

VICTORIA MARONE

Plaintiff,

v.

MILWAUKEE AREA TECHNICAL COLLEGE
DISTRICT

Case No. 13-CV-004154

Defendant,

Hon. David A. Hansher

v.

AMERICAN FEDERATION OF TEACHERS,
LOCAL 212, WFT, AFL-CIO

Intervenor-Defendant.

**JOINT MEMORANDUM IN FURTHER SUPPORT OF DEFENDANT'S AND
INTERVENOR-DEFENDANTS' RESPECTIVE MOTION FOR JUDGMENT
ON THE PLEADINGS AND MOTION TO DISMISS**

Plaintiff Victoria Marone (“Marone”) initiated the above-captioned matter asking the court to declare certain future conditional agreements (referred to herein as the “Conditional Successor Agreements”), between defendant Milwaukee Area Technical College District (“MATC”) and intervenor-defendant American Federation of Teachers, Local 212, WFT AFL-CIO (“Local 212”) (collectively, with MATC, the “Defendants”), to be unlawful, invalid and void. (Compl. ¶¶ 1-2). The Conditional Successor Agreements explicitly were conditioned upon Dane County Circuit Court Judge Juan Colas’ decision declaring portions of 2011 WI Act 10 (“Act 10”)¹ to be unconstitutional being upheld by Wisconsin’s Appellate Courts. The

¹ Act 10 fundamentally changed the Municipal Employment Relations Act (“MERA”) and public employee

Wisconsin Supreme Court recently overturned Judge Colas' decision and declared the portions of Act 10 at issue to be constitutional in *Madison Teachers, Inc. v. Walker*, 2014 WI 99, 851 N.W.2d 337. As a result, the condition precedent to the Conditional Successor Agreements coming into being was not satisfied, and the Conditional Successor Agreements did not and will not become binding contracts.

MATC and Local 212 submit, in light of these recent developments and MATC's and Local 212's agreement that the Conditional Successor Agreements are not binding upon any party, that the above-captioned matter is moot. There is no a justiciable controversy ripe for judicial determination such that Marone's claims for declaratory relief must be dismissed and Marone cannot recover damages allegedly arising out of a non-existent contract. This matter can and should be dismissed in its entirety for the reasons set forth below, in Local 212's Motion to Dismiss the Complaint and MATC's Motion for Judgment on the Pleadings Seeking Dismissal in Full or In Part.

SUPPLEMENTAL STATEMENT OF UNDISPUTED FACTS

1. Status Of Marone's Claims for Relief.

In Marone's First Cause of Action in the Complaint, she seeks a declaration that defendant MATC violated statutes modified by Act 10, specifically Wis. Stat. §§ 66.0506 and 111.70(4)(mb), by negotiating terms and conditions that were prohibited subjects of bargaining, and that, as a result, the Conditional Successor Agreements negotiated are unlawful, invalid and void. (Compl. ¶¶ 30-33; p. 9). In her Second Cause of Action, Marone further seeks a declaration that MATC violated the prohibition against contracts or agreements in restraint of

collective bargaining in Wisconsin by prohibiting collective bargaining over anything other than total base wages for many public employers and their employees, modifying numerous statutes under MERA including Wis. Stat. §§ 66.0506 and 111.70(4)(mb). Prior to Act 10, the public employers and labor organizations representing public employees were required to bargain over wages, hours and conditions of employment.

trade under Wis. Stat. § 133.03(1) because the Conditional Successor Agreements preclude Marone from being able to negotiate the terms and conditions of her employment directly with MATC and that, as a result, the Conditional Successor Agreements negotiated are unlawful, invalid and void. (Compl. ¶¶ 34-43; p. 9). The Defendants seek dismissal of the claims on numerous grounds, including that there is no justiciable controversy.² (Dkt. No. 6, MATC's Answer, ¶5; Dkt. 27, Local 212's Mot. to Dismiss). MATC and Local 212 filed their respective Motion for Judgment on the Pleadings Seeking Dismissal in Full or In Part and Motion to Dismiss the Complaint in its entirety on November 15, 2013. (Dkt. Nos. 27, 29). The matter was stayed pending a decision by the Wisconsin Supreme Court in *Madison Teachers*. (Dkt. No. 43).

2. Status Of Conditional Successor Agreements.

While the constitutionality of Act 10 was being litigated in *Madison Teachers*, MATC's District Board entered into negotiations with Local 212 and, subsequently agreed upon the terms of the Conditional Successor Agreements for three bargaining units represented by Local 212, including the part-time teacher bargaining unit of which Marone was a member. (Compl. ¶¶ 1, 3, 17, 20, 22, Ex. D). The Conditional Successor Agreements were proposed to commence on February 16, 2014. (Compl. 23, Ex. D). However, the negotiations and the Conditional Successor Agreements were subject to all applicable laws and regulations, and conditioned on Judge Colas' decision declaring portions of Act 10 to be unconstitutional, in *Madison Teachers, Inc. v. Walker*, No. 11CV3774 (Dane Co. Cir. Ct. Sept. 12, 2014), being upheld by Wisconsin's Appellate Courts. (Compl. 23, Ex. D).

² MATC joins Local 212's Motion to Dismiss the Complaint in its entirety on the grounds that there is no justiciable controversy.

Judge Colas' decision was appealed and certified to the Wisconsin Supreme Court. *Madison Teachers, Inc. v. Walker*, No. 2012AP2067, 2013 WL 1760805, *3 (Ct. App. Apr. 25, 2013). In February 2014, when the Conditional Successor Agreements were proposed to commence *if* Judge Colas' decision was upheld, MATC implemented terms and conditions of employment that reflected the relationship between the employer (MATC) and the employees. MATC did not implement any terms and conditions of employment that related to fair share or dues deductions.³ In light of the Wisconsin Supreme Court decision in *Madison Teachers*, the Defendants, as parties to the proposed Conditional Successor Agreements, have agreed that the condition precedent to the finalization and effectiveness of the Conditional Successor Agreements did not occur, and that the Conditional Successor Agreements were not and could not be binding contracts, because Judge Colas' decision was not upheld.

SUPPLEMENTAL ARGUMENT

1. The Complaint Must Be Dismissed Because Marone's Claim For Relief Is Moot Because The Conditional Successor Agreements Never Were And Never Will Be Binding Contracts.

a. The Conditional Successor Agreements Never Became Binding Contracts.

Under Wisconsin contract law, the Conditional Successor Agreements never became binding contracts and never can be binding contracts.

Wisconsin courts have held: “ ‘Where the parties to the proposed contract have agreed that the contract is not to be effective or binding until certain conditions are performed or occur, no binding contract will arise until the conditions specified have occurred or been performed.’ ” *Fox v. Catholic Knights Ins. Soc.*, 2003 WI 87, ¶ 26, 263 Wis. 2d 207, 665 N.W.2d 181, *quoting Kocinski v. Home Ins. Co.*, 147 Wis.2d 728, 739, 433 N.W.2d 654 (Ct.App.1988), *aff'd by* 154

³ The terms and conditions of employment should not be in dispute. The parties can provide the details of these terms and conditions by affidavit if required by the Court or disputed by Marone.

Wis.2d 56, 452 N.W.2d 360 (1990). Here, the negotiations and Conditional Successor Agreements between the Defendants were conditioned on all applicable law, regulations and Judge Colas' decision in *Madison Teachers* being upheld by Wisconsin Appellate Courts. (Compl. Ex. D). However, Judge Colas' decision was not upheld as the Wisconsin Supreme Court overturned his decision. *Madison Teachers, Inc. v. Walker*, 2014 WI 99. The condition required to make the proposed contract a binding contract did not occur.

Now that Judge Colas' decision has been overturned, there is no possibility that Judge Colas' decision can be upheld by Wisconsin Appellate Courts as required for the Conditional Successor Agreements to become binding contracts. Moreover, the Defendants agree that the Conditional Successor Agreements were never binding contracts and never will be binding contracts, such that their terms and conditions will never be implemented. Therefore, under Wisconsin contract law, no binding contract has arisen or can arise.

b. The Controversy Of Whether MATC Violated Wis. Stat. §§ 66.0506, 111.70(4)(mb) and 133.18 Is Moot.

Under Marone's First and Second Causes of Action, respectively, she asks the court to declare that MATC violated Wis. Stat. §§ 66.0506 and 111.70(4)(mb) by negotiating terms and conditions that were prohibited subjects of bargaining and violated Wis. Stat. § 133.03(1) because the Conditional Successor Agreements preclude Marone from being able to negotiate the terms and conditions of her employment directly with MATC. (Compl. ¶¶ 30-43; p. 9). In addition, Marone asks the court to declare that, as a result of those violations, the Conditional Successor Agreements negotiated are unlawful, invalid and void. (Compl. ¶¶ 30-43; p. 9). However, both points are moot, and the all claims requesting declaratory relief should be dismissed.

As a general rule, dismissal is appropriate when the issues to be resolved in a controversy are moot. *State ex rel. La Crosse Tribune v. Circuit Court for La Crosse County*, 115 Wis. 2d 220, 228-29, 340 N.W.2d 460 (1983). “An issue is moot when its resolution will have no practical effect on the underlying controversy. In other words, a moot question is one which circumstances have rendered purely academic.” *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425 (internal citations omitted). “It is generally thought to be in the interest of judicial economy not to continue to litigate issues that will not affect real parties to an existing controversy.” *La Crosse Tribune*, 115 Wis. 2d at 228.

First, whether the Conditional Successor Agreements are valid is a moot point. The court does not need to declare that the Conditional Successor Agreements are unlawful, invalid and void. The Defendants agree that the Conditional Successor Agreements were not, are not and can never be binding contracts. In addition, under Wisconsin law, the Conditional Successor Agreements were not and are not binding contracts because the condition precedent to them becoming binding contracts has not and cannot be satisfied. This issue is no longer in controversy, and the resolution of this question by the court has no practical effect.

Second, the court does not need to address whether MATC violated the law because Marone’s purpose in requesting such declarations was to have the Conditional Successor Agreements declared unlawful, invalid and void. As the Conditional Successor Agreements were not, are not and cannot be binding contracts, resolution determination of whether MATC violated the law will have no practical effect and is a purely academic question. *See State ex rel. Olson*, 2000 WI App 61, ¶ 3. Regardless, the fact that the Conditional Successor Agreements never were and never can be binding contracts negates any claim that the MATC violated Wis. Stat. § 133.03(1) because, by her own admission “[i]n the absence of the Labor Agreement,

Plaintiff 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 wages.” (Compl. ¶ 37).

As such, the issues presented in Marone’s First and Second Causes of Action, are moot and the request for declaratory relief should be dismissed.

2. The Complaint Must Be Dismissed Because There Is No Justiciable Controversy.

The court does not have jurisdiction to grant Marone’s requested declaratory relief because the facts alleged do not present a justiciable controversy ripe for judicial determination.

As set forth in Local 212’s Brief in Support of Its Motion to Dismiss, under Wisconsin’s Declaratory Judgment Act, codified in Wis. Stat. § 806.04, a plaintiff seeking declaratory relief must allege a justiciable controversy by establishing that the issue involved in the controversy is ripe for judicial determination.⁴ *Loy v. Bunderson*, 107 Wis. 2d 400, 320 N.W.2d 175 (1982); *Putnam v. Time Warner Cable*, 2002 WI 108, ¶ 41, 255 Wis. 2d 447, 649 N.W.2d 626. A court does not have jurisdiction to order declaratory relief if a controversy is not ripe for judicial determination. *Sipl v. Sentry Indem. Co.*, 146 Wis. 2d 459, 469, 431 N.W.2d 685 (Ct. App. 1988). For a controversy to be ripe for judicial determination, the facts on which the court is asked to make a judgment must be sufficiently developed to avoid courts “entangling themselves in abstract disagreements” and should not be contingent or uncertain. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 43, 309 Wis.2d 365, 387, 749 N.W.2d 211 (citation omitted). “[‘It] is not a judicial function’ to declare rights based on ‘issues that are fictitious, colorable, or hypothetical.’” *Sipl*, 146 Wis. 2d at 466-67. Moreover, the Declaratory Judgment Act does not

⁴ The other required elements of a justiciable controversy include that the controversy in which a claim of right is asserted against one who has an interest in contesting it; the controversy must be between persons whose interests are adverse; and, the controversy must have a legal interest in the controversy – that is to say, a legally protectable interest. *Loy*, 107 Wis. 2d at 410.

permit courts to issue merely advisory opinions, which are interpretations of the law without binding effect. *Sipl*, 146 Wis. 2d at 468.

Marone seeks declarations under Wisconsin's Declaratory Judgment Act on a controversy that is not ripe for judicial determination because it is based upon facts that are contingent on the Conditional Successor Agreements being binding contracts. However, the Conditional Successor Agreements were never binding contracts and can never be binding contracts because the condition precedent to the agreements becoming binding, Judge Colas' decision being upheld by Wisconsin Appellate Courts, did not and cannot occur. The result is that any determination as to whether entering into Conditional Successor Agreements violated any law is merely an advisory opinion based upon a fictitious issue given the agreements were never entered into and can never be entered into. Thus, the controversy is not a justiciable controversy and not proper for the court to decide under Wisconsin's Declaratory Judgment Act.


CONCLUSION

For the reasons set forth herein, and in the Defendants' respective Motion to Dismiss and Motion for Judgment on the Pleadings Seeking Dismissal in Full or In Part, the court must dismiss Marone's claims for relief in their entirety. Marone's requests for declarations that MATC unlawfully entered into the Conditional Successor Agreements and that the Conditional Successor Agreements are unlawful, invalid and void must be dismissed as the matter is moot because the Conditional Successor Agreements were never binding contracts and never can be binding contracts. In addition, the court does not have jurisdiction under the Declaratory Judgment Act to make the requested declarations because the controversy is not ripe for judicial determination. The issues presented by Marone are fictitious and not a justiciable controversy

for which the court has jurisdiction to decide because the alleged agreements at issue never became or will become binding contracts.

Dated: September 25, 2014.

DAVIS & KUELTHAU, s.c.
Attorneys for Milwaukee Area Technical College

By: 

Kirk D. Strang
State Bar No. 1010841
Kathy L. Nusslock
State Bar No. 1014027
Claire E. Hartley
State Bar No. 1074011

P.O. Address:

111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
(414) 276-0200

Direct contact information:

Kirk D. Strang (414) 225-1495 direct dial
(608) 280-3043 direct fax
kstrang@dkattorneys.com

Kathy L. Nusslock (414) 225-1447 direct dial
(414) 278-3647 direct fax
knusslock@dkattorneys.com

Claire E. Hartley (414) 225-1412 direct dial
(414) 278-3612 direct fax
chartley@dkattorneys.com

Dated: September 25, 2014.

HAWKS QUINDEL, S.C.
Attorneys for Intervenor-Defendant American
Federation of Teachers, Local 212, WFT, AFL-CIO

By: 

Timothy E. Hawks
State Bar No. 1005646
B. Michele Sumara
State Bar No. 101018

P.O. Address:

P.O. Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 (Fax)

Direct contact information:

Timothy E. Hawks thawks@hq-law.com

B. Michele Sumara msumara@hq-law.com