STATE OF WISCONSIN MILWAUKEE COUNTY CIRCUIT COURT
Branch 42

VICTORIA MARONE,
Plaintiff,

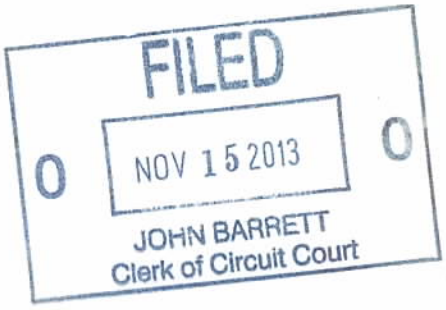
v.

MILWAUKEE AREA TECHNICAL COLLEGE DISTRICT,
Defendant,

and

AMERICAN FEDERATION OF TEACHERS, LOCAL 212, WFT, AFL-CIO,
Intervenor-Defendant.

Case no. 13-CV-4154
Case code 30701



BRIEF IN SUPPORT OF THE MOTION TO DISMISS OF INTERVENOR-DEFENDANT AMERICAN FEDERATION OF TEACHERS, LOCAL 212, WFT, AFL-CIO

INTRODUCTION

Pursuant to Wis. Stat. §802.06(2), Intervenor-Defendant American Federation of Teachers, Local 212, WFT, AFL-CIO (Local 212) moves this Court for an order dismissing the complaint in its entirety, with prejudice.

As more fully discussed below, this motion is based on the following grounds allowing this Court to dismiss the complaint on finding that Plaintiff has failed to state a claim upon which relief can be granted. First, Plaintiff has not alleged a justiciable controversy, in that she lacks standing to bring this lawsuit and her claims are not ripe for adjudication. Further, Plaintiff's claim for restraint of trade is expressly and unequivocally exempted by Wisconsin Law, Wis. Stat. Chapter 133. Finally, this court should dismiss this lawsuit as a matter of comity. The

courts and the Wisconsin Employment Relations Commission (WERC) have concurrent jurisdiction over prohibited practices alleged in the complaint and this Court should dismiss the lawsuit to give priority to the WERC's jurisdiction.

This motion to dismiss "tests the legal sufficiency of the complaint" and it should be granted because "it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of [the] allegations." *PRN Associates LLC v. State,* 2009 WI 53, ¶¶26, 27, 317 Wis. 2d 656, 674, 766 N.W.2d 559, 568.

I. The Court Should Dismiss the Complaint Because Plaintiff Has Not Alleged a Justiciable Controversy in That She Has Not Alleged Legally Protectible Interests Sufficient to Provide Standing and Her Claims are Not Ripe for Adjudication

Plaintiff seeks a declaratory judgment invalidating conditional successor labor agreements between Defendant Milwaukee Area Technical College District (MATC) and Local 212 and specifically the conditional successor labor agreement that "runs from February 16, 2014 to February 15, 2015." (Compl. ¶23) Plaintiff asks this Court to declare that the labor agreement covers topics prohibited under the Municipal Employment Relations Act (MERA), Wis. Stat. §111.70, and is therefore invalid. (Compl. ¶¶29, 30)

To seek declaratory relief under Wis. Stat. §806.04, Plaintiff must allege a justiciable controversy presenting the often-cited four elements:

> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
>
> (2) The controversy must be between persons whose interests are adverse.
>
> (3) The party seeking declaratory relief must have a legal interest in the controversy – that is to say, a legally protectible interest.

(4) The issue involved in the controversy must be ripe for judicial determination. *Loy v. Bunderson,* 107 Wis. 2d 400, 320 N.W.2d 175 (1982) (citation omitted); *Putnam v. Time Warner Cable*, 2002 WI 108, ¶41, 255 Wis. 2d 447, 472, 649 N.W.2d 626, 638-639. "These prerequisites to the maintenance of a declaratory judgment action are designed primarily to insure that a bona fide controversy exists and that the court, in resolving the questions raised, will not be acting in a merely advisory capacity." *Lister v. Board of Regents,* 72 Wis. 2d 282, 306, 240 N.W.2d 610, 624 (1976).

Plaintiff alleges justiciability on the basis of broadly-stated allegations that she has standing to seek declaratory relief because she is employed by MATC as a part-time teacher. (Compl. ¶¶1, 3) She also alleges that she is "engaged in trade or commerce within the State of Wisconsin. In the ordinary course of such commerce, Plaintiff and MATC would be free to negotiate the factors and conditions of Plaintiff's employment by MATC." (Compl. ¶36) Plaintiff asserts broadly that, as a part-time employee of MATC, she has "a legally protected interest in her right to individually negotiate the factors and conditions of her employment other than total base wages with MATC." (Compl. ¶5) As for damages, she asserts that the effect of the labor agreement "is to preclude Plaintiff and MATC from individually negotiating and agreeing upon the factors and conditions of her employment by MATC, other than total base wages, during the time period covered by the Labor Agreement." (Compl. ¶5) Restated, plaintiff asserts that the 2014-2015 conditional successor agreement between MATC and Local 212 precludes "MATC . . . from individually negotiating the factors and conditions of employment with [her]. . . ." (Compl. ¶32) She also alleges that "[a]s a direct result of the unlawful Labor Agreement . . . [she]

has been injured in that she is precluded from individually negotiating the factors and conditions of her employment by MATC in the free market." (Compl. ¶42)

Whether Plaintiff's claimed interest "deserve[s] protection against injury, and what should be enough to constitute an injury," are two of the fundamental questions that this Court must answer in its inquiry whether this lawsuit is justiciable. *Wisconsin's Environmental Decade, Inc. v. Public Serv. Comm'n,* 69 Wis. 2d 1, 13, 230 N.W.2d 243, 249 (1975). As the Supreme Court explained long ago, "[w]hether interests deserve legal protection depends upon whether they are sufficiently significant and whether good policy calls for protecting them or denying them protection." *Id.*

Notably, Plaintiff has not alleged that she sought to bargain individual terms and conditions of employment with MATC and was rebuffed by her employer. She has also not alleged that she sought a waiver from Local 212 to allow her to bargain individual terms and conditions with MATC and that she was refused such a waiver. Further, Plaintiff has not alleged a prohibition in MERA of her individual bargaining, nor is there such a prohibition. In fact, under MERA, an employer commits a prohibited practice by refusing "to issue or seek to obtain contracts . . . with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement." Wis. Stat. §111.70(3)(a)4.

Plaintiff's assertion of an interest in individual bargaining, which she has heretofore not pursued, does not provide substantial sufficient, cognizable interest to make her complaint justiciable. Further it is too speculative to be ripe for adjudication. Plaintiff's assertion that, but for the conditional labor agreements which will become effective on February 16, 2014, Plaintiff would engage with MATC in bargaining over the wages, terms and conditions of her employment, presumably to produce for her a better result than achieved by Local 212, is based on Plaintiff's far too uncertain predictions of conduct by her employer. Significantly, as Plaintiff indicates in her complaint, the viability of the 2014-2015 labor agreement will potentially be determined by the Wisconsin Supreme Court in *MTI Inc. v. Walker,* 2012AP2067, 2011CV3774. That case is awaiting a decision, having been fully briefed and argued before the Supreme Court on November 11, 2013. This Court may take judicial notice that, on November 7, 2013, the defendants in *MTI Inc. v. Walker* also filed in the Supreme Court an emergency motion to stay the Circuit Court's decision which forms the basis of the appeal. The parties were invited by the Supreme Court to argue the merits of the request for a stay in the oral argument on the appeal on November, 11, 2013. *See* http://wscca.wicourts.gov/appealHistory.xsl;jsessionid=2826F020D4DA84777EE2FCEAAF7AF476?caseNo=2012AP002067&cacheId=F3E5E6C7DE35522EA522589D518D5E01&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC (last visited November 14, 2013). Having completed briefing and their oral argument, the parties in *MTI Inc. v. Walker* are now awaiting a decision on the merits of the appeal as well as a decision on the November 7th emergency motion for a stay.

A decision by the Supreme Court on either issue will change the landscape of Plaintiff's case. While awaiting the Supreme Court's decisions, Plaintiff requests that this Court issue an advisory opinion on the very issues to be addressed by the Supreme Court. This Court should exercise its discretion not to do so. Despite a liberal interpretation of justiciability in the context of declaratory judgments, Courts nevertheless "will not decide as to future or contingent rights, but will wait until the event giving rise to rights has happened, or, in other words, until rights have become fixed under an existing state of facts." *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 23, 264 N.W. 627, 629 (1936) (citations omitted).

II. This Court Should Dismiss the Second Cause of Action Because Plaintiff Does Not Allege a Cognizable Claim for Restraint of Trade Under Wis. Stat. Chapter 133

For Plaintiff's second cause of action, she seeks a declaration that the labor agreement violates Wis. Stat. §133.03(1), as it acts in restraint of trade. She alleges that but for the labor agreement she and other employees of MATC "would be free to negotiate with MATC as to all of the factors and conditions of their employment except for total base pay." (Compl. ¶37)

Plaintiff does not allege a cognizable claim under Chapter 133. Her claim of restraint of trade is specious and frivolous because Local 212 is exempt from liability under Wis. Stat. §133.03. The express language of Wis. Stat. §§133.08, and 133.09, 15 U.S.C. §17 and 29 U.S.C. §52 and longstanding case law unequivocally exempts from the antitrust laws collective bargaining between an employer and the union representing its employees. Wis. Stat. §133.08(1) reads, in pertinent part:

> Working people may organize themselves into or carry on labor unions and other associations or organizations to aid their members to . . . the regulation of their wages and

> their hours and conditions of labor . . . or for such other object or objects for which working people may lawfully combine, having in view their mutual protection or benefit.

Similarly, Wis. Stat. §133.09 states:

> This chapter shall be so construed as to permit collective bargaining by associations of producers of agricultural products, by organizations permitted under ch. 185 or 193 and by associations of employees when such bargaining is actually and expressly done for the individual benefit of the separate members of each such association making such collective bargain.

Further, Wis. Stat. §133.02 defines "person," to exclude labor unions: "[n]othing in this definition may be construed to affect labor unions or any other association of laborers organized to promote the welfare of its members. . . ."

In 1923, ten printers unsuccessfully sought to invalidate a collective bargaining agreement as an illegal restraint of trade and the Court of Appeals opined that a collective bargaining agreement did not violate the predecessors to Chapter 133, stating, as follows:

> We can find nothing on the face of the contract here presented which can be reasonably construed to be a violation of any one of the specific statutes just above cited. It is in effect an agreement that there shall be by the employer no individual but only collective bargaining with the union or other labor unions. On its face it does not show a purpose to unlawfully interfere with, impair, or impede the individual defendants or other individual workmen so as to require a holding that it is a violation of public policy.

Trade Press Publishing Co. v. Milwaukee Typographical Union No. 23, 180 Wis. 449, 460-461, 193 N.W. 507 (1923) (citations omitted).

Wisconsin law on restraint of trade "is drawn largely from federal antitrust law" and Wisconsin courts have long held that Wisconsin courts look to federal jurisprudence "for guidance" regarding restraint of trade. *Independent Milk Producers Co-op v. Stoffel,* 102 Wis. 2d 1, 6-7, 298 N.W.2d 102, 104 (Ct. App. 1980); *Pulp Wood Co. v. Green Bay Paper & Fiber Co.,*

157 Wis. 604, 147 N.W. 1058 (1914). In 1975, the United States Supreme Court explained the nature of federal labor policy and the antitrust exemption for collective bargaining in a case addressing secondary agreements between unions and the non-union subcontractors of the primary employer:

> The basic sources of organized labor's exemption from federal antitrust laws are §§6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U.S.C. §17 and 29 U.S.C. §52, and the Norris-La Guardia Act, 47 Stat. 70, 71, and 73, 29 U.S.C. §§104, 105, and 113. These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. See *United States v. Hutcheson*, 312 U.S. 219 (1941). They do not exempt concerted action or agreement between unions and nonlabor parties. *Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965). The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).
>
> The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.

Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621-622 (1975) (additional citations omitted).

Despite the express exemptions, Plaintiff rests her second cause of action on a tortured construction of Chapter 133 and the artifice that once this Court declares that the conditional labor agreements between MATC and Local 212 are illegal, then the illegal agreements are cognizable as a restraint of trade. Chapter 133 exempts collective bargaining, she acknowledges,

but *not* the collective bargaining between MATC and Local 212, because it produced illegal agreements. Plaintiff's construction of Chapter 133 would eviscerate the goals of federal and state labor policy, which caused the Congress and the Wisconsin legislature expressly to exempt collective bargaining from the antitrust laws. Her construction of the conditional labor agreements is an unsuccessful device to bring collective bargaining between MATC and Local 212 within antitrust prohibitions. As a result, this Court should dismiss with prejudice Plaintiff's second cause of action for its failure to state a claim on which relief can be granted.

III. This Court Should Dismiss This Lawsuit in its Entirety on the Basis of Comity, as the WERC Has Concurrent Jurisdiction of the Prohibited Practices Complained of by Plaintiff

The gravamen of the complaint concerns Plaintiff's claims that the conditional labor agreements between Local 212 and MATC cover topics prohibited under MERA. Such claims are potentially cognizable as prohibited practices (referred to in federal parlance as unfair labor practices) under MERA, Wis. Stat. §§111.07, 111.70. And prohibited practices are within the purview of the WERC, Wis. Stat. §111.70(4)(a). Because the complaint comes within the ambit of MERA, this Court and the WERC have concurrent jurisdiction. However, given the statutory delegation to the administrative agency of a focused concentration in such matters, this Court may, as a matter of comity, exercise its discretion to dismiss the complaint, giving priority to the WERC's jurisdiction. The Supreme Court articulated the contours of judicial and agency concurrent jurisdiction and the doctrine of comity:

> We fully recognize that administrative agencies are designed to provide uniformity and consistency in the fields of their specialized knowledge. The expertise that comes with experience and also the fact-finding facility that comes with a more flexible procedure enable the agencies to perform a valuable public function. When an issue arises

> which fits squarely within the very area for which the agency was created, it would be logical to require prior administrative recourse before a court entertains jurisdiction.
>
> Nonetheless, we believe it improper to couch such priority in terms of power or jurisdiction. The standard, in our opinion, should not be power but comity. The court must consider which course would best serve the ends of justice. If the issue presented to the court involves exclusively factual issues within the peculiar expertise of the commission, the obviously better course would be to decline jurisdiction and to refer the matter to the agency. On the other hand, if statutory interpretation or issues of law are significant, the court may properly choose in its discretion to entertain the proceedings. The trial court should exercise its discretion with an understanding that the legislature has created the agency in order to afford a systematic method of fact-finding and policy-making and that the agency's jurisdiction should be given priority in the absence of a valid reason for judicial intervention.

Wisconsin Collectors Ass'n, Inc. v. Thorp Finance Corp., 32 Wis. 2d 36, 44-45, 145 N.W.2d 33, 36-37 (1966); *Browne v. Milwaukee Board of Sch. Dir.*, 83 Wis. 2d 316, 329, 265 N.W.2d 559, 564-565 (1978); *White v. Ruditys,* 117 Wis. 2d 130, 135, 343 N.W.2d 421, 423 (Ct. App. 1983) (any controversy concerning unfair labor practices may be submitted to the commission).

Because Plaintiff's first cause of action complains of matters over which the Courts and the WERC have concurrent jurisdiction, this Court may dismiss the complaint on the basis of comity, giving priority to the jurisdiction and administrative expertise of the WERC.

CONCLUSION

On the basis of all of the above, Local 212 requests that this Court grant the motion to dismiss and order the following:

(a) The complaint in its entirety shall be dismissed with prejudice;

(b) Local 212 shall be awarded its costs, disbursements and attorneys' fees incurred in defending this action and bringing the motion;

(c) Any further relief this Court deems just and equitable.

November 15, 2013

Respectfully submitted,

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