UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

OPERATING ENGINEERS OF WISCONSIN, IUOE LOCAL 139 AND LOCAL 420, *et al.,*

Plaintiffs,

v.

TONY EVERS, in his official capacity as Governor; JOSH KAUL, in his official capacity as Attorney General for the State of Wisconsin; and, JAMES J. DALEY, in his official capacity as Chairman of the Wisconsin Employment Relations Commission,

Defendants.

CIVIL ACTION

NO. 18 C 285

JUDGE LYNN ADELMAN

PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

Plaintiffs, Operating Engineers of Wisconsin, *et al.*, by and through their attorneys, hereby file their Response in Opposition to Motion to Intervene filed by Kristi Koschkee.

Plaintiffs filed their original action in this case on February 23, 2018, and filed a Notice of Voluntary Dismissal on May 11, 2018. On May 3, 2019, Plaintiffs filed their First Amended Complaint. On June 12, 2019, Plaintiffs filed their Second Amended Complaint, eliminating several counts and substantially changing some of the key allegations.

In light of Plaintiffs' Second Amended Complaint, the Intervenor's motion should be denied as moot, as some or all of the proposed Intervenor's concerns may be addressed by the Second Amended Complaint.

Additionally, the Defendants in this action, Governor Evers, Attorney General Kaul, and WERC Director Davis, have not formally been served. Now that the Second Amended Complaint

has been filed, Plaintiffs will promptly serve the Defendants with the Complaint. Defendants should be given the opportunity to respond to the Complaint, and to any motion to intervene, prior to an Intervenor being given leave to be added to the action, particularly as a party defendant.

Finally, the Motion to Intervene should be denied on its merits. In order to intervene as of right, the intervenor must show that: (1) the intervention is timely, (2) they have an interest "relating to the property or transaction which is the subject of the action," (3) they are so situated that resolving the case without intervention would impair or impede their ability to protect their interest, and (4) the existing parties will not adequately protect the their interest. *Sokaogon Chippewa Cmty. v. Babbitt, 214 F.3d 941, 945-46 (7th Cir. 2000)*. "Intervention of right will not be allowed unless all requirements of the Rule are met." *Id. at 946 (citation omitted)*. Permissive intervention is appropriate only if: (1) the motion is timely, (2) the potential intervenor asserts a claim or defense that has a question of law or fact in common with the main action, and (3) the intervention would not unduly delay or prejudice the adjudication of the rights of the original parties. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 163 F.R.D. 268, 273 (N.D. Ill. 1995), aff'd in part, vacated in part, 101 F.3d 503 (7th Cir. 1996)*. The intervenor bears the burden of proving that it meets each element. *Id*. Even upon making the showing, the court considers "whether intervention would be productive, not whether it would be harmless." *Id. (Citation omitted)*.

Here, Intervenor has alleged nothing more than an interest in ensuring Act 10 is enforced as written. The State, through elected and appointed officers, is a party to this action. The State is presumably capable of defending such a law before this Court and capable of representing the interests of all its citizens. *United States v. State of New York, 820 F.2d 554 (2nd Cir. 1987); United States v. Hooker Chemicals and Plastics Corp. 749 F.2d 968 (2nd Cir. 1984)*. In order to intervene,

the movant must demonstrate that its interests are different from those of the State and that its interest will not be represented by the State. *See also, Keith v. Daley, 764 F.2d 1265 (7th Cir. 1985)* (finding that a state could adequately defend the challenged law, despite the comparative passion of the intervenors for the issue).

Although Intervenor asserts five different interests (Docket # 11-1, p. 7-8), those interests in enforcing the statute do not differ from the interest of the State, nor is there any reason the State is unable to represent and defend those interests. Indeed, as Intervenor notes, in a prior case challenging Act 10, the Seventh Circuit affirmed the denial of intervention made by interested citizens. *Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640 (7th Cir. 2013).* Contrary to Intervenor's assertions, there is no basis to reach a different conclusion on this motion to intervene. Here, as in WEAC, "the Employees and the state share the same goal: protecting Act 10 against the Union's constitutional challenges." *Id. at 659*.

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Motion to Intervene.

Respectfully submitted,

/s/ Brian C. Hlavin

Dated: June 14, 2019

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that he electronically filed the foregoing document (Plaintiffs' Response in Opposition to Motion to Intervene) with the Clerk of Court using the ECF system, which will provide notification to the following ECF participants:

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and further certifies that he served the above-referenced document by U.S. Mail to the following non-ECF participants on or before the hour of 5:00 p.m. this 14th day of June 2019:

Mr. Tony Evers, Governor
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