

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

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OPERATING ENGINEERS OF WISCONSIN,  
IUOE LOCAL 139 AND LOCAL 420,

Plaintiffs,

v.

Civil Action No. 2:18-cv-00285-LA

TONY EVERS, IN HIS OFFICIAL CAPACITY  
AS GOVERNOR, *et al.*,

Defendants.

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**PROPOSED INTERVENOR-DEFENDANT’S REPLY BRIEF IN SUPPORT OF  
MOTION TO INTERVENE AS DEFENDANT**

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Plaintiffs have created substantial procedural disorder in this case and now attempt to use the disorder they have created to prejudice the rights of the Proposed Intervenor-Defendant Kristi Koschkee (“Intervenor”). It is unclear which, if any, of the three complaints filed by Plaintiffs in the last 16 months is properly before the Court and thus the proper subject of Intervenor’s motion and reply.

Plaintiffs filed their initial complaint in February of 2018, but then voluntarily dismissed it less than three months later. *See* Compl., ECF No. 1; Notice of Voluntary Dismissal, ECF No. 8. As of that date this case was closed. *See* Docket Entry of May 11, 2018 (“Case Terminated pursuant to . . . Notice of Voluntary Dismissal.”). The dismissal and closure means that the initial complaint is certainly not properly before the Court.

Approximately one year after the case’s dismissal, Plaintiffs filed what they called a First Amended Complaint in this dismissed and closed case without moving this Court under Fed. R.

Civ. P. 60(b) to grant them relief from a final judgment, order, or proceeding. Unambiguous case law explains that “a suit that has been voluntarily dismissed under Rule 41(a)(1)(A)(i) generally is treated as if it had never been filed” except to allow the Court to consider certain limited matters such as Rule 11 sanctions or a Rule 60 motion. *Nelson v. Napolitano*, 657 F.3d 586, 588-89 (7th Cir. 2011). Thus, there was nothing for Plaintiffs to amend. They had the option of either filing a motion for relief under Rule 60 to reopen the previously closed case or filing a new lawsuit. *See id.* at 588 (“Once an action has been dismissed under Rule 41(a)(1) without prejudice, the plaintiff may bring the suit again by filing a new complaint.”). But Plaintiffs did neither and instead filed what they called an “Amended Complaint” in the closed case. Other than possible judge-shopping, there is no explanation as to why Plaintiffs sought to file an amended complaint in a closed case rather than filing a new complaint.

Following Intervenor’s filing of her motion to intervene along with a proposed answer to Plaintiff’s purported “First Amended Complaint” (including a proposed affirmative defense based on the above procedural irregularity), Plaintiffs have now filed a substantially different pleading which they call a “Second Amended Complaint.” But this pleading suffers from the same problem as pointed out above and raises an additional issue under Fed. R. Civ. P. 15(a). That rule provides that while “[a] party may amend its pleading *once* as a matter of course,” “[i]n all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(1)-(2) (emphasis added). Thus, even if the problem did not exist that *this is a closed case* and the First Amended Complaint were somehow proper, Plaintiffs could not have filed a second amendment without the opposing party’s written consent (which they do not say they have) or with permission from the Court (which Plaintiffs never sought).

The ostensible purpose for Plaintiffs' Second Amended Complaint, which, in Plaintiffs' own words, "eliminat[es] several counts and substantially chang[es] some . . . key allegations," is apparently to attempt to moot Intervenor's interest in the case. *See* Pls.' Resp. 1, ECF No. 19 ("In light of Plaintiffs' Second Amended Complaint, the Intervenor's motion should be denied as moot."). Intervenor is attempting to safeguard her rights. But she cannot hit a moving target, much less one that moves outside of the boundaries established by the Federal Rules of Civil Procedure.

Regardless, and assuming Plaintiffs' most recent pleading entitled "Second Amended Complaint" is properly before the Court, neither of the two arguments in Plaintiffs' three-page response to Intervenor's motion to intervene have merit. First, and as noted above, Plaintiffs argue that their Second Amended Complaint has mooted Intervenor's interest. But they do not actually explain why, likely because the Second Amended Complaint still asserts three of the five counts included in the First Amended Complaint, *compare* First Am. Compl. 8-9 (Count II), 9-10 (Count III), and 10-11 (Count IV), ECF No. 9, *with* Second Am. Compl. 6-10 (Counts I-III), ECF No. 18. Intervenor has already explained how those counts imperil her interests and entitle her to intervene. *See* Proposed Intervenor-Def.'s Mem. of Law 7-10, ECF No. 11. Intervenor will not repeat those arguments here, but the important point is that, as to those three counts, nothing has changed material to Intervenor's motion.

On the merits, Plaintiffs make only a single argument against intervention: that the State adequately represents Intervenor's interests because both seek to uphold 2011 Wisconsin Act 10. Intervenor anticipated this argument and spent several pages of her brief rebutting it. *See* Proposed Intervenor-Def.'s Mem. of Law 12-15, ECF No. 11.

There are a number of substantial reasons why the State Defendants do not adequately represent Intervenor's interests. First, the Seventh Circuit has held as a matter of law that the state is not charged by law with protecting the interests of union non-members in a lawsuit by unions challenging Act 10. *Wisconsin Educ. Ass'n Council v. Walker [WEAC]*, 705 F.3d 640, 658-659 (7th Cir. 2013).

This makes perfect sense because this is a multi-sided dispute. Workplaces such as those at issue in this case feature three sets of parties: the municipal employer (which is a statutory creation of the State), the union and its members, and union non-members. In disputes between those parties, the State also acts as both the rule-setter (by enacting legislation) and sometimes as the umpire (such as through the Wisconsin Employment Relations Commission). The Defendants have multiple interests different from and sometimes adverse to those of Intervenor in this context.

This same dynamic produces a conflict between the parties that rebuts any presumption of adequate representation arising from any overlapping of goals. As Intervenor explained in her initial brief, Intervenor's municipal employer is a government entity created by the State. This Court should not ask Intervenor to effectively place her fate in the workplace in the hands of her own employer. *See Proposed Intervenor-Def.'s Mem. of Law 14, ECF No. 11.*

Regardless, Defendants and Intervenor do not necessarily share the same goals in this action. For example, Intervenor explained the differences between Intervenor's interests and the Defendants' interests on the First Amendment issues at page 13 of her opening brief. In short, Intervenor seeks to protect her First Amendment rights in avoiding association with, support of, or interference by unions and in not participating in the recertification process. Defendants do not share these goals.

The fact that the interests of the Defendants may overlap with those of Intervenor is irrelevant. That is most clear from the Supreme Court’s decision on intervention in *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972). In that case, the Supreme Court held that although the Secretary of Labor was charged with protecting the individual’s rights against his union, the Secretary also had “an obligation to protect the ‘vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.’” *Id.* at 538-39 (quoting *Wirtz v. Local 153, Glass Bottle Blowers Ass’n*, 389 U.S. 463, 475 (1968)). These two duties, the Court concluded,

may not always dictate precisely the same approach to the conduct of the litigation. Even if the Secretary [were] performing his duties, broadly conceived, as well as [could] be expected, the union member [might] have a valid complaint about the performance of ‘his lawyer.’ Such a complaint, filed by the member who initiated the entire enforcement proceeding, should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2).

*Id.* at 539.

For the foregoing reasons, this Court should grant Intervenors’ motion to intervene, either by intervention as of right under Fed. R. Civ. P. 24(a)(2), or, in the alternative, by permissive intervention under Fed. R. Civ. P. 24(b).

Respectfully submitted,  
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