
Kenosha Education Association,

Plaintiff,

v.

Case No. 14-CV-214

Wisconsin Employment Relations Commission,
Defendant,

***AMICI CURIAE* BRIEF OF KRISTI LACROIX AND CARRIEANN GLEMBOCKI**

INTRODUCTION

Kristi Lacroix and CarrieAnn Glembocki are plaintiffs in a separate action pending in Kenosha County Circuit Court, *Lacroix, et al. v. Stevens, et al.*, Case No. 13-CV-1899 (the “*Lacroix* case”). The *Lacroix* case has been pending before the Honorable David Bastianelli since November 22,¹ 2013. The defendants in the *Lacroix* case are the Kenosha Unified School District Board of Education (the “Board”), four individual members of the Board, the Kenosha Unified School District (the “School District”), Service Employees International Union, Local 168 (“SEIU”), American Federation of State, County and Municipal Employees, Local 2383 (“AFSCME”), **and, most importantly for matters relating to this case, Kenosha Education Association (“KEA”) – the petitioner here.** The *Lacroix* complaint alleges that the Collective Bargaining Agreement (the “CBA”) entered into between the School District and KEA, SEIU, and AFSCME is illegal and void.

The basis of most of the plaintiffs’ claims in the *Lacroix* case is that the CBA was negotiated in violation of Act 10. Most relevant to this case, the plaintiffs in the *Lacroix* case argued, among other things, that KEA had failed to recertify as a collective bargaining agent as

¹ The *Lacroix* case was filed on November 21, 2013, and was originally assigned to Judge Schroeder, who recused himself on November 22, 2013.

required by Act 10. Thus, the constitutionality of Act 10 and its enforceability in light of other Act 10 cases is in issue in that case.

The plaintiffs in the *Lacroix* case moved for a temporary injunction. In connection with that motion, the parties fully briefed and argued the applicability of the other cases relating to Act 10 to their Kenosha County Circuit Court action, including the decision of Judge Colas that KEA relies upon in this case.

The temporary injunction motion in the *Lacroix* case was decided by Judge Bastianelli on December 12, 2013. A copy of the transcript containing the court's decision is attached to the McGrath Affidavit filed herewith. Although Judge Bastianelli denied the requested temporary injunction on the ground that the plaintiffs had not shown irreparable harm, what is significant is that Judge Bastianelli, in his ruling on the motion, considered the same authorities that KEA is relying upon in this case and rejected the idea that Judge Colas' decision (the primary authority relied upon by KEA here as in the *Lacroix* case) was binding on him or on the parties to the *Lacroix* case. In his ruling, Judge Bastianelli concluded that Judge Colas' decision did not have statewide effect and was not binding on nonparties. Transcript of Hearing at 4-9, *Lacroix, et al. v. Stevens, et al.*, Kenosha County. Cir. Ct. No. 13-CV-1899 (Dec. 12, 2013); McGrath Aff. Ex. A.

In this case, petitioner KEA is seeking another bite at the same apple. *Amici* submit this brief so this Court is fully aware of Judge Bastianelli's decision in the *Lacroix* case and to suggest that this Court withhold any decision on KEA's preliminary motion in light of pending developments in an ongoing Kenosha County Circuit Court case and, in any event, until after the

Wisconsin Supreme Court decides the constitutionality of Act 10 at issue in *Madison Teachers, Inc. v. Walker* case², which was argued before the Supreme Court on November 11, 2013.

I. This Case Involves One of the Same Issues as in the *Lacroix* Case.

In this case, KEA contends that the February 5, 2014 decision of the Wisconsin Employment Relations Commission (“WERC”) concluding that KEA was decertified as of August 30, 2013 was wrong, because Judge Colas held in his September 14, 2012 decision that Act 10 was unconstitutional. As noted above, this precise issue was considered and ruled upon by Judge Bastianelli in the *Lacroix* case.

In the wake of its passage by the Legislature, several lawsuits were filed that challenged the validity of Act 10. The U.S. District Court for the Western District of Wisconsin dismissed many of these challenges and, on appeal, the U.S. Court of Appeals for the Seventh Circuit dismissed all challenges to the statute on federal constitutional grounds. *WEAC v. Walker*, 705 F.3d 640 (7th Cir. 2013). On September 11, 2013, the U.S. District Court of the Western District of Wisconsin upheld Act 10 against a related constitutional challenge, dismissing that case as well. *Laborers Local 236, AFL-CIO v. Walker*, No. 11-CV-462-wmc, 2013 WL 4875995 (W.D. Wis. Sept. 11, 2013).³ On October 23, 2013, the Dane County Circuit Court, the Honorable John Markson presiding, upheld Act 10 against another constitutional challenge brought by state employees and a union representing them, dismissing that case. *Wisconsin Law Enforcement Ass’n v. Walker*, Dane County Circuit Court Case No. 12-CV-4474.

² *Madison Teachers v. Walker*, Dane County Cir. Ct. Case No. 11-CV-3774; Wisconsin Supreme Court 2012 AP 2067.

³ *Laborers* was just affirmed by a unanimous three-judge panel of the Seventh Circuit Court of Appeals. *Laborers Local 236, AFL-CIO v. Walker*, No. 13-3193 (7th Cir. Apr. 18, 2014).

But on September 14, 2012, another branch of the Dane County Circuit Court, the Honorable Juan Colas presiding, in a decision that cannot be reconciled with the three decisions upholding Act 10, held parts of Act 10 to be in violation of the Wisconsin State Constitution. *Madison Teachers, Inc. v. Walker*, Dane County Circuit Court Case No. 11-CV-3774. That decision was appealed to the Wisconsin Court of Appeals and then certified to the Wisconsin Supreme Court. The Wisconsin Supreme Court heard oral argument in the *Madison Teachers* matter on November 11, 2013, but has not yet issued a ruling in the case.

Judge Bastianelli was fully advised of the decisions in all of these Act 10 cases, and he concluded that Judge Colas' decision was not binding in the *Lacroix* case. Transcript of Hearing at 4-9, *Lacroix, et al. v. Stevens, et al.*, Kenosha Cnty. Cir. Ct. No. 13-CV-1899 (Dec. 12, 2013); McGrath Aff. Ex. A. If Judge Bastianelli is correct, as *amici* believe that he is, there is no basis on which this Court should stay WERC's decision on KEA's decertification because KEA was clearly out-of-compliance with the recertification requirement of Act 10.

Furthermore, the plaintiffs in the *Lacroix* case are arguing that the CBA is void because KEA had no valid authority to bargain with the School District on behalf of Kenosha teachers due to KEA's failure to recertify as required by Act 10. Judge Bastianelli has already determined that Act 10 applied (and continues to apply) to KEA, but has not yet determined what effect KEA's failure to recertify has on the merits of the *Lacroix* case. *Amici* expect that he will do so on summary judgment. KEA, in this case, seeks to preempt Judge Bastianelli's ruling on that issue by asking a different judge to declare true what Judge Bastianelli has indicated he may declare false.

II. KEA Has Engaged in Forum Shopping.

For obvious reasons, KEA is not happy with the portion of Judge Bastianelli's decision that concluded that Judge Colas' decision regarding Act 10 is not binding on the Kenosha County Circuit Court. KEA asks, in this case, for a second opinion on the same issue from a different Kenosha County judge, hoping for a different result.

That a second opinion is at the heart of KEA's pending motion is obvious from the history of the case. When this case was originally filed on February 12, 2014, it was assigned to Judge Bastianelli. KEA then substituted against Judge Bastianelli. The case was assigned to Judge Schroeder, who recused himself, and it was then assigned to this Court.

Further, Judge Bastianelli has set a scheduling conference in the *Lacroix* case for May 9, 2014, where he will set a date and briefing schedule for summary judgment motions. A summary judgment decision in that case will dispose of the substantive issue raised in this case and that decision will then be *res judicata* as to KEA. In order to avoid that possibility, KEA asks this Court for preliminary relief, in the form of a motion to stay the WERC decision, so that it can get a decision from this Court before Judge Bastianelli decides a summary judgment motion in the *Lacroix* case currently before him. KEA not only wants a "second opinion," it also wants to advance the schedule in this case so that this Court's decision comes before Judge Bastianelli has a chance to, through his ruling in the *Lacroix* case, decide the central issue in this case. KEA knows that Judge Bastianelli's decision on the motion for summary judgment in the *Lacroix* case would be *res judicata* as to KEA, and it is trying to avoid that result by advancing this case as quickly as it can. This is blatant forum shopping.

III. This Court Should Withhold Deciding this Matter Until the Wisconsin Supreme Court Decides the Constitutionality of Act 10.

The *Madison Teachers* case was argued before the Wisconsin Supreme Court on November 11, 2013. Even if the Supreme Court waits until the very end of the term to decide that case, a decision will be announced within a few months – by July of this year. Applying and relying on Act 10 in 2012, WERC originally concluded that the KEA was decertified. Judge Colas then held WERC in contempt and as part of his contempt decision required WERC to notify the KEA that the KEA was certified. WERC promptly complied with Judge Colas' order. The Wisconsin Supreme Court then vacated Judge Colas' contempt order on November 21, 2013. *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶20, 351 Wis. 2d 237, 839 N.W.2d 388. On February 5, 2014, WERC again notified KEA that it was decertified. In its motion to stay, KEA seeks to have WERC undo its decertified status for the second time. But, of course, if KEA gets its desired stay but the Supreme Court upholds Act 10, then KEA would have to be decertified yet again.

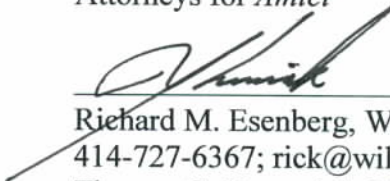
Amicus CarrieAnn Glembocki is a teacher in Kenosha and is directly affected by this back and forth process. In the past 24 months she has been informed that KEA is her bargaining agent, is not her bargaining agent, is her bargaining agent, and is not her bargaining agent. Now, in this case, the KEA asks this Court to once again turn KEA's bargaining agent status to "is" – subject to the Wisconsin Supreme Court, through its ruling in *Madison Teachers*, possibly resetting it to "is not" in just a few months. In light of the proceedings in the *Lacroix* case and the imminent decision from the Wisconsin Supreme Court in *Madison Teachers*, *Amici* request that this Court defer making any decision in the present case until after the Wisconsin Supreme Court has ruled on the constitutionality of Act 10 and with due consideration to the pendency of the *Lacroix* case.

CONCLUSION

In light of the pendency of a prior case in Kenosha County Circuit Court and the pendency of the *Madison Teachers* case in the Wisconsin Supreme Court, *Amici* request that this Court withhold any decision in this case, at a minimum, until the Wisconsin Supreme Court decides the constitutionality of Act 10.

Dated this 18th day of April, 2014.

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