STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

VICTORIA MARONE

Plaintiff,

v. Case No. 13-CV-004154

MILWAUKEE AREA TECHNICAL COLLEGE DISTRICT,

Defendant,

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

Intervenor-Defendant.

PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' JOINT SUPPLEMENTAL BRIEF IN SUPPORT OF MOTIONS FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS BASED ON MOOTNESS

INTRODUCTION

This case is not moot. The Defendants illegally collectively bargained in late 2012 and early 2013. They reached an agreement in February 2013, which was signed both by the Union and by MATC (the "Labor Agreement"). The agreement that was collectively bargained was then ratified by the Union and by MATC. The ratified agreement, although illegal under Act 10, has, by its terms, been in effect for eight months, since February 16, 2014. The Plaintiff's claims that the collective bargaining was illegal and that the Labor Agreement is void are not moot.

The Defendants' argument to the contrary is that their agreement was "conditioned" on an ultimate finding that Act 10 is unconstitutional. That is simply not true. The Labor Agreement contains no conditional language. While MATC has produced an internal memo – generated after the Agreement was signed – calling it "conditional," that memo is nothing more than an after-the-fact statement of MATC's view of the Labor Agreement – a view that is at odds with the Agreement itself and that was never agreed to by the Union. Although the Union now

argues that the Agreement was "conditional," this was not its position at the outset of this litigation and the parties cannot change what the Agreement actually says. "We didn't mean it" is not a defense.

It is understandable that MATC and the Union do not want to admit that they got it wrong when they took a risk that Act 10 would be found unconstitutional. But they did it get it wrong and, moreover, seem to have administered – and may still be administering – an unlawful agreement for the better part of this year. Plaintiff is entitled to relief.

I. STANDARD FOR MOOTNESS.

An issue is moot only when its resolution will have no practical effect on the underlying controversy. *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 79 Wis. 2d 161, 171, 255 N.W.2d 917, 924 (1977); *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 688 (Ct. App. 1985). "[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. "The purpose of a dismissal for mootness is simply to prevent an unnecessary expenditure of time by the court and the parties." *Wisconsin's Envtl. Decade, Inc.*, 79 Wis. 2d at 171.

This action is not moot. First, the Labor Agreement is not conditional. Second, there are at least two issues that require resolution to end this controversy: (1) was the collective bargaining which occurred in 2012 and 2013 illegal, and (2) have the Defendants been implementing the terms of the illegal collective bargaining since February 16, 2014.

II. THE LABOR AGREEMENT BETWEEN MATC AND THE UNION WAS NOT CONDITIONAL.

In their brief, the Defendants call their collectively bargained Labor Agreement the "Conditional Successor Agreement." But that is not what they called it when they entered into it.

"Conditional Successor Agreement" is not the title of the document. It is merely a rhetorical tool to try to make their ultimate point that the Labor Agreement was allegedly "conditional." The moniker is not supported by the facts in the Complaint.

The Defendants did not bring a motion for summary judgment, which would permit them to introduce their own evidence and insist that the Plaintiff prove the facts alleged in her Complaint. Instead, the Defendants have incorporated their mootness arguments into their motions to dismiss and for judgment on the pleadings. In considering such motions, the Court must accept the allegations of the Complaint, and all reasonable inferences from those allegations, as true. *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶11, 283 Wis. 2d 555, 699 N.W.2d 205 (citing *Ollerman v. O'Rourke Co.*, 94 Wis. 2d 17, 24, 288 N.W.2d 95 (1980)). Furthermore, pleadings are liberally construed. *Id.* The complaint need not state all the ultimate facts constituting the cause of action, but rather the complaint should be dismissed as legally insufficient only if there are no conditions under which the plaintiff can recover. *Id.*

The Complaint does not allege a "Conditional Successor Agreement." It alleges that the Defendants reached a Labor Agreement through collective bargaining. (Complaint ¶¶ 1, 2, 5, 10-13, 17, 20-23.) Those allegations must be taken as true. The Court is not free to reject those allegations and adopt the alternate set of facts now being asserted by the Defendants on their motions to dismiss and for judgment on the pleadings.

Second, even if it were acceptable to go outside the four corners of the complaint, the undisputed facts do not support the Defendants' position. Act 10 became the law in Wisconsin on June 29, 2011; Act 32 on July 1, 2011. Act 32 and Act 10 (collectively "Act 10"), among other things, amended Wis. Stat. §111.70, the statute that governs collective bargaining between MATC and the union representing its employees. Section 111.70(4)(mb), as amended by Act 10,

prohibits MATC from bargaining with any union representing its employees with respect to any of the factors or conditions of employment except for total base wages. §111.70(4)(mb).

Nevertheless, in conspicuous violation of Act 10, MATC decided to bargain with Local 212 and to enter into a new labor agreement effective on February 16, 2014, without regard for the limitations imposed by Act 10. In response to discovery served by the Plaintiff, MATC produced its own business records which revealed the following. "In October 2012 the MATC District Board authorized the college's administration to open bargaining with members of Local 212, which represents full- and part-time faculty and paraprofessionals." (September 26, 2013 Kamenick Aff. ¶5, Ex. B; produced by MATC as Document No. MATC 00028.[1]) At the time of this decision by MATC, Act 10 had been the law of Wisconsin for over a year. *The authorization does not state that the collective bargaining was conditional in any way.*

On December 4, 2012, MATC sent a notice to the public that MATC and Local 212 would "reopen their collective bargaining agreements … and reconvene collective bargaining" on December 5, 2012. (September 26, 2013 Kamenick Aff. ¶5, Ex. B; produced by MATC as Document No. MATC 00025.) The December 4, 2012, notice informed the public that the parties would be exchanging their initial proposals at the December 5th session and would then go into closed session to commence negotiations. (*Id.*) *The notice does not state that the collective bargaining was conditional.*

On February 22, 2013, Pablo Cardona, MATC's Interim Vice President for Human Resources and Labor Relations, sent an email addressed to the administrative employees of MATC stating, "As you probably know, in October 2012 the MATC District Board authorized

[1] MATC produced business records of MATC in discovery and bates-stamped the documents as MATC 00025 through MATC 00232). These materials are in the record before this Court because they were filed as an attachment to the Kamenick Affidavit filed with the Plaintiff's summary judgment materials filed in September, 2013.

the college's administration to open up negotiations with members of AFT Local 212, which represents full and part-time faculty and paraprofessionals. As was announced by Local 212 leaders at MATC Day yesterday, the administration and leaders of the three Local 212 bargaining units have reached a tentative labor contract for the term of February 16, 2014 through February 15, 2015." (September 26, 2013 Kamenick Aff. ¶5, Ex. B; produced by MATC as Document No. MATC 00026.) *This notice did not state that the new Labor Agreement was conditional.*

Here is the most important part. On February 26, 2013, the MATC Board approved the new Labor Agreement. (September 26, 2013 Kamenick Aff. ¶5, Ex. B; produced by MATC as Document No. MATC 00112.) MATC passed three virtually identical Resolutions: one referring to the agreement with full-time employees, one referring to the agreement with part-time employees, and one referring to the agreement with paraprofessionals. (September 26, 2013 Kamenick Aff. ¶6, Ex. C.)[2] The Resolution relating to the agreement with the bargaining unit for part-time faculty stated as follows:

> **RESOLUTION TO APPROVE LABOR AGREEMENT BETWEEN MATC AND LOCAL 212, WFT, AFL-CIO (PART-TIME FACULTY) (Resolution BD0017-2-13)**
>
> WHEREAS, the Milwaukee Area Technical College District Board has entered into negotiations with Local 212, WFT, AFL-CIO (hereinafter "Local 212"); and
>
> WHEREAS, the Board representatives have reached a tentative one-year agreement (February 16, 2014- February 15, 2015) with representatives of Local 212; and
>
> WHEREAS, Local 212 (Part-time Faculty) has ratified the tentative labor agreement on February 25, 2013; and
>
> WHEREAS, the Board has reviewed the terms and conditions of said agreement;

[2] Pursuant to the Court's Order dated October 7, 2014, the Plaintiff's claim is now limited to the Labor Agreement for Part-Time Faculty.

therefore,

> **BE IT RESOLVED, that the Milwaukee Area Technical College District Board hereby accepts and approves the agreement reached by MATC and Local 212 (Part-time Faculty) bargaining unit**, and authorizes signatures representing the MATC District Board and the Administration on the approved agreement, at which time said agreement shall be incorporated by reference to this resolution.

(September 26, 2013 Kamenick Aff. ¶6, Ex. C (emphasis added).)

The resolution approved by the MATC Board was to accept and approve the agreement reached through collective bargaining. *The resolution did not state that the Labor Agreement was conditional.*

Nor do the Agreements themselves provide that they are conditional. The Labor Agreement has been signed by the parties with some sections dated February 19, 2013, and some dated February 26, 2013. (September 26, 2013 Kamenick Aff. ¶4, Ex. A; produced by MATC as Document No. MATC 00032-87.) The contracts for all three bargaining units appear to have been negotiated together, and the references to the Labor Agreement for Part-time Faculty are interspersed throughout the documents produced by MATC. They include but are not necessarily limited to MATC, 00044, 00046-47, 00053-55, 00057, 00061, 00062-72. In addition, the issues that were collectively bargained were only the changes from the previous collective bargaining agreement. Any provisions of the previous collective bargaining agreement not changed by the documents referenced above remained in effect. *None of the signed documents stated that the Labor Agreement was conditional.*

The signed documents have the acronym "TA" on them. The Plaintiff understands that "TA" is an acronym that stands for "Tentative Agreement." But that does not make them "conditional." Those terms were "tentative" only until ratified by the union members and the employer. That ratification occurred on February 25, and February 26, 2013 and the Labor

Agreement then became final. (Complaint, ¶¶20-21.) The Defendants' argument that the Labor Agreement was never finalized because even though it was signed and ratified by both parties, it was not signed a second time after it was ratified (Defendants' Br. at 3-4), makes no sense because there was no need for it to be signed a second time. The Court will see that the Labor Agreement is signed by both parties in numerous places and it is undisputed that this signed version was then ratified. Nothing more is necessary to establish a contract. At best, this would present a question of fact. Did the parties mutually expect a second round of signatures? This is not what is alleged in the Complaint. Certainly, if there is a dispute on this point, it does not render the case moot. It simply means that there would be a factual or legal dispute to be resolved by discovery and then summary judgment or trial. But given the existing signatures and the subsequent ratification this is a red herring.

To attempt to establish that the Labor Agreement was conditional, the Defendants point to a single document, an internal MATC document that was attached to the Complaint as Exhibit D. The Complaint describes the document as a summary of the Labor Agreement which was distributed to and discussed by members of the MATC Board at their meeting on February 26, 2013. (Complaint, ¶22.) The internal MATC summary does say that the negotiations "have been conditioned on Judge Colas' decision being upheld by Wisconsin's appellate courts." But this is no more than a statement of what the author of the document thought the effect of the Labor Agreement would be. A statement on the summary cannot alter the contract's terms. The Labor Agreement is complete and integrated and cannot be varied by parole evidence; in this case, a subsequently created document prepared by only one party and setting forth the position of that party. As we've seen, the Labor Agreement is conditioned on nothing. There is no evidence that the memorandum now relied upon was ever incorporated into the Labor

Agreement. There is no evidence that it was ever shared with the Union or, in fact, that the Union ever saw it, much less agreed to it or that the parties incorporated it into the Labor Agreement. Certainly, no such facts are alleged in the Complaint.

Even if this internal memorandum could be regarded as part of the Labor Agreement, the memo *does not* say that the unconstitutionality of Act 10 is a condition precedent[3] to the agreement itself. The memo *does not* say that, if Act 10 is upheld, the Labor Agreement is void. It simply says "[i]f Judge Colas' decision were to be overturned or invalidated, fully or in part, all obligations to bargain or resulting agreements are to be contingent on relevant Wisconsin appellate courts' ruling and applicable laws." In other words, the memo says nothing more than that the continued validity of the Labor Agreements *might* be affected if Judge Colas' decision was reversed. It says no more than that the impact of the Labor Agreement will be determined by the law in light of subsequent appellate decisions. That statement is a truism. Of course, the legality of the Labor Agreement must be determined in light of the law; that is what this case is all about. The Plaintiff seeks a declaration that the Labor Agreement is void in light of the law as determined by the Wisconsin Supreme Court.

If the Defendants agree that the Labor Agreement is void due to the Supreme Court's holding in *Madison Teachers*, then they need merely stipulate to judgment. The Court may remember that counsel for the Plaintiff proposed this very result at the last hearing and opposing counsel refused. The language in the internal MATC memo does not establish a binding condition. Even if that language were in the Labor Agreement, MATC and the Union could still

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[3] The brief statement in the summary does not indicate whether the "condition" was precedent or subsequent to the contract. Therefore, even if this Court concludes that the Labor Agreement is conditional, this case is not moot. MATC and the Union have recently argued that the condition is a condition precedent – that the contract never came into existence until and unless Judge Colas's decision was upheld. The language can just as easily be read as a condition subsequent – that the contract existed until Judge Colas's decision *was reversed*. If MATC or the Union operated under that understanding (regardless of what they claim now), the Plaintiff is entitled to a declaration that the implementation of the contract was unlawful.

take the position that the agreements were valid.[4] That they are not so arguing here is not because of an agreed-upon condition precedent, but a recognition that they were wrong and cannot win. That does not make the case moot. It just means that Plaintiff is entitled to judgment.

That there is not and never was a condition precedent is reflected in the positions taken by the Union. While it now says that the Labor Agreement was "conditional," it held the opposite position until recently. In its Newsletter from March 2013 (immediately after the Labor Agreement was collectively bargained), the Union advised its members that a new labor contract had been reached. The Newsletter does not suggest in any way that the Labor Agreement was conditional. (McGrath Aff. Ex. A.) Most significantly, in its brief filed with the Court on November 15, 2013, MATC advised the Court that the Union had taken the position that the labor agreement "will be enforceable regardless of the Wisconsin Supreme Court's decision [on Act 10.]" MATC Br. at p.2, fn 4. Thus, even after this action was filed, the Union's position was that the Labor Agreement was not conditional. Why the Union has switched its position is not explained in the joint brief filed by the Union and MATC.

III. THERE ARE STILL ISSUES THAT NEED TO BE RESOLVED IN THIS CASE.

As pointed out in the first section of this brief, an issue is moot only when its resolution will have no practical effect on the underlying controversy. *Wisconsin's Envtl. Decade, Inc.*, 79 Wis. 2d at 171; *Warren*, 123 Wis. 2d at 485. That is not the situation in this case. There are at least two issues that still require resolution to end this controversy: (1) was the collective

[4] Indeed, the Madison School District, Madison Teachers, Inc., and the Kenosha Education Association are taking precisely that position in two cases involving non-Act 10 compliant collective bargaining agreements negotiated before Judge Colas' decision was reversed. *Blaska v. MMSD*, Dane County Case No. 2014-cv-2578; *Lacroix v. KEA*, Kenosha County Case No. 2013-cv-1899.

bargaining which occurred in 2012 and 2013 illegal, and (2) have the Defendants been implementing any of the terms of the collective bargaining since February 16, 2014.

A. The Legal Status of the Collective Bargaining Is Still in Dispute

In her Complaint, the Plaintiff alleged that the very act of engaging in collective bargaining was unlawful, and sought a declaration to that effect. (Complaint, p. 9, ¶A.) As a member of the Union, she is entitled to a declaration that it represented her in an illegal manner. Neither the Union nor MATC has conceded that they engaged in conduct prohibited by state law. That issue is not moot.

The most relevant Wisconsin case on mootness is *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, 278 Wis. 2d 388, 692 N.W.2d 304. That case concerned the removal of Catharine Lawton from the Town of Barton Plan Commission. Ms. Lawton alleged that the meetings related to her removal violated Wisconsin's Open Meetings Law. *Id.*, ¶5. The circuit court resolved Ms. Lawton's claim by finding that the town board had no power to remove her. *Id.*, ¶7. The circuit court then determined that her open meetings claim was mooted by the determination that the board lacked authority. *Id.*, ¶8. The Court of Appeals reversed and held that even though Ms. Lawton had obtained the personal relief she sought by the determination that the board lacked the power to remove her, the open meetings act claim was not moot because Ms. Lawton was entitled to a declaration of the unlawful conduct of the board members. *Id.*, ¶15. The Court of Appeals held that it could not moot the open meetings claim because doing so would amount to approval of the board's unlawful conduct. *Id.*, ¶19.

That holding applies here. In *Lawton*, the defendants argued that the claim was moot because their action was declared unlawful on other grounds. Here, the Defendants argue that the claim regarding the contract is moot because the contract is void on grounds other than those

alleged in the complaint. Just as the plaintiff in *Lawton* was entitled to a declaration that the defendant's conduct was unlawful, so is the Plaintiff here. As in *Lawton*, this Court cannot hold that the Plaintiff's claim is moot without approving of the Defendants' unlawful conduct. While the Defendants argue that the Labor Agreement is void for reasons other than those alleged by the Plaintiff, the issue still remains that they conducted illegal collective bargaining, and to moot the case would sanction their illegal conduct.

A second relevant case is *State ex rel. Badke v. Village Board of Greendale*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993). In that case, the plaintiff sought a declaratory judgment that the Village Board had violated the Open Meetings Act because the majority of the Village Board attended meetings of the Village Plan Commission. The dispute involved the Board's decision relating to a certain development project that was discussed at the Plan Commission meetings. The Village Board argued that the claim was moot because it held a second meeting in which the Board complied with the provisions of the Open Meetings Act, and the Board approved the permit at the second meeting. The Court of Appeals disagreed and said:

> This case is not moot. As explained earlier, the controversy in this case did not end when the Village Board held its second meeting. The controversy in this case is the legal status of the acts that preceded the revote, and a declaratory judgment will have a legal effect on that controversy: it will declare the legal status of the Village Board's acts. We conclude that the criteria for sustaining a declaratory action have been met, and the controversy continues despite the second, valid meeting of the Village Board. Accordingly, this case is not moot.

Id. at 568.

The same is true here. The controversy in this case is the legal status of the collective bargaining that occurred in late 2012 and early 2013. The Plaintiff specifically requested a declaration that the collective bargaining was illegal. (Complaint p. 9, ¶A.) That issue is still in dispute. The Plaintiff seeks a declaration that the conduct was illegal and the Defendants oppose the requested declaration. Just as in *Lawton* and *Badke*, the request for a declaration is not moot.

B. If the Defendants Implemented any of the Terms Contained in the Labor Agreement on or after February 16, 2014, the Plaintiff is Entitled to a Declaration that the Implementation Was Unlawful

The record before the Court contains no evidence as to what has happened with respect to the Labor Agreement from February 16, 2014 to the present. It is undisputed that the Labor Agreement was to go into effect on February 16, 2014. The existing contract expired on February 15, 2014 and something had to replace it while *Madison Teachers* was pending. The Resolution adopted by the MATC Board makes it clear that the Labor Agreement will start on February 16, 2014. So do numerous provisions in the agreement itself. (*See, e.g.*, MATC 00062 "For employees hired or rehired on or after February 16, 2014 . . . ."; MATC 00064 "Commencing February 16, 2014 . . . .".)

So, what happened on February 16, 2014? Did MATC implement <u>any</u> of the terms of the new Labor Agreement? The terms are lengthy, but each and every one of them (other than terms setting base wages) would be unlawful to implement. For example:

1. The Labor Agreement has a provision for dealing with on-line classes taught at MATC. (MATC 00063.) It deals with the class load implications of such work and the compensation for such work. Did MATC implement this collectively bargained provision as of February 16, 2014?

2. The Labor Agreement has a provision on part-time teaching appointments (MATC 00042-00044) and part-time faculty access to full-time faculty positions (MATC 00067) Did MATC implement these collectively bargained provisions as of February 16, 2014?

3. The Labor Agreement has a provision on Coaching and Performance Evaluation of faculty. (MATC 00064-00065.) Did MATC implement this collectively bargained provision as of February 16, 2014?

4. The Labor Agreement has a provision as to health coverage available to Part-Time Faculty (MATC 00068) Did MATC implement this collectively bargained provision as of February 16, 2014?

5. The Labor Agreement has a provision on Part-Time Faculty Pay. (MATC 00069). Did MATC implement this collectively bargained provision as of February 16, 2014?

6. The Labor Agreement has a provision on Sick Leave. (MATC 00053-00055.) Did MATC implement this collectively bargained provision as of February 16, 2014?

7. The Labor Agreement has a provision on Step Increases (in pay). (MATC 00071) Did MATC implement this collectively bargained provision as of February 16, 2014?

In addition, as mentioned above, the collective bargaining in late 2012 and early 2013 only dealt with changes to the then-existing 3-year agreement. Were all of the unchanged provisions of the previous 3-year collective bargaining agreement continuously implemented from February 16, 2014 forward? The Plaintiff is entitled to proceed through discovery to determine whether any of this has happened – to determine whether the Defendants' claims that there is no contract are belied by a wink-and-a-nod arrangement where MATC implements the terms of the contract anyway. A "knowing wink" can be sufficient to establish the existence of an unlawful agreement. *Esco Corp. v. U.S.*, 340 F. 2d 1000, 1007 (9th Cir. 1965). And if one of the parties to such an agreement acts in way that is consistent with the agreement, that action is evidence that the party is acting pursuant to the agreement even if it claims that it is acting unilaterally. *U.S. v. Foley*, 598 F.2d 1323, 1332 (4th Cir. 1979).

At the last hearing, the Plaintiff requested the right to take discovery on these questions. But the Court stated that the Plaintiff could not yet do so because the Court wanted to decide the motions to dismiss and for judgment on the pleadings. The Defendants, tellingly, have not placed facts into the record one way or the other that would indicate whether any terms from the new Labor Agreement have been implemented. The Defendants assert that the Labor Agreement never came into effect, but that is a factual question, and one that can and should be resolved by discovery.

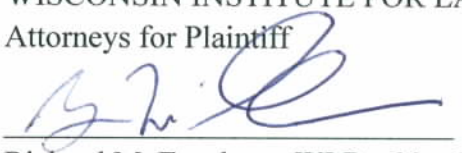
MATC was not free to implement the terms of the Labor Agreement on February 16, 2014. The terms and conditions in the Labor Agreement are themselves illegal, because they were bargained for in violation of Act 10. As a result, the Labor Agreement should be declared void. Once that occurs, MATC will then have to decide on new terms and conditions. It will need to do so in a manner consistent with Act 10 (and the Open Meetings Act).

CONCLUSION

For the above reasons, Ms. Marone requests that the Joint Motion to Dismiss or for Judgment on the Pleadings based on mootness be denied. She requests that this Court either order immediate briefing by the Defendants on Ms. Marone's pending Motion for Summary Judgment or, in the alternative, if the Court agrees that the undisputed facts demonstrate that the Labor Agreement was not conditional, that it order judgment for the Plaintiff. In the event the Court does not order judgment for the Plaintiff, she requests that it permit her to take further discovery on whether MATC has implemented any terms of the Labor Agreement.

Dated this 6th day of November 2014.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiff



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