**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF WISCONSIN**

S.V.

Plaintiff,

vs. Case No.: 10-919

KENNETH KRATZ

Defendant.

**DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT**

## INTRODUCTION

In August 2009, Plaintiff reported to police that her then-boyfriend had strangled and beaten her, resulting in his arrest and eventual conviction for strangulation and suffocation. (Complaint ¶¶ 5, 29; Answer & Affirmative Defenses ¶¶ 5, 29.) As a result of Plaintiff's August 2009 report, Defendant, in keeping with his duties as Calumet County District Attorney, charged Plaintiff's ex-boyfriend and proceeded to prosecute him. (Compl. ¶5; Answer & Affirmative Defenses ¶¶ 8, 9, 24.) Defendant contacted Plaintiff during the course of that case in order to fulfill his duties to her as the victim of a crime and to ensure that her wishes would be taken into consideration with respect to the resolution of the case. (Compl. ¶8, 9; Answer & Affirmative Defenses ¶ 5.) During the course of his contact with the Plaintiff, and prior to the conclusion of that case, Defendant sent Plaintiff several text messages that Plaintiff now claims violated her Constitutional rights to due process and equal protection of the law and deprived her of the privileges granted to witnesses or victims of crime pursuant to Wis. Stats. Ch. 950. (*See* Compl. ¶¶ 13-18; Answer & Affirmative Defenses ¶¶ 16-18.) Plaintiff seeks

unspecified monetary damages for stress and embarrassment allegedly caused by Defendant's text messages. (Compl. ¶¶ 35, 45, A, C.)

Plaintiff's Complaint must be dismissed on at least two separate grounds. First, pursuant to Fed. R. Civ. Pro. 12(b)(6), Plaintiff has failed to state a claim on which relief can be granted and has alleged no clear violation of her constitutional rights. Second, and alternatively, Plaintiff's Complaint must be dismissed based upon a finding of summary judgment because Defendant is entitled to absolute or qualified immunity with respect to all allegations in Plaintiff's complaint.

**STATEMENT OF PROPOSED MATERIAL FACTS**

Defendant has moved to dismiss, thus, Defendant believes that the Complaint fails to state a claim even if all of the factual allegations therein are deemed to be true. To the extent Defendant's Motion is treated as a Motion for Summary Judgment, Defendant offers the following proposed material facts, pursuant to Civil L.R. 56, which even if deemed to be true, would still require a dismissal of Plaintiff's claims.

1. Defendant Kratz was, at all times material hereto, acting as a District Attorney. (Compl. ¶4).

2. At all times material to Plaintiff's Complaint, Defendant was acting within the scope of his employment. (Compl. ¶4).

3. Defendant Kratz prosecuted Plaintiff's former live-in partner under circumstances that constituted domestic abuse. (Compl. ¶5).

4. Defendant and Plaintiff met to discuss the criminal prosecution of her former live-in partner. (Compl. ¶9).

5. Plaintiff believed that Defendant had influence and control over the prosecution, and understood that Defendant was responsible for ensuring that she received protection from harm or threats of harm that could come from her cooperation in the prosecution. (Compl. ¶10-11).

6. After the meeting, and during the prosecution of the former live-in partner, in a three day period of October 20-22, 2009, Defendant sent Plaintiff thirty text messages urging Plaintiff to have a relationship with him. (Compl. ¶14).

7. In the text messages, Defendant asked Plaintiff to consider what her life would be like in the future, and what the benefit would be for her to have a relationship with a man like him. (Compl. ¶15).

8. Defendant texted Plaintiff the following: "Quite frankly I don't know what would happen, it would go slow enough for Shannon's case to get done. Remember it would be special enough to risk all." (Compl. ¶16).

9. Defendant texted the following to Plaintiff: "Hey.. Miss Communication, what's the sticking point? Your low self-esteem and you fear you can't play in my big sandbox? Or ???" (Compl. ¶17).

10. Defendant texted the following to Plaintiff: "I am serious! I am the attorney. I have the $350,000 house. I have the six figure career. You may be the tall, young, hot nymph, but I am the prize! Start convincing." (Compl. ¶18).

11. Plaintiff reported the text messages to the Kaukauna Police Department. (Compl. ¶ 25).

12. Defendant withdrew from further prosecution of the case against Plaintiff's former live-in partner. (Compl. ¶27).

13. On a plea of no contest, Plaintiff's former live-in partner was convicted of the most serious charge filed against him, the felony charge of strangulation and suffocation. (Compl. ¶29).

14. Under ethical rules, attorneys in Wisconsin cannot engage in conduct that creates a conflict of interest as defined in the rules. (Compl. ¶33).

15. Under the ethical rules, attorneys may not engage in sexual discrimination and sexual harassment in carrying out their professional responsibilities as lawyers as defined in such ethical rules. (Compl. ¶34).

16. Chapter 950 of the Wisconsin Statutes, and specifically, §950.04(2w) states that witnesses of crimes have the following rights: (c) to receive protection from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available. (Compl. ¶35).

The remaining allegations in the Complaint are either legal conclusions or nonmaterial factual assertions. The text messages speak for themselves and any characterization of them is irrelevant.

## ISSUES

I. Whether Defendant's alleged conduct deprived Plaintiff of her constitutional rights to due process and equal protection under the Fourteenth Amendment of the U.S. Constitution.

II. Whether Defendant is entitled to absolute or qualified immunity with respect to all allegations in Plaintiff's Complaint.

## BRIEF ANSWERS

I. Defendant's conduct did not deprive Plaintiff of her constitutional rights to due process or equal protection of the law.

1. Plaintiff has failed to demonstrate any Due Process violation as a result of Defendant's text messages.

    a. Defendant's text messages do not shock the conscience.

    b. Plaintiff was not denied any liberty or property interest under Federal or State law including Chapter 950 of the Wisconsin Statutes.

2. Plaintiff has failed to demonstrate that Defendant's text messages violated her right to equal protection based upon her sex.

II. Defendant is entitled to absolute immunity or, at the very least, qualified immunity with respect to all allegations in Plaintiff's Complaint as a matter of law.

**ARGUMENT**

"To survive a motion to dismiss, a complaint must contain sufficient factual allegations which, if true, "'state a claim to relief that is plausible on its face.'"" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For purposes of a motion to dismiss, the court must "accept[] the facts alleged in the complaint as true." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696 (9th Cir. 1990). If the allegations in a complaint cannot raise a right to relief above speculation, the complaint must be dismissed. *Twombly*, 550 U.S. at 555.

The Defendant has alternatively moved for Summary Judgment pursuant to FRCP 56, which states that it shall be granted if all of the information on file, together with any affidavits, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "In a §1983 case, the plaintiff bears the burden of proof on the constitutional deprivation that underlies the claim and must present sufficient evidence to create genuine issues of material fact to avoid summary judgment." *Sow v. Fortville Police Department*, No. 10-2188, slip op. at 9 (7th Cir. 2011) (citing *McAllister v. Price*, 615 F.3d 877, 881 (7th Cir. 2010)). The

Court's task is to determine whether there is a genuine material issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "The mere existence of some evidence to support the non-moving party is not sufficient for denial of summary judgment; there must be 'sufficient evidence favoring the non-moving party for a jury to return a verdict for that party.'" *Bailey v. Allgas, Inc.*, 284 F. 3d 1237, 1243 (11th Cir. 2002)(quoting *Anderson*, 477 U.S. at 249). "A mere 'scintilla' of evidence supporting the [non-moving] party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F. 2d 1573, 1577 (11th Cir. 1990).

## I. DEFENDANT'S CONDUCT DID NOT DEPRIVE PLAINTIFF OF HER CONSTITUTIONAL RIGHTS TO DUE PROCESS OR EQUAL PROTECTION OF THE LAW.

"To state a claim for relief in an action brought under § 1983, respondents must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999). Furthermore, "[i]t is well established that in order to state a claim under § 1983, a plaintiff must allege (1) that the challenged conduct was attributable at least in part to a person acting under color of state law, and (2) that such conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States." *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993). The allegations contained in Plaintiff's complaint "must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th

Cir. 2008). The standard this Court must use "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft*, 129 S. Ct. at 1949.

The parties do not dispute that Defendant acted under color of state law with respect to the allegations in the complaint. However, in light of the above standard, Plaintiff has failed to articulate any constitutionally guaranteed right, privilege, or immunity that was denied to her as a result of the text messages she received from Defendant.

**1. Plaintiff has failed to demonstrate any Due Process violation as a result of Defendant's text messages.**

Plaintiff's complaint does not specify whether Defendant violated her procedural or substantive due process rights. However, according to the complaint, Plaintiff's ex-boyfriend was diligently prosecuted after she reported his acts of domestic abuse to the police. (Compl. ¶ 5, 8-12, 29.) In fact, Plaintiff's ex-boyfriend was ultimately convicted and sentenced for his crimes, and Plaintiff was in contact with Defendant during the course of the criminal proceedings regarding the details of the case (pursuant to Defendant's duties as district attorney). (*See Id.*) *See also* Wis. Stats. § 950.04(1v). Based upon the facts alleged in the complaint, Plaintiff cannot plausibly claim that Defendant's text messages deprived her of her procedural due process rights as the victim of a crime. Defendant should not have to guess at what Plaintiff intends her claim to be, but there is no procedural due process violation even suggested by the allegations in the Complaint. [1]Thus, Defendant shall assume the Plaintiff intends to claim a violation of a substantive due process right.

[1] **The *Parratt* decision precludes the Plaintiff from using Chapter 950 as a basis for any procedural Due Process violation.** In *Parratt v. Taylor*, 451 U.S. 527 (1981), a prison inmate sued

Courts have ruled that "'to prevail on either a procedural or substantive due process claim, a plaintiff must first establish that a defendant's actions deprived plaintiff of a protectable property interest.'" *Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir. 2007) (quoting *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000)). "A due process claim under the 14th Amendment can only be maintained where there exists a constitutionally cognizable liberty or property interest with which the State has interfered." *Steffey v. Orman*, 461 F. 3d 1218, 1221 (10th Cir. 2006). Substantive due process "is a doctrine limited to impingement on fundamental rights."

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state officials for violation of his due process rights under the 14th Amendment and for relief under 42 U.S.C. §1983. In essence, the plaintiff prisoner ordered hobby materials which were received by the prison, but were subsequently lost because the prison failed to follow its mail procedures. *Id*. at 528-29. The Supreme Court found that the prisoner's claim actually satisfied three requirements of a due process claim: that the state officials acted under color of state law, the hobby materials were property, and the loss amounted to a deprivation. *Id*. at 536. However, those three elements did not establish a violation of the 14th Amendment. *Id*. The Court went on to hold that post-deprivation remedies can satisfy the due process clause. *Id*. at 538. In *Parratt*, the plaintiff had the ability to seek state court tort claim procedure to obtain recovery of his loss. *Id*. at 543.

The Court stated that although the plaintiff had been deprived of property under color of state law, "The deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the state to follow established state procedure." *Id*. There is no contention that those procedures were inadequate or that it was reasonable for the state to provide a pre-deprivation hearing. *Id*. Moreover, even though the plaintiff argued that the state tort claims procedure did not provide all of the remedies of a §1983 claim, that did not mean that the state remedies were not adequate to satisfy the requirements of due process. *Id*. It is important to note that the Supreme Court was quite cognizant of the fact that accepting plaintiff's claim under §1983 "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official ... into a violation of the 14th Amendment cognizable under §1983." Under the plaintiff's rationale "any party who is involved in nothing more than an automobile accident with the state official could allege a constitutional violation under §1983." Such reasoning "would make the 14th Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Id*. at 544, (quoting, *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

The 6th Circuit Court of Appeals extended the rule of *Parratt* and applied it to §1983 actions for damages resulting from the deprivation of a liberty interest. *Wilson v. Beebe*, 770 F. 2d 578 (6th Cir. 1985). Plaintiff's complaint appears to allege that she is entitled to relief as a victim/witness of a crime. Neither victims nor witnesses are considered to be a protected class for purposes of the Fourteenth Amendment to the U.S. Constitution, so Plaintiff's claims as a victim/witness are limited to rights or privileges afforded to persons with that status under Wisconsin law. *See DeShaney*, 489 U.S. at 189. Plaintiff's complaint cites Chapter 950 of the Wisconsin Statutes but references only a witness' right to protection from harm during the course of a criminal proceeding. Wis. Stats. §950.04(2w)(c). However, if Plaintiff wishes to assert a claim pursuant to Chapter 950, then she would be entitled, at most, to the relief provided for in the statute itself. Wisconsin Stats. § 950.11 states, "A public official, employee, or agency that intentionally fails to provide a right specified under s. 950.04(1v) to a victim of a crime may be subject to a forfeiture of not more than $1,000."

*Hanson v. Dane County, Wisconsin*, 608 F.3d 335 (7th Cir. 2010). "There are two types of substantive due process violations. The first occurs when the state actor's conduct is such that it 'shocks the conscience.' . . . The second occurs when the state actor violates an identified liberty or property interest protected by the Due Process Clause." *T.E. v. Grindle*, 599 F.3d 583 (7th Cir. 2010) (quoting *Rochin v. California*, 342 U.S. 165, 172-73, 72 S. Ct. 205, 96 L. Ed. 183 (1952) and citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)). Plaintiff has not cited any Wisconsin law that provides her with a property or liberty interest to be free from flirtatious text messages. Plaintiff has provided no factual allegation to indicate she had a property right or entitlement to be free from flirtatious text messages, and certainly such possible right would not fit a traditional understanding of property. Moreover, Plaintiff has no constitutionally protected liberty interest in being free from unwanted attention from the opposite sex where said attention is not violent, harassing, or abusive. The legal standards established for purposes of conducting due process analysis further illustrate the frivolity of Plaintiff's claims.

### A. Defendant's text messages do not "shock the conscience" as that standard is applied under §1983.

Defendant's text messages may have been offensive to Plaintiff, but they hardly constitute a shock to the conscience, particularly when compared with cases in which courts have found a deprivation of substantive due process rights.

For example, in *T.E.*, 599 F.3d at 590-91, the 7th Circuit Court of Appeals held that elementary school students were denied their substantive due process rights to bodily integrity when their school principal actively concealed reports of sexual abuse by one of their teachers. *Id.* Even in such an extreme case, the court noted that "[g]enerally, state actors do not have a due process obligation to protect citizens from private violence." *Id.* at 590 (citing *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 195-97, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)). Nonetheless, the sexual abuse of small children by trusted adults so shocks the conscience as to create a substantive due process right to be free from such abuse. *Id.*

In a similarly extreme example, *Dwares*, 985 F.2d 94, the 2nd Circuit Court of Appeals concluded that the substantive due process rights of demonstrators were violated when police officers conspired with a gang of "skinheads" to allow the demonstrators to be physically beaten. *See Id.* at ¶ 22. One of the demonstrators was severely beaten by a "skinhead" while police officers stood nearby and watched. *Id.* Both *Dwares* and *T.E.* show the extreme conduct and severe harm necessary to a "shock the conscience" analysis. Other cases show that merely offensive or even disturbing conduct is not enough.

In *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990), the Court held that a victim's due process rights were violated "only if the state ha[d] taken affirmative action that increase[d] the individual's danger of, or vulnerability to, . . . violence beyond the level it would have been absent state action." *Id.* at ¶ 9. In that case, a father murdered his children after the police refused to enforce the mother's restraining order against him. Likewise, in *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696 (9th Cir. 1990), the 9th Circuit Court of Appeals concluded that a woman's due process rights were not violated even when her ex-husband repeatedly harassed and threatened her, to the point of throwing a firebomb through the window of her home, allegedly causing her extreme stress and anxiety. Despite the extreme nature of the acts of violence committed in *Freeman* and *Balistreri*, both courts concluded that the plaintiffs had not been deprived of their rights to due process when state officials failed to take action on their behalf. *Id.* ¶¶ 8, 22.

The Supreme Court addressed the issue of substantive due process rights in *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989), a case arising from the Eastern District of Wisconsin. In that case, the Court stated, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Due Process Clause is seen as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Id.* at 195. In *DeShaney*, a boy was beaten

by his father to the point that he suffered permanent brain damage. The Winnebago County Department of Social Services knew of the abuse, but even though it failed to intervene on behalf of the boy, the Court concluded that the boy had not been denied substantive due process of the law. *Id*. at 189, 195.

At least one Court has noted the difficulty in applying the "shock the conscience" test in cases that do not involve excessive force. Applying such test in an "area other than excessive force … is problematic." *Braley v. City of Pontiac*, 906 F. 2d 220, 226 (6th Cir. 1990). The Court doubted the utility of such a standard outside the "realm of physical abuse." *Id*. The Court then noted that the test had been abandoned in cases involving excessive force by police as a result of the Supreme Court's decision in *Graham v. Connor*, 109 S. Ct. 1865 (1989). In light of the *Graham* decision, the Court found the test "in contexts other than allegations of excessive force" to be uncertain. *Id*. The *Braley* court found that the Plaintiff's claims for false arrest, false imprisonment and malicious prosecution did not rise to the level of a constitutional violation. *Id*. at 226-27.

In this case, Plaintiff has failed to allege sufficient facts to show Defendant deprived her of any life, liberty, or property interest by abuse of official power that shocks the conscience. Assuming, for purposes of this motion, that all of the factual allegations in the complaint are true, Defendant sent several text messages to the Plaintiff, none of which were explicitly sexual in nature, but some of which implied that he found her to be attractive and wanted to pursue a personal relationship with her. (Compl. ¶¶ 14-18.) The text messages were sent to Plaintiff over a period of only three days (*see* Compl. ¶ 14), after which they stopped. Plaintiff has not alleged that

Defendant ever physically threatened or attempted to coerce her into a relationship with him; she has never suggested that Defendant physically forced himself on her, went to her home or workplace, or otherwise harassed or stalked her; she has not provided any factual information that would suggest Defendant's actions somehow made her more vulnerable to future incidents of domestic abuse or that Defendant knowingly put her in harm's way, for example, by refusing to protect her from her ex-boyfriend; and she certainly has not suggested that Defendant himself ever threatened her with violence or abused her himself. (*See* Compl. ¶¶ 14-18.) Nor does she suggest that Defendant, as a public official, failed to act on her behalf as was the case in *Dwares*, *Freeman*, *Balistreri*, and *DeShaney* above. The "shock the conscience" analysis has been understandably limited to only the most outrageous and extreme conduct, and it simply does not apply here as a matter of law.

**B. Plaintiff was not denied any liberty or property interest under Federal or State law including Chapter 950 of the Wisconsin Statutes.**

Because the Plaintiff has not alleged sufficient facts under a "shock the conscience" analysis, we must look for the deprivation of a particular constitutional guarantee. The Plaintiff has failed to identify any particular liberty or property interest that was deprived. Plaintiff cites no federal Constitutional provision or law indicating that a victim or witness would have any protected liberty or property interest. Plaintiff can look to state law to determine if there was a protected liberty or property interest. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908 (1989). However, the types of interests that constitute liberty and property are not unlimited, and the interest must rise to more than "an abstract need or desire." *Id.*

*(quoting Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). The Plaintiff must show a "legitimate claim of entitlement" to an interest for it to be constitutionally protected. *Thompson*, 490 U.S. at 460.

In *Yordy v. Naylor*, 55 F. 3d 285 (7th Cir. 1995), a crime victim sued the State prosecutor under §1983 claiming the prosecutor had deprived the victim and his company of their status as victims of a criminal offense, which would have made him eligible for restitution under Illinois statutes. The Court of Appeals agreed with the District Court that the plaintiff's claim failed on two counts, the first being that there was no protected liberty or property interest. *Id.* at 288. Although state statute allowed the possibility of restitution, it was left to the discretion of the District Court. *Id.* The Court of Appeals noted that to conclude that a state has created a liberty interest, the state must use "explicitly mandatory language" in connection with the establishment of "specified substantive predicates" to limit discretion. *Id.* (quoting *Thompson*, 490 U.S. at 463, 109 S. Ct. at 1910).

In another §1983 case, a plaintiff filed an action against a prosecutor and other defendants claiming, among other things, a violation of Ohio's Victim Rights Law. *Pusey v. City of Youngstown*, 11 F. 3d 652 (6th Cir. 1993). The Court examined whether the state law created a liberty interest. Again citing to the *Thompson* decision by the U.S. Supreme Court, the 6th Circuit noted the necessity of establishing "substantive predicates" to govern official decision making and the necessity of the state to "mandate the outcome to be reached upon a finding that the relevant criteria have been met." *Id.* at 656 (quoting *Thompson*, 490 U.S. at 462, 109 S. Ct. at 1909). The Court found that while the state law extended procedural rights such as notice to a victim and right to

make a statement, it did not protect a substantive interest to which a victim would have a legitimate claim of entitlement. *Id*. The 6th Circuit noted that a liberty interest was not created because the statute did not specify how a victim's statement must affect a hearing, nor did it require a specific outcome. *Id*.

In a tragic case involving victim rights, the Supreme Court had to examine claims by the mother of three children who were murdered by their father after the mother had made repeated reports to the police that the father had taken the children and violated her restraining order against him. *Castle Rock v. Gonzales*, 545 U.S. 748 (2005). The plaintiff mother filed a §1983 claim on the grounds that she had a property interest in police enforcement of the restraining order against her husband and such property interest was violated. The statute at issue directed police officers to "use every reasonable means to enforce a restraining order;" and it directed a police officer "to arrest, or if an arrest would be impractical … seek a warrant for the arrest of the restrained person … ." *Id*. at 752. Despite the apparent mandatory language, the Court found that state law truly did not make such enforcement mandatory. *Id*. at 748. Thus, there was no personal entitlement to enforcement of restraining orders and the plaintiff did not have a property interest therein. *Id*.

The Court stated that the Due Process Clause does not protect everything that might be described as a "benefit". *Id*. at 756. "To have a property interest and a benefit, a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. The Court went on to note that if government officials have some discretion in granting or denying a benefit, it is not a protected entitlement. *Id*.

The Court even went so far as to state that if the Colorado statute at issue made enforcement of restraining orders mandatory, it would still not necessarily have given the plaintiff an entitlement. *Id*. at 764-65. "Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people." *Id*. at 765. The Court also made other important distinctions about the plaintiff's claim to an entitlement under the statute. For example, the Court noted the vagueness and novelty of making a personal entitlement out of enforcement of a restraining order. *Id*. at 766. The Court also noted that such a "property" interest for purposes of the Due Process Clause would not resemble any traditional concept of property. *Id*. Finally, the Court noted that the respondent did not specify the precise means of enforcement of the statute such as whether she was entitled to have the police arrest her husband, have them seek a warrant for his arrest, or have them use "every reasonable means, up to and including arrest, to enforce the order's terms." *Id*. at 763. "Such indeterminacy is not the hallmark of a duty that is mandatory. Nor can someone be safely deemed 'entitled' to something when the identity of the alleged entitlement is vague." *Id*. (*citing Roth*, 408 U.S. at 577).

In general, as already noted in I.1.a. herein, the State does not have a due process obligation to protect individuals from all harm. In our case, the Plaintiff looks to one state statutory provision to establish a protected interest. Under Wis. Stats. §950.04(2w), which is apparently referenced in paragraph 35 of the Complaint, the statute states: "Witnesses of crimes have the following rights: (c) to receive protection from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection

available." While the statute does not specifically state what harm or threat of harm is to be prevented, it should be obvious from the plain reading of the statute that the intent is for a witness to be protected from harm perpetrated by a defendant or agents of a defendant that could prevent a witness from testifying against the defendant or that could intimidate the witness. There is no indication that the statute is intended to protect a witness from any and all flirtatious text messages they may receive from any individual involved in the legal process.

More important, and fatal for the Plaintiff's claim, is the vagueness of the statute and complete lack of any mandatory outcome or prevention of the exercise of discretion by government officials. The type and extent of harm is not defined. The type and amount of protection is not defined. Thus, government officials have apparent unfettered discretion to determine the level of protection available. Just as in the *Castle Rock* case, it is very clear that law enforcement would be able to use their discretion to determine how to treat any particular situation that could result in harm or a threat of harm.

This statute does not even contain the mandatory type language as in the restraining order at issue in *Castle Rock*. It is clear that the level of discretion under §950.04(2w) would be even greater than the statute in *Castle Rock*. It is not difficult to imagine the diversity of situations that can result in criminal prosecutions. Law enforcement has to evaluate the threat of harm in each and every individual case and make determinations as to what level of protection is appropriate or available. For example, it would be impossible for a police officer to be stationed as a private bodyguard for every witness in every criminal case around the clock, even if there were

credible threats of harm in every such case. Thus, just as the statute in *Castle Rock* did not provide a protected liberty or property interest, neither does the statute alleged by Plaintiff in her Complaint.

Finally, Chapter 950 of the Wisconsin Statutes makes it clear on its face that the legislature did not intend the rights enumerated therein to rise to the level of a protected entitlement. Wis. Stats. §950.10 entitled "Limitation on Liability" states under (1) as follows: "No cause of action for money damages may arise against the state, any political subdivision of the state, or any employee or agent of the state or a political subdivision of the state for any act or omission in the performance of any power or duty under this Chapter, or under Article I, Section 9m, of the Wisconsin Constitution … relating to the rights of, services for or notices to victims." As already noted herein, a penalty provision is then provided in §950.11 for any intentional violation of victim rights. Certainly, if the legislature had intended to make the Victim / Witness Bill of Rights an entitlement, it could have included language making that clear. There is no mandated outcome, there is no "substantive predicate" and a private right of action is specifically prohibited. Any attempt by the Plaintiff in our case to appeal to Chapter 950 as a basis for a §1983 claim falls woefully short of constitutional requirements.

**2. Plaintiff has failed to demonstrate that Defendant's text messages violated her right to equal protection based upon her sex.**

Plaintiff states in Paragraph 24 of her Complaint that "Defendant's communications . . . were directed to her because of her sex," and she refers to herself throughout the complaint as a "victim/witness," stating that witnesses are entitled to certain rights pursuant to Wis. Stats. Ch. 950. (Compl. ¶¶ 35, 38, 39.) Plaintiff also

states in Paragraph 34 that the CPR (ethical rules) prohibits attorneys from engaging in "sexual discrimination or sexual harassment." Based upon the above language, it appears that Plaintiff believes she was subjected to sexual harassment by the Defendant when he texted her and thereby deprived of her right to equal protection based on her sex.

The 10th Circuit Court of Appeals has stated with respect to Equal Protection claims, "'[i]n order to carry his burden, the plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant has violated it. Rather, the plaintiff must articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity . . . .'" *Sh.A. ex rel. J.A. v. Tucumcari Municipal Schools*, 321 F.3d 1285 (10th Cir. 2003) (quoting *Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995)). In *Johnson v. Martin*, 195 F.3d 1208, ¶ 30 (10th Cir. 1999), the court concluded that "in order to satisfy § 1983's 'color of law' requirement, the defendant in a sexual harassment claim must exercise some governmental **authority** over the plaintiff." (Emphasis added). "'The mere fact that . . . the participant[] [was] a state employee[] . . . is not enough.'" *Id.* ¶ 30 (quoting *Woodward v. City of Worland*, 977 F.2d 1392 (10th Cir. 1992)).

In *Sh.A.*, the defendant was an elementary school teacher who had molested several of his male students in violation of the equal protection clause and while exercising authority over them as their teacher. *See Sh.A. ex rel. J.A.*, 321 F.3d at 1286-87. In *Johnson*, the defendant, Director of the Building Codes and Enforcement Department of the City of Muskogee, exercised authority over each of the plaintiffs who were seeking building permits or licenses from the defendant. *Johnson*, 195 F.3d at ¶ 1.

In each of those cases, and in other cases in which sexual harassment occurs outside the employment context, the common thread shared by the defendants is that they threatened to use, or did use, their authority over the plaintiffs to coerce them into engaging in a sexual relationship. *See, e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028 (1992) (in which a female high school student was sexually molested by a teacher); *Doe v. Smith*, 470 F.3d 331 (7th Cir. 2006) (in which a male middle school student was sexually molested by the Dean of Students); *Sh.A.*, 321 F.3d 1285 (in which elementary school boys were sexually molested by their math teacher); *Johnson*, 195 F.3d 1208 (in which multiple female plaintiffs were told by the defendant that they would not receive various building permits/licenses if they did not engage in sexual acts with him); *Whitney v. State of New Mexico*, 113 F.3d 1170 (10th Cir. 1997) (in which the female plaintiff was denied a license to operate a daycare facility, allegedly because she would not engage in a sexual relationship with the defendant, an agent of the State of New Mexico); and *R.S. v. Board of School Directors of Public Schools*, No. 02-C-0555 (E.D. Wis. 2006) (in which an elementary school teacher sexually molested multiple students).

In contrast to all of the above-cited cases, Defendant in this matter did not use his authority to intimidate the Plaintiff into a sexual relationship. In fact, Defendant had no authority over Plaintiff. Based upon the factual allegations contained in the Complaint, Defendant texted the Plaintiff on several occasions and told her in various ways that he found her attractive and wanted a personal relationship with her. (Compl. ¶¶ 14-18.) There is no allegation that Defendant threatened to use the authority of the state to harm Plaintiff if she refused him. (*See Id.*) For example, there is no allegation

even suggested that if Plaintiff refused his advances he would decline to prosecute the case against her ex-boyfriend. (*See Id.*) There is no allegation that Defendant threatened to stop informing Plaintiff as to what was happening in her ex-boyfriend's case or refuse to take her wishes into consideration in making decisions regarding sentencing. (*See Id.*) Likewise, Defendant never denied police protection to Plaintiff (in fact, Plaintiff never requested such protection from Defendant), nor did he threaten to do anything that would put Plaintiff at risk of future incidents of domestic abuse from her ex-boyfriend or anyone else. (*See Id.*) Defendant in no way exercised authority over the Plaintiff so as to deny her equal protection of the law, and Plaintiff's equal protection claim therefore fails on its merits.

The above-cited cases share two other commonalities. First, the abuse or harassment complained of continued for at least one, and sometimes multiple, years in each of those cases. *See, e.g., Franklin*, 503 U.S. 60; *Sh.A.*, 321 F.3d 1285, *Johnson*, 195 F.3d 1208, *Whitney*, 113 F.3d 1170, *Smith*, 470 F.3d 331, and *R.S.*, No. 02-C-0555. Second, in each of those cases the abuse or harassment complained of was significantly more egregious than the text messages exchanged in this case. *See id*. For example, in *Johnson*, the defendant contacted the plaintiffs at their residences and would sometimes show up at their homes in person to threaten them and to demand sexual favors. *Johnson*, 195 F.3d at 1211-12, ¶¶ 4-5. The defendant in that case even went so far as to grab or touch some of the plaintiffs against their will. *Id*. With respect to the above-cited cases involving minor children, it goes without saying that those cases involved non-consensual physical contact between the defendants and plaintiffs, and the abuse in those cases typically endured for at least an entire school year or until parents pulled

their students from the abusive teachers' classes. *See, e.g., Doe v. Smith*, 470 F.3d at 335-36; *Sh.A. ex rel. J.A*, 321 F.3d at 1286; *Franklin v. Gwinnett County Public Schools*, 503 U.S. at 63-64; and *R.S. v. Board of School Directors of Public Schools*, No. 02-C-0555, slip op. at 3-6.

This case, on the other hand, involves some text messages sent over a period of three days, none of which included threats to the Plaintiff, although some, according to the Complaint, were suggestive. At no time did Defendant neglect or threaten to neglect his duties as prosecutor for Plaintiff's case against her ex-boyfriend. From the time charges were filed until the assistant attorney general began handling the case, Defendant fulfilled his duties and obligations to Plaintiff and to the State of Wisconsin as its legal representative. (*See* Compl. ¶¶ 8-12, 29.)

This case is therefore distinguishable from other cases in which sexual harassment has been found to violate one's rights to equal protection. In fact, additional case law suggests that the Equal Protection Clause is not meant to encompass actions and behaviors such as those alleged here. For example, in *Lewis v. McDade*, 250 F.3d 1320 (11th Cir. 2001), the court stated, "[t]he Constitution does not prohibit all boorish or rude behavior," and noted in citations to other cases that "federal employment law creates no 'general civility code,' [and] . . . that 'simple teasing' in the workplace insufficient to support sexual harassment claim." *Lewis*, 250 F.3d at 1321 (internal citations omitted) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 2283-84, 141 L. Ed. 2d 662 (1998); and *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1003, 140 L. Ed. 2d 201 (1998)).

Similarly, in *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180 (7th Cir. 1986), the court stated, "'not all workplace conduct that may be described as "harassment,"' constitutes sex discrimination. . . . The harassment 'must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 1186, ¶ 25 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), and *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)). The court in *Bohen* continued, "'every passing overture made by a male public official to a female public employee because of her gender is not a denial of equal protection. . . . Likewise, 'a single, innocent, romantic solicitation which inadvertently causes offense to its recipient is not a denial of equal protection." *Bohen*, 799 F.2d at 1186, ¶ 26 (internal citations omitted) (quoting *Skadegaard v. Farrell*, 578 F. Supp. 1209, 1216-17 (D.N.J. 1984), and *Moire v. Temple University*, 613 F. Supp. 1360, 1369-70 (E.D. Penn. 1985)).

In the instant case, none of the conduct alleged by Plaintiff rises to the level of discrimination based on sex, nor does it constitute an abuse of power by a public official. The fact that Plaintiff was offended by Defendant's suggestion that she might want to pursue a relationship with him is not enough on its own for the text messages to constitute harassment, and Plaintiff's Complaint as to violation of her right to Equal Protection must therefore be dismissed.

## II. DEFENDANT IS ENTITLED TO ABSOLUTE IMMUNITY OR, AT THE VERY LEAST, QUALIFIED IMMUNITY WITH RESPECT TO ALL ALLEGATIONS IN PLAINTIFF'S COMPLAINT.

### 1. Absolute Immunity

In addition to the above grounds for dismissal, Defendant in this case is entitled to summary judgment based on absolute immunity from suit as a public official. Plaintiff cannot sue Defendant for actions undertaken in relation to "'the judicial phase' of criminal justice." *See Thomas v. City of Peoria*, 580 F.3d 633, 639 (7th Cir. 2009). The court further elaborated this rule in *Smith v. Power*, 346 F.3d 740 (7th Cir. 2003), stating, "[a] prosecutor is shielded by absolute immunity when he acts 'as an advocate for the State' . . . . Moreover, absolute immunity shields prosecutors even if they act 'maliciously, unreasonably, without probable cause, or even on the basis of false testimony or evidence.'" *Id*. at 743 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993), and *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1238 (7th Cir. 1986)).

The court has also defined actions taken as advocate for the State, stating, "'the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution.'" *Smith*, 346 F.3d at 743 (quoting *Imbler*, 424 U.S. at 431, n. 33). Those actions include "[p]reparation of witnesses for trial . . . [and] 'an out-of-court effort to control the presentation of a witness' testimony . . .' , even the knowing presentation of false testimony at trial is protected by absolute immunity." *Spurlock v. Thompson*, 330 F.3d 791, 797 (6th Cir. 2003) (citing *Higgason v. Stephens*, 288 F.3d 868, 877 (6th Cir. 2002), and quoting *Imbler*, 424 U.S. at 413).

Other circuits have also recognized the above standards, finding, for example, that "because the immunity depends not upon the defendant's status as a prosecutor but upon the 'functional nature of the activities' of which a plaintiff complains, . . . immunity for performance of inherently prosecutorial functions is not defeated by allegations of improper motivation such as malice, vindictiveness, or self-interest. . . . Similarly, allegations of abusive, illegal, or unethical conduct must fail if they represent an attempt to impose damages liability for acts encompassed in the initiation or conduct of adversarial proceedings by a prosecutor." *Myers v. Morris*, 810 F.2d 1437, 1445-46 (8th Cir. 1987) (citing *Imbler*, 424 U.S. at 430; *Wahl v. McIver*, 773 F.2d 1169, 1173 (11th Cir. 1985); and *Lerwill v. Joslin*, 712 F.2d 435, 441 (10th Cir. 1983)).

In the 9th Circuit, the court of appeals concluded, "We think that conferring with potential witnesses for the purpose of determining whether to initiate proceedings is plainly a function 'intimately associated with the judicial phase of the criminal process,' . . . and is therefore a quasi-judicial function 'to which the reasons for absolute immunity apply with full force.'" *Demery v. Kupperman*, 735 F.2d 1139, 1144, ¶ 17 (9th Cir. 1984) (quoting *Imbler*, 424 U.S. at 430).

Plaintiff repeatedly characterizes herself in her Complaint as a "witness," and Defendant's contact with her prior to preliminary hearing, trial and sentencing in her ex-boyfriend's criminal matter is therefore protected as part of his duties in the judicial phase of adversarial criminal proceedings. Taking Plaintiff's allegations in the light most favorable to Plaintiff, the only potential claim is that Defendant injected some self interest into his communications with a witness, communications precipitated by and required by furtherance of the legal process.

### 2. Qualified Immunity

If this Court concludes that absolute immunity does not apply, then the Complaint must still be dismissed because the Defendant is, at a minimum, entitled to qualified immunity. "'The doctrine of qualified immunity protects government officials from liability for civil damages when their conduct does not clearly violate established statutory or constitutional rights of which a reasonable person would have known.'" *Ault v. Speicher*, No. 09-2104, slip op. at 8 (7th Cir. Mar. 3, 2011) (quoting *McAllister v. Price*, 615 F.3d 877, 881 (7th Cir. 2010)). "On a qualified immunity claim the court confronts two questions: (1) whether the plaintiff's allegations make out a deprivation of a constitutional right; and (2) whether that right was clearly established at the time of the defendant's alleged misconduct." *Ault*, No. 09-2104, slip op. at 8. Furthermore, "[i]n order to carry her burden of proving that the constitutional right she claims Defendant violated was clearly established, Plaintiff must either (1) present case law that has articulated both the right at issue and applied it to a factual circumstance similar to the one at hand or (2) demonstrate that the 'contours of the right are so established as to make the unconstitutionality obvious.'" *Id.* at 9 (quoting *Boyd v. Owen*, 481 F.3d 520, 526-27 (7th Cir. 2007)).

Section I, *supra*, establishes that Plaintiff's allegations in this case fail to make out any deprivation of a constitutional right. However, even if this Court were to conclude that somehow Plaintiff's constitutional rights had been violated, those rights were not clearly established at the time of the alleged misconduct. Based on the case law cited in this brief above, Defendant would have had no way of knowing that sending a flirtatious text message to a woman with whom he wanted a personal relationship

constituted an obvious constitutional violation. In fact, case law published before 2009 suggests the opposite—that sexual conduct must be significantly more egregious than Defendant's text messages in order to deprive a person of her right to equal protection or due process. Inserting self-serving or "boorish" comments into communications with a victim/witness have not been viewed as a constitutional violation. It is difficult to see how such comments could have been an "obvious" violation in the Fall of 2009.

Based upon the law at the time of the alleged misconduct, there are several things Defendant might have known. For example, Defendant might have known that he had a duty to contact Plaintiff and keep her informed as to the status of her ex-boyfriend's criminal case; that he had a duty to contact her for purposes of taking her wishes into consideration when resolving said criminal case; that he had a responsibility to prepare a witness. He also may have known that he might violate her constitutional rights by physically touching her without her consent; that he might violate her constitutional rights by continuing severe, pervasive and abusive contact with her for weeks or months after she made it clear she did not want a relationship with him; or that he might violate her constitutional rights by refusing to prosecute her case due to her refusal to pursue a relationship with him. Notably, Plaintiff does not allege that Defendant did any of the things actually prohibited by law, because Defendant never actually did any of those things. Plaintiff has not alleged one clearly established constitutional right that Defendant did violate based upon the state of the law at the time of the allegations in the Complaint. Therefore, qualified immunity must apply, entitling Defendant to dismissal of the Complaint on the merits.

## CONCLUSION

Defendant respectfully asserts that, based upon the above-cited law and authority, this Court must dismiss Plaintiff's Complaint in its entirety, both for failure to state a claim upon which this Court can grant relief and based on Defendant's immunity from suit in this matter.

Dated this 7th day of April, 2011.

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## CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2011, I electronically filed this **DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT** WITH THE Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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