IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

Operating Engineers of Wisconsin, IUOE Local 139 and Local 420, Plaintiffs, v. Tony Evers, in his official capacity as Governor; Josh Kaul, in his official capacity as Attorney General for the State of Wisconsin; and, James J. Daley, in his official capacity as Chairman of the Wisconsin Employment Relations Commission, Defendants.	)	Case No. 18-C-285 Judge: Magistrate Judge:

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This action is brought under 42 U.S.C. § 1983, and the First and Fourteenth Amendments of the United States Constitution to challenge changes made to Wisconsin Statutes § 111.70, *et seq.*, pursuant to a budget repair bill known as 2011 Wisconsin Act 10 ("Act 10"). In support thereof, Plaintiffs state as follows.

Jurisdiction and Venue

1. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States. This Court also has jurisdiction under 28 U.S.C. § 1343(a)(3) because this action seeks to redress the deprivation, under color of state law, of rights secured by the Constitution and laws of the United States.

2. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Defendants reside in this District.

Parties

3. Plaintiff International Union of Operating Engineers Local 139 ("Local 139") is a labor organization, as defined under the National Labor Relations Act, 29 U.S.C. §152(5) and the Wisconsin Municipal Employee Relations Act, Wis. Stat. 111.70(h), representing approximately 9,500 working men and women in Wisconsin. Local 139 maintains its headquarters in Pewaukee and additional offices in Madison, Altoona, Pewaukee, and Appleton, Wisconsin.

4. Plaintiff International Union of Operating Engineers Local 420 ("Local 420") is a labor organization, as defined under the National Labor Relations Act, 29 U.S.C. §152(5) and the Wisconsin Municipal Employee Relations Act, Wis. Stat. 111.70(h), representing more than 1,600 working men and women in Wisconsin. Local 420 maintains offices in Green Bay and Oak Creek, Wisconsin.

5. Defendant Tony Evers[1] is sued in his official capacity as Governor of the State of Wisconsin. Governor Scott Walker signed Act 10 into law to effectuate the change to Wis. Stat. 111.70.

6. Defendant Josh Kaul[2] is sued in his official capacity as Attorney General for the State of Wisconsin. Defendant Kaul has responsibility for enforcing Wisconsin's laws.

7. Defendant James J. Daley is sued in his official capacity as the Chair of the Wisconsin Employment Relations Commission, which is responsible for enforcing and resolving disputes arising under Wisconsin Statutes §111.70., *et seq.*, including the changes pursuant to Wisconsin's Act 10.

[1] This action previously named Scott Walker as a Defendant, in his official capacity as Governor. Plaintiffs have substituted Governor Evers in this Amended Complaint.
[2] This action previously named Brad Schimel as a Defendant, in his official capacity as Attorney General. Plaintiffs have substituted Attorney General, Josh Kaul, in this Amended Complaint.

Legal Background

8. In *Janus v. AFSCME,* the United States Supreme Court overruled its prior decision in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), and declared public sector agency fee arrangements unconstitutional under the First Amendment.

9. *Abood* held that public employers and the union representatives of their public employees can negotiate collective bargaining agreements which include union security clauses requiring individuals to pay fair share fees as a condition of employment. Such fees, however, could only be used for negotiation and administration of collective bargaining agreements and cannot be used for political purposes, lest they violate the First Amendment.

10. In overruling Abood, *Janus* held that it violates the First Amendment right of a non-member to be compelled to pay fees to the union that is required by law to provide representation and services. By that same reasoning, it also violates the rights of the union and its members to require them to use their money to speak on behalf of the non-member. Hence, the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. Similarly, freedom of association plainly presupposes a freedom not to associate.

11. The Supreme Court explained in Janus that "[w]e have held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all." (slip op. p 8). It explained that:

> [w]hen speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence. (Slip op. p. 9).

12. The Supreme Court explained in Janus that "[w]hen a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk." (Slip op. p. 24). Indeed, the Supreme Court made clear that issues over which unions may bargain are matters of great public concern, and not mere private interests. (Slip op. p. 27-31). Among the matters of public concern on which Unions speak, both in and out of collective bargaining, are "how public money is spent. . . education, child welfare, healthcare and minority rights[,]" plus "controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions." (Slip op. p. 29-30). The Supreme Court recognized these "sensitive political topics [as] undoubtedly matters of profound 'value and concern to the public.'" (Slip op. p. 30-31).

13. This lawsuit is brought in good faith for the Court to evaluate Act 10, in light of the decision in *Janus*, and as such raises arguments not previously ruled upon by either the District Court or the United States Court of Appeals for the Seventh Circuit with respect to Act 10.

14. In 2011, the Wisconsin Legislature enacted 2011 Wisconsin Act 10, a budget repair bill that made sweeping changes to the governance of employment relations and collective bargaining for public employees and labor organizations covered by the Municipal Employment Relations Act ("MERA"), Wis. Stat. § 111.70, *et seq.*

15. Among other things, Act 10 amended the statute that governs collective bargaining between municipal employers and their certified representatives under MERA. Wis. Stat. § 111.70(4)(mb)1 reads in part:

> *Prohibited subjects of bargaining; general municipal employees.* The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a general municipal employee with respect to any of the following:

> 1. Any factor or condition of employment except wages, which includes only total base wages and excludes any other compensation, which includes, but is not limited to, overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions.

16. Act 10 amended the statute that governs deduction of labor organization dues under MERA. Wis. Stat. § 111.70(3g) reads:

> WAGE DEDUCTION PROHIBITION. A municipal employer may not deduct labor organization dues from the earnings of a general municipal employee or supervisor.

17. Act 10 amended the statute that governs negotiated base wage increases under MERA. Wis. Stat. § 111.70(4)(mb)2 reads, in part:

> (mb) *Prohibited subjects of bargaining; general municipal employees.* The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a general municipal employee with respect to any of the following:
>
> …
>
> 2. Except as provided in s. 66.0506 or 118.245, whichever is applicable, any proposal that does any of the following:
>
> a. If there is an increase in the consumer price index change, provides for total base wages for authorized positions in the proposed collective bargaining agreement that exceeds the total base wages for authorized positions 180 days before the expiration of the previous collective bargaining agreement by a greater percentage than the consumer price index change.

18. Act 10 amended the statute that governs recertification elections of the representatives of all bargaining units under MERA. Wis. Stat. § 111.70(4)(d)3b reads, in part:

> Annually, the commission shall conduct an election to certify the representative of the collective bargaining unit that contains a general municipal employee … The commission shall certify any representative that receives at least 51 percent of the votes of all of the general municipal employees in the collective bargaining unit. If no representative receives at least 51 percent of the votes of all of the general municipal employees in the collective bargaining unit, at the expiration of the collective bargaining agreement, the commission shall decertify the current representative and the general municipal employees shall be nonrepresented.

Factual Allegations

19. Plaintiffs Local 139 and Local 420 (collectively, "the Unions") represent thousands of Operating Engineers in Wisconsin. The Operating Engineers represented by Local 139 include those who are employed by public employers within Wisconsin, including cities, counties and townships and who perform construction, maintenance and repair work. Local 420-represented Engineers operate and maintain the physical plant systems in buildings throughout Wisconsin and are employed by public employers such as public utilities, and public schools.

20. Local 139 has been representing workers in Wisconsin since 1902. Local 420 was formed in 2012 by the merger of three local unions, which together had represented Wisconsin workers for a combined 200 years.

21. Each of the Unions spends significant financial and human resources representing every employee in the bargaining units for which it has been elected "exclusive representative," Union members and non-members alike.

22. Although the work of the Unions benefits all bargaining unit employees, under Wisconsin's law, only those employees who choose to be Union members may be required to pay for the benefits they receive. Any employee who declines Union membership is given a state-sanctioned right to receive all these services for free.

23. Prior to the enactment of Act 10, both Unions routinely negotiated contracts which included a variety of benefits and protections such as health issuance, pensions, seniority rights, and protection against unjust termination. After Act 10, none of those subjects can be negotiated.

24. Prior to the enactment of Wisconsin's Act 10, each of the Unions had, in each of its collective bargaining agreements, a clause that required all bargaining unit employees to pay their fair share for the Union's representation.

25. Wisconsin Statute §111.70, *et. seq.* has caused and continues to cause irreparable injury to the Unions.

Count I
Content Based Restriction on Subjects of Collective Bargaining

26. Plaintiffs reallege and incorporate herein by reference each and every allegation of Paragraphs 1-25.

27. By restricting the topics over which Unions and municipal employers can bargain, Act 10 imposes content based restrictions on matters of significant public importance. Wis. Stat. § 111.70(4)(mb).

28. Clearly, bargaining over wages, and documenting the agreement over wages, is speech between a Union and municipality.

29. Under *Janus*, it is now equally clear that bargaining over and entering into collective bargaining agreements concerning other topics, such as seniority, pension contributions, a grievance procedure and other terms and conditions of employment are no less protected speech and therefore such exercise of free speech is a fundamental First Amendment right under the U.S. Constitution. .

30. Wisconsin, by statutorily limiting the topics of speech, has violated the First Amendment rights of municipal employees represented by Local 139 and Local 420.

WHEREFORE, Plaintiffs respectfully request for the following relief:

a. A declaration that the changes made pursuant to Act 10, to Wisconsin Statute § 111.70, are unconstitutional in violation of the First Amendment and 42 U.S.C. § 1983 and therefore unlawful and invalid as applied to unions, employers, and employees;

b. An injunction enjoining Defendants, their agents, employees, assigns, and

all persons acting in concert or participation with them from enforcing Wisconsin Statute §111.70 to the extent that it limits the subjects of collective bargaining and/or prohibits an employer and a union covered by Act 10 from agreeing that all bargaining unit employees, regardless of union membership status, must pay a service fee for union representation expenses;

c. Reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and,

d. Such other and further relief as the Court deems just and proper.

Count II
Content Based Restrictions on Non-Collectively Bargained Agreements

31. Plaintiffs reallege and incorporate herein by reference each and every allegation of Paragraphs 1-25.

32. Act 10 has been interpreted and applied by the WERC to preclude any agreements between Unions and municipalities over any issues besides wages, even if not "collectively bargained."

33. For example, one municipal employer sought Local 139's assistance with training its workforce. Local 139 sponsors an apprenticeship and training center that could provide the training in which the municipal employer was interested, in an effective, cost efficient manner.

34. Another municipal employer wanted to work with Local 139 assistance to obtain access to a skilled, temporary workforce to handle seasonal busy periods.

35. Another municipal employer sought Local 139's assistance with health benefit coverage for its workforce. Local 139 sponsors a Taft-Hartley Trust Fund which could provide the health benefit coverage and in which the municipal employer was interested, in an effective,

cost efficient manner.

36. Because of Act 10, as interpreted by the WERC, the parties were precluded from entering into agreement to address such issues, despite said terms being voluntarily adopted by the municipality, outside of collective bargaining.

37. Such an interpretation and application of Act 10 imposes a content based restriction on Unions' ability to negotiate and/or contract with municipal employers on matters of significant public concern in violation of the First Amendment.

WHEREFORE, Plaintiffs respectfully request for the following relief:

a. A declaration that the changes made pursuant to Act 10, to Wisconsin Statute § 111.70, are unconstitutional in violation of the First Amendment and 42 U.S.C. § 1983 and therefore unlawful and invalid as applied to unions, employers, and employees;

b. An injunction enjoining Defendants, their agents, employees, assigns, and all persons acting in concert or participation with them from enforcing Wisconsin Statute §111.70 to the extent that it limits the subjects of collective bargaining and/or prohibits an employer and a union covered by Act 10 from agreeing that all bargaining unit employees, regardless of union membership status, must pay a service fee for union representation expenses;

c. Reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and,

d. Such other and further relief as the Court deems just and proper.

Count III
Prohibition on Disfavored Speech

38. Plaintiffs reallege and incorporate herein by reference each and every allegation of

Paragraphs 1-25.

39. Act 10 further infringes on the First Amendment rights of public employees through its absolute prohibition on voluntary dues deductions. Wis. Stat. § 111.70(3g).

40. An employee may wish to support a Union or other non-profit entities through a wage deduction.

41. Act 10's blanket prohibition on wage deductions for Union dues constitutes a content based restriction on public employees' First Amendment rights.

WHEREFORE, Plaintiffs respectfully request for the following relief:

a. A declaration that the changes made pursuant to Act 10, to Wisconsin Statute § 111.70, are unconstitutional in violation of the First Amendment and 42 U.S.C. § 1983 and therefore unlawful and invalid as applied to unions, employers, and employees;

b. An injunction enjoining Defendants, their agents, employees, assigns, and all persons acting in concert or participation with them from enforcing Wisconsin Statute §111.70 to the extent that it limits the subjects of collective bargaining and/or prohibits an employer and a union covered by Act 10 from agreeing that all bargaining unit employees, regardless of union membership status, must pay a service fee for union representation expenses;

c. Reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and,

d. Such other and further relief as the Court deems just and proper.

Count IV
Compelled Speech

42. Plaintiffs reallege and incorporate herein by reference each and every allegation of Paragraphs 1-25.

43. In the provision of Act 10 requiring annual recertification elections, it declares that a non-vote is a vote against Union representation. Wis. Stat. § 111.70(4)(d)3b.

44. By equating not voting with voting no, Act 10 directly infringes on the rights of public employees to not engage in speech.

45. Local 139 has been directly harmed by this provision of Act 10 in two recertification elections, the results of which were certified in April 2019. Local 139 received 100% of all ballots cast, but because Act 10 equates not voting with a "no" vote, it was not recertified as the bargaining unit representative for such employees.

46. Local 420 has been directly harmed by this provision of Act 10 in a recertification election among a bargaining unit of engineers at Milwaukee Public Schools in November 2014. Local 420 received 100% of ballots cast, but because Act 10 equates not voting with a "no" vote, it was not recertified as the bargaining unit representative for such employees that year.

47. No other elections, whether national, state or local, count a non-vote either for or against a candidate or referendum.

48. By counting a non-vote as a "no" vote, Act 10 violates the First Amendment rights of public employee non-voters to remain silent in the re-certification process.

WHEREFORE, Plaintiffs respectfully request for the following relief:

a. A declaration that the changes made pursuant to Act 10, to Wisconsin Statute § 111.70, are unconstitutional in violation of the First Amendment and 42 U.S.C. § 1983 and therefore unlawful and invalid as applied to unions, employers, and employees;

b. An injunction enjoining Defendants, their agents, employees, assigns, and all persons acting in concert or participation with them from enforcing

Wisconsin Statute §111.70 to the extent that it limits the subjects of collective bargaining and/or prohibits an employer and a union covered by Act 10 from agreeing that all bargaining unit employees, regardless of union membership status, must pay a service fee for union representation expenses;

c. Reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and,

d. Such other and further relief as the Court deems just and proper.

Count V
Violation of Freedom of Association Under First Amendment

49. Plaintiffs reallege and incorporate herein by reference each and every allegation of Paragraphs 1-25.

50. The First Amendment protects against State infringement on association and, conversely, State punishment or penalty for the exercise of associational rights. The right of employees to self-organization and to select representatives of their own choosing for collective bargaining without restraint by their employer is a fundamental right. The provisions in Act 10 infringe upon association rights to organize as a collective bargaining unit by increasing costs and penalties through its recertification and fair share provisions.

51. By requiring collective bargaining units to hold annual recertification elections in which 51% of eligible employees must vote in favor of recertification and by requiring the collective bargaining unit to pay a certification fee, costs to Plaintiffs are increased.

52. Additionally, although a collective bargaining unit must provide services to all within their unit, Act 10 eliminates any agreements that would require non-members to pay their proportionate share of the cost of providing those services. This creates free-riders thereby increasing the financial burden on dues paying members.

53. Therefore, provisions in Act 10 infringe upon the exercise of associational rights by discouraging membership and by making membership financially burdensome. These provisions adversely affect the ability of Plaintiffs to pursue collective efforts thereby infringing on Plaintiffs' associational rights.

54. Act 10 further infringes on the associational rights by preventing public employees from voluntarily having their Union dues or fees deducted from their wages.

55. Because state law otherwise allows for voluntary wage deductions, such as for United Way or other non-profit organizations, it may not disfavor the association rights of Union members who wish to financially support their Unions.

WHEREFORE, Plaintiffs respectfully request for the following relief:

a. A declaration the changes made pursuant to Act 10 to that Wisconsin Statute § 111.70, *et seq.*, are unconstitutional in violation of the First and Fourteenth Amendments and 42 U.S.C. § 1983 and therefore unlawful and invalid as applied to unions, employers, and employees;

b. An injunction enjoining Defendants, their agents, employees, assigns, and all persons acting in concert or participation with them from enforcing Wisconsin Statute §111.70 to the extent that it limits the subjects of collective bargaining and/or prohibits an employer and a union covered by Act 10 from agreeing that all bargaining unit employees, regardless of union membership status, must pay a service fee for union representation expenses;

c. Reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and,

d. Such other and further relief as the Court deems just and proper.

Dated: May 3, 2019

Respectfully submitted,

By: /s/ Mark A. Sweet

Attorneys for IUOE Local 420
Mark A. Sweet (WI Bar No. 1024320)
John M. Loomis (WI Bar No. 1014890)
Sweet and Associates, LLC
2510 East Capitol Drive
Milwaukee, WI 53211
Ph. 414/332-2255
Fx. 414/332-2275
msweet@unionyeslaw.com
jloomis@unionyeslaw.com

By: /s/ Brian C. Hlavin

Attorneys for IUOE Local 139
Brian C. Hlavin (WI Bar No. 1044654)
Patrick N. Ryan (WI Bar No. 1102188)
Baum Sigman Auerbach & Neuman, Ltd.
c/o IUOE Local 139
N27 W23233 Roundy Drive
P.O. Box 130
Pewaukee, WI 53072
Ph. 312/236-4316
Fx. 312/236-0241
bhlavin@baumsigman.com
pryan@baumsigman.com

I:\139\ACT 10\first amended complaint declaratory relief.4-9-19.docx