the

filing of the Complaint, is already known to the parties and this Court, and does not justify dismissal under Rule 12(b)(6). Whether or not the FEC is entitled to some degree of deference (*see, e.g.*, FEC Motion at 1, 9), it is not entitled to so much deference that any petition for review of its actions must be dismissed at the complaint stage. Such a result would write the judicial review provision out of the Federal Election Campaign Act (“FECA”), 2 U.S.C. § 437g(a)(8).

I. ARGUMENT

A. *Local 369’s Complaint states a claim upon which relief can be granted*

4. In its Complaint, Local 369 has alleged that the FEC erred in dismissing an administrative complaint filed by Local 369 asserting that the Covanta Energy Corporation (“Covanta”) is engaging in the solicitation of contributions to a Covanta-established federal political action committee (“PAC”). According to the Complaint, that solicitation was contained in a Covanta employee handbook, entitled “Policy of Business Conduct” (“Handbook”). *See, e.g.*, Complaint ¶¶ 30-31.¹

5. Whether the Covanta Handbook, in the context presented here, encourages employee-readers to support, or facilitates contributions to, the Covanta federal PAC is a disputed question of fact. For purposes of deciding this Motion, and as acknowledged by the FEC, this Court “accept[s] all factual allegations in the complaint as true” (*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also* FEC Motion at 4). As such, the Court should accept as true that the Covanta Handbook encourages or facilitates contributions to the Covanta federal PAC. *See Walther v. FEC*, 468 F. Supp. 1235, 1242 (D.D.C. 1979) (denying a motion to dismiss under Rule 12(b)(6) where “facts alleged by the plaintiff constitute a violation

¹ The Handbook is Attachment A to the Complaint.

[of FECA] and... plaintiff's allegations of FEC inactivity describe administrative decisions which are contrary to law.”).

6. Stripped of factual disagreements, the FEC makes only two arguments potentially relevant to a Federal Rule of Civil Procedure 12(b)(6) motion. First, the FEC states that dismissal is warranted because the Complaint “fails to allege that the Commission acted unreasonably in dismissing Local 369’s underlying administrative complaint.” FEC Motion at 1. The FEC’s contention does not hold water. Local 369 alleges that the FEC acted contrary to law (*see, e.g.*, Complaint ¶¶ 6, 15), which is the statutory standard contained in 2 U.S.C. § 437g(a)(8)(C).² To the extent necessary, an allegation of “unreasonableness” is contained in Local 369’s allegation that the FEC’s dismissal of the Complaint was contrary to law. However, if this Court decides that Local 369 should have explicitly alleged that the FEC’s dismissal of Local 369’s complaint was unreasonable, as well as unlawful, Local 369 respectfully requests leave to amend its complaint to include this (in our view already at least implicit) allegation.

7. Second, the FEC asserts that the Complaint is deficient in that it lacks an allegation that express language in the Covanta Handbook “*actually* invites such contributions.” FEC Motion at 11. The claim is not correct. Paragraph 30 of the Complaint contains the assertion that “language” of the Covanta Handbook “constitutes a solicitation by Covanta of employees outside of its ‘restricted class’ for Covanta’s federal PAC.”

8. The FEC ignores this assertion, and argues that Local 369 has instead premised its challenge on what the FEC believes is an inaccurate paraphrase of a passage in Covanta’s Handbook. *Id.* The basis for the FEC’s claim is at best unclear, in that it is not obvious why the paraphrase of “[c]ontributions to the PAC by eligible employees are voluntary” to “eligible

² The reasonableness of the FEC’s decision may be relevant to this Court’s ultimate determination, if it adopts the FEC’s argument with respect to the appropriate standard of review, but it is not a fact that must be alleged (or

employees' may make voluntary contributions" constitutes a "mischaracterization." If an "eligible" employee is an employee who may make contributions — and "eligible" can reasonably have no other meaning in this context — the two sentences convey identical information.

9. It could be argued that the question of whether the Handbook language is a "solicitation" is a mixed question of law and fact, which involves the application of a legal standard to a particular set of facts. Were this to be found to be the case, it would afford no procedural protection to the FEC. As this Court has held, "[i]n resolving a Rule 12(b)(6) motion, the court must treat the pleading's factual allegations — *including mixed questions of law and fact* — as true and draw all reasonable inferences therefrom in the pleader's favor." *Command Consulting Group, LLC v. NeuralIQ, Inc.*, 2009 U.S. Dist. LEXIS 48082, at *5 (D.D.C., June 9, 2009) (emphasis added).

10. The cases cited by the FEC in support of its Motion to Dismiss are almost universally cases decided after a hearing or on summary judgment. The exceptions (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Trudeau v. FTC*, 456 F.3d 178 (D.C. Cir. 2006); and *Hicks v. Ass'n of Am. Med. Colls.*, 503 F.Supp.2d 48 (D.D.C. 2007)) are cited only for general propositions regarding motions to dismiss, such as that dismissal under Rule 12(b)(6) is proper when a complaint fails to state a claim upon which relief can be granted, or whether attachments to the complaint may be considered by the Court. The cases do not support the FEC's attempts to persuade this Court to consider the merits of the case in the context of a motion to dismiss under Rule 12(b)(6).

addressed) in a complaint.

B. The FEC's arguments on the merits are both premature and misplaced

11. The bulk of the Motion consists of the dual claims that the FEC (a) is accorded substantial deference; and (b) acted reasonably in dismissing the Complaint. Regardless of whether these claims are well-founded, they do not belong in a motion to dismiss. As this Court made clear in a recent ruling, a Rule 12(b)(6) Motion deals only with the “legal sufficiency of a claim.” *Command Consulting Group, LLC v. NeuralIQ, Inc.*, 2009 U.S. Dist. LEXIS 48082, at *3.

12. To the extent the Court nonetheless chooses to consider the claims made in the FEC's Motion, we note the statement that:

Local 369 does not purport to challenge the permissibility of the Commission's interpretation of “solicitation” as excluding communications that neither encourage support of, nor facilitate contributions to, a corporation's separate segregated fund. On the contrary, Local 369 *invokes* the Commission's interpretation, asserting that “Covanta's Handbook . . . encourages readers to support the Covanta PAC's activities.”

FEC Motion at 10-11. The FEC's observation is correct and unremarkable. The Complaint does not challenge the FEC's “interpretation of ‘solicitation.’” Instead, the Complaint contends that the language of the Covanta Handbook itself falls within the parameters of what the FEC has determined in other contexts constitutes a “solicitation.”

13. The FEC argues that Local 369 has failed to demonstrate any connection between a solicitation of contributions to Covanta's State PAC and the alleged solicitation of contributions to the Federal PAC at issue in the Complaint. FEC Motion at 13 (referencing Complaint ¶ 34). While presumably not relevant at this stage of the proceeding, Local 369 notes that there is no question that (a) Covanta solicits State PAC contributions from its employees; and (b) Covanta's Handbook references *all* of its political activities, whether state or federal in nature. Local 369 is concerned that the presence of even permissible solicitations for State PAC contributions, in a

context in which Covanta references its state and federal political activities in the same passage in its employee Handbook, has the effect of inviting or encouraging employee support for all Covanta political activities.

14. The FEC notes (Motion at 13-14) that there is nothing untoward in the statement in the Handbook that employees with questions concerning contributions should contact “our General Counsel.” Complaint ¶ 28 (quoting Handbook). The relevance of this statement is obvious: the statement invites employees to have a dialogue with a high-level Covanta official about making a contribution to Covanta’s political activities.

CONCLUSION

15. Local 369’s Complaint states a claim upon which relief can be granted, and the FEC has failed to demonstrate the contrary.

16. For the foregoing reasons, Local 369 respectfully requests that this Court deny the FEC’s Motion to Dismiss Local 369’s Complaint.

Respectfully submitted,

/s/ Scott H. Strauss

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August 11, 2009

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2009, I electronically filed the foregoing document through the CM/ECF system, which will send a notice of electronic filing to Erin R. Chlopak.

Dated on this 11th day of August, 2009.

Respectfully submitted,

/s/ Scott H. Strauss

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