

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 139, AFL-CIO, KAREN ERICKSON, and
HEATH HANRAHAN,

Plaintiffs,

CIVIL ACTION

v.

NO. 19-cv-1233

JAMES J. DALEY, IN HIS OFFICIAL CAPACITY AS
CHAIRMAN OF THE WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Defendant.

PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

Plaintiffs, Operating Engineers of Wisconsin, *et al.*, by and through their attorneys, hereby file their Response in Opposition to the Motion to Intervene filed by Kristi Koschkee (“Intervenor”) (Docket # 18). As Intervenor cannot establish entitlement to intervene as of right or that permissive intervention is warranted under Rule 24 of the Federal Rules of Civil Procedure, her motion to intervene should be denied.

In order to intervene as of right, an intervenor must show that: (1) the intervention is timely, (2) they have an interest “relating to the property or transaction which is the subject of the action,” (3) they are so situated that resolving the case without intervention would impair or impede their ability to protect their interest, and (4) the existing parties will not adequately protect the their interest. *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 945-46 (7th Cir. 2000). “Intervention of right will not be allowed unless all requirements of the Rule are met.” *Id.* at 946 (citation omitted). Permissive intervention is appropriate only if: (1) the motion is timely, (2) the

potential intervenor asserts a claim or defense that has a question of law or fact in common with the main action, and (3) the intervention would not unduly delay or prejudice the adjudication of the rights of the original parties. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 163 F.R.D. 268, 273 (N.D. Ill. 1995), *aff'd in part, vacated in part*, 101 F.3d 503 (7th Cir. 1996). The intervenor bears the burden of proving that it meets each element. *Id.* Even upon making the showing, the court considers “whether intervention would be productive, not whether it would be harmless.” *Id.* (Citation omitted).

Here, Intervenor has alleged nothing more than an interest in ensuring Act 10 is enforced as written. The State is already a party to this action, represented by the Office of the State Attorney General, and the Wisconsin Legislature separately has further sought leave to intervene (Docket # 13).¹ The State is presumptively capable of defending such a law before this Court and capable of representing the interests of all its citizens. *United States v. State of New York*, 820 F.2d 554 (2nd Cir. 1987); *United States v. Hooker Chemicals and Plastics Corp.*, 749 F.2d 968 (2nd Cir. 1984). In order to intervene, a movant must demonstrate that its interests are different from those of the State and that its interest will not be represented by the State. *See also, Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985) (finding that a state could adequately defend the challenged law, despite the comparative passion of the intervenors for the issue).

Although Intervenor asserts four different interests (Docket # 18-1, p. 6-7), those interests in enforcing the statute do not significantly differ from the interest of the State, nor is there any reason the State is unable to represent and defend those interests. Moreover, Intervenor’s alleged interests are unsupported and/or speculative (see, Docket 18-1, p. 6-7). For instance, as to Count I,

¹ Plaintiffs take no position on the motion to intervene filed by the Wisconsin Legislature.

Intervenor seems to agree with Plaintiffs that the current recertification scheme in Act 10 implicates employees' First Amendment right to remain silent in the process, though Intervenor wants the current mechanism to remain in place, (Docket 18-1, p. 6). However, unlike the individual Plaintiffs whose will was effectively overruled by their non-voting co-workers (Docket # 1, ¶ 21-22), Intervenor claims no such direct harm. As with any public referendum, citizens have the right to refrain from participating, but all are and should be bound by the will of those who did vote. Local 139 is challenging the fact that non-voters can, and have, overruled the will of voters in the recertification process mandated by Act 10. Act 10 thus compels speech from those who wish to remain silent, and silences the voices of those who spoke.

As to Count II, Intervenor clearly has not asserted an interest requiring protection. In her memorandum, Intervenor asserts that she does not understand the basis of Plaintiffs' claim, yet still asserts she will be harmed if relief is granted: "[a]lthough the exact nature of Plaintiffs' challenge is unclear at this stage, if it is successful Ms. Koschkee stands to lose that protection." (Docket 18-1, p. 7).

Finally, as to Count III, Intervenor makes an unsupported claim that if Plaintiffs have the ability to voluntarily have dues deducted, this would somehow "pressure employees like Ms. Koschkee into 'voluntary' dues deduction." (Docket 18-1, p. 7). A claim of coercion requires evidence; an unsupported, speculative claim that there is a protectable interest is not sufficient.

As Intervenor notes, in a prior case challenging Act 10, the Seventh Circuit affirmed the denial of intervention made by interested citizens. *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013). While Plaintiffs agree with Intervenor that the Supreme Court's decision in *Janus* changed the landscape in many ways, it does not change the fact that, here, as in *WEAC*,

“the Employees and the state share the same goal: protecting Act 10 against the Union’s constitutional challenges.” *Id.* at 659.

As for permissive intervention, Intervenor has not satisfied her burden to establish that her participation would be productive and beneficial to the litigation. Given the absence of a protectable interest and the fact that Intervenor seeks nothing more than to maintain the *status quo* under Act 10, Intervenor’s participation will not provide the court with any information or insight beyond what the State can provide. Whether sought under Rule 24(a) or (b), Intervenor has not established that intervention is warranted.

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Motion to Intervene.

Respectfully submitted,

/s/ Brian C. Hlavin

Dated: October 24, 2019
Brian C. Hlavin
Patrick N. Ryan
Attorneys for IUOE Local 139
BAUM SIGMAN AUERBACH & NEUMAN, LTD.
N27 W23233 Roundy Drive
PO Box 130
Pewaukee, WI 53072
Telephone: (312) 216-2567; Fax: (312) 236-0241
Email: bhlavin@baumsigman.com; pryan@baumsigman.com

I:\139\ACT 10\plaintiffs' resp.in.opp.to mot.to.intervene.pnr.kp.wpd

CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that on or before 5:00 p.m. on October 24, 2019, he electronically filed the foregoing document (Plaintiffs' Response in Opposition to Defendant's Motion to Intervene) with the Clerk of Court using the ECF system, which will provide notification to the following ECF participants:

Steven C. Kilpatrick
Clayton P. Kawski
Assistant Attorney General
Wisconsin Dept. Of Justice
P.O. Box 7857
Madison, WI 53707-7857
Phone: (608) 266-1792 (SCK)
(608) 266-8549 (CPK)
Email: kilpatricksc@doj.state.wi.us
Email: kawskicp@doj.state.wi.us

Richard M. Esenberg
Lucas Vebber
Anthony LoCoco
Wisconsin Institute for Law & Liberty
1139 East Knapp Street
Milwaukee, WI 53202
Phone: (414) 727-9455
Email: rick@will-law.org;
Email: Lucas@will-law.org
Email: alococo@will-law.org

Eric M. McLeod
Lisa M. Lawless
Husch Blackwell LLP
P.O. Box 1379
33 East Main Street, Suite 300
Madison, WI 53701-1379
Phone: (608) 255-4440
Email: eric.mcleod@huschblackwell.com

Misha Tseytlin
Troutman Sanders LLP
1 N. Wacker Drive, Suite 2905
Chicago, IL 60606
Phone: (608) 999-1240
Email: misha.tseytlin@troutman.com

/s/ Brian C. Hlavin

Dated: October 24, 2019

Brian C. Hlavin

Patrick N. Ryan

Attorneys for IUOE Local 139

BAUM SIGMAN AUERBACH & NEUMAN, LTD.

N27 W23233 Roundy Drive

PO Box 130

Pewaukee, WI 53072

Telephone: (312) 216-2567; Fax: (312) 236-0241

Email: bhlavin@baumsigman.com; pryan@baumsigman.com

E:\139\ACT 10\plaintiffs' resp.in.opp.to mot.to.intervene.pnr.kp.wpd