UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO, *et al.*,

Plaintiffs,

v. Civil Action No. 2:19-cv-01233-JPS

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

Defendant.

PROPOSED INTERVENOR-DEFENDANT KRISTI KOSCHKEE'S REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT[1]

This action is the most recent litigation front in a long-running and multi-sided dispute over Act 10. The sides include (1) municipal employers (which are statutory creations of the state), (2) municipal employees who are members of and are represented by a union, (3) municipal employees such as the Proposed Intervenor, Ms. Koschkee, who are not members of and do not want to be represented by a union, (4) the Wisconsin Employment Relations Commission and (5) the State itself. The State of Wisconsin plays a multifaceted role in the labor dispute; not only is the State the creator of the municipal employers involved in the dispute, but the State also acts as the rule-setter for the dispute (by enacting legislation) and sometimes as the umpire (such as through the Wisconsin Employment Relations Commission).

The issue here is whether all of the sides involved in the dispute are able to participate in

[1] This brief replies to both the brief in opposition filed by the Defendant on October 18, 2019, *see* ECF #25, and the brief in opposition filed by the Plaintiffs on October 24, 2019, *see* ECF #27.

this litigation on an equal footing. Ms. Koschkee, an employee and a union non-member, has interests different from those of her municipal employer; different from those of the employees who are members of the union; different from those of the union; and different from those of the State as rule-setter and umpire. To fully protect her interests, Ms. Koschkee, like the other parties to the dispute, should be permitted to take discovery and make legal arguments in this case, even if the other parties find her arguments to be unhelpful or inconvenient to their legal positions.

The Plaintiffs and Defendant variously argue that Ms. Koschkee should not be able to participate as a party because what interests she has are allegedly the same as those of the Defendant and because those interests are adequately represented by Defendant's counsel. But that is wrong for three reasons: (1) Ms. Koschkee and the Defendant have different interests, (2) Ms. Koschkee's unique interests are in danger of being impaired in this lawsuit, and (3) Ms. Koschkee's interests are not adequately represented by Defendant's counsel.[2]

I. Ms. Koschkee and the Defendant have Different Interests.

There is no dispute that in order to intervene as of right, a proposed intervenor must have a direct, significant, legally protectable interest and that the asserted interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit. Both Ms. Koschkee and the Defendant cite *United States v. BDO Seidman*, 337 F.3d 802, 808 (7th Cir. 2003) and *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985) for this standard. There is simply disagreement as to whether or not Ms. Koschkee meets the test.

Ms. Koschkee pointed out four separate ways in which she satisfies the applicable standard

[2] Ms. Koschkee and the parties agree that there are four factors to be considered by the Court on a motion to intervene but the parties only challenge Ms. Koschkee's motion on these three factors. The parties do not contest the fourth factor - the timeliness of Ms. Koschkee's motion.

in her opening brief and the Plaintiffs and Defendant fails to effectively rebut any of them. The first has to do with the Plaintiffs' argument regarding the fact that Act 10 requires collective bargaining representatives to obtain "at least 51 percent of the votes *of all of the general municipal employees in the collective bargaining unit*" in order to receive recertification. Wis. Stat. § 111.70(4)(d)3.b. (emphasis added). In Plaintiffs' view (as alleged in the complaint), this treats abstention from a recertification election as a "no" vote and thus supposedly violates an employee's First Amendment right "to remain silent in the re-certification process."

The Plaintiffs contend that instead, as a matter of constitutional law, certification should occur if 51% of the employees who vote, vote "yes", i.e., in favor of certification. But if that were the case, then under the Plaintiffs' own theory the government would be coercing employees like Ms. Koschkee (who do not favor certification) into active participation in an election and into speaking by voting "no." The Plaintiffs argue that Ms. Koschkee would not be harmed in such a scenario under its theory because, according to Plaintiffs, under a statutory recertification system, "all . . . should be bound [only] by the will of those who did vote" (as opposed to the will of those who chose to withhold union approval by abstaining). Pl.'s Resp. in Opp. to Mot. to Intervene 3, ECF #27. But this is a policy argument (to be considered by the legislature) and not a legal argument (to be considered by a court). The Plaintiffs cite no cases in support of this statement and it certainly does not square with the Plaintiffs' own theory that the statutory certification process implicates the First Amendment.

The Plaintiffs and Ms. Koschkee are the ying and the yang of the First Amendment dispute raised by the Plaintiffs. What one wants adversely affects the other and in ways differently than any effect on the Defendant. The Defendant says that this is not enough for intervention because Ms. Koschkee allegedly does not cite any legal authority for the proposition that abstention from

voting involves her First Amendment rights, but Ms. Koschkee cited *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018), in which the Supreme Court held that in the context of union membership "[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'" and that "[t]he right to eschew association for expressive purposes is likewise protected." This is direct, applicable legal authority from the U.S. Supreme Court.

Janus is the linchpin for the Plaintiffs' entire case and Ms. Koschkee desires to defend her First Amendment rights by showing that the Plaintiffs are construing *Janus* exactly the opposite of its actual meaning. The Plaintiffs' claim directly endangers Ms. Koschkee's rights to refrain from speaking and to eschew association and that right is personal to her and not a right that belongs to the Defendant.

Ms. Koschkee's second interest is her opposition to Plaintiffs' claim that the union has the power to enter into non-collectively-bargained agreements with municipal employers on "issues besides wages." Ms. Koschkee has made it crystal clear that she does not want the union to bargain anything on her behalf or to interfere with the bargaining relationship she enjoys with her employer and she opposes any claim by the Plaintiffs to the contrary. Further, Ms. Koschkee's bargaining rights are her own; they do not belong to the Defendant. Thus, again, this is a right personal to Ms. Koschkee. Notably, the Plaintiffs do not deny that their desired actions could or would in fact interfere with Ms. Koschkee's bargaining relationship with her employer.

Third, Plaintiffs argue that "Act 10's "blanket prohibition on wage deductions for Union dues constitutes a content based restriction on public employees' First Amendment rights." This statutory safeguard, however, reflects a legislative decision to address the often coercive presence of unions in public workplaces by eliminating any incentive for unions to pressure employees like

Ms. Koschkee into "voluntary" dues deductions. The Defendant pays no union dues and would never be asked to pay any union dues – voluntary, coerced or otherwise. Thus, Ms. Koschkee's interest is different than that of the Defendant.

The Defendant concedes that Ms. Koschkee has an interest in maintaining this protection, but alleges that her interest is no different that the Defendant's interest in defending Act 10. Defendant's Br. at 8, ECF #25. But, here, the Defendant is confusing the two different issues being briefed. The first is whether Ms. Koschkee has an interest – and the Defendant admits that she does – and the second is whether Ms. Koschkee's interest is adequately represented by Defendant's counsel, an issue which is addressed fully in Section III below.

For their part, Plaintiffs argue (again without citation) that Ms. Koschkee cannot claim an interest in maintaining a ban on voluntary dues deduction to reduce the risk of union coercion unless she provides actual evidence of coercion. Plaintiffs confuse a legal assertion with a factual one. This is not, for example, some criminal case in which Ms. Koschkee is trying to prove a coercion defense. Her point is instead that an important governmental interest – removing any *incentive* for a union to coerce employees into "voluntarily" deducting dues from their paycheck – motivated the enactment of this provision of Act 10. Ms. Koschkee has an interest in preserving this protection (even if the Plaintiffs do not think it is necessary) an interest which dovetails with her fourth and final interest at stake in this suit.

For unexplained reasons, the Plaintiffs and the Defendant ignore Ms. Koschkee's fourth point in her principle brief, i.e., that she has an adequate interest for purposes of intervention because she is in the class of persons that Act 10 was enacted to protect. The Seventh Circuit in *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) held that this was an adequate interest for purposes of intervention. Yet the other parties have nothing to say about it. Their

silence is telling.

Because Ms. Koschkee's constitutional and statutory rights are directly at stake in this litigation, and because there is no other party that has the same rights at stake, she meets this part of the test for intervention as of right.

II. Ms. Koschkee is at Risk of Impairment of her Interests

Neither the Plaintiffs nor the Defendant make any new argument with respect to the impairment of Ms. Koschkee's interests and both argue only that because she allegedly has no interest, there can be no interest that is impaired. But as shown above Ms. Koschkee has a variety of interests at stake herein and none of them are shared by or belong to another party in the case.

On each claim for which the Plaintiffs seek a declaration that the challenged provisions of Act 10 are unconstitutional, it is at the expense of the protections granted by those provisions for non-union employees such as Ms. Koschkee. A judgment in this case declaring one or more of the statutory provisions in issue to be unconstitutional, from a practical standpoint will affect Ms. Koschkee in the same way as if she were a party. She will lose the protections granted to her by the statutes. This is to say nothing of the danger posed to Ms. Koschkee's First Amendment rights, discussed above. Denying Ms. Koschkee's motion to intervene will leave her unable to protect her rights.

III. Ms. Koschkee is not Adequately Represented by Counsel for the Defendant.

The Defendant argues that he shares the same goal as Ms. Koschkee – upholding Act 10 – and, as a result, there is a presumption that Defendant's counsel will provide adequate counsel. Defendant's Br. at 10, ECF #25.[3] The Plaintiffs echo this argument.

[3] The Defendant acknowledges that he is not a governmental body charged by law with protecting the interests of the proposed intervenors. Defendant's Br. at 10, ECF #25. Thus, there is no

Defendant and Ms. Koschkee may in fact share *a* single goal, but plainly they do not share all of the same *goals*. Their common interest is to see Act 10 upheld. But at the same time Ms. Koschkee and the Defendant have other goals which are not in common.

The Defendant argues that Ms. Koschkee offers no legal support of the proposition that the distinction between sharing *a* goal and sharing all *goals* is important. This simply and completely ignores *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972) which Ms. Koschkee discussed at length in her opening brief.

In *Trbovich* the Secretary of Labor initiated an action to invalidate a union election following a complaint by a union member. The union member then sought to intervene in part "to seek certain specific safeguards with respect to any new election that [might] be ordered," and the Secretary of Labor argued that intervention was unwarranted because the proposed intervenor was adequately represented. *Id.* at 529, 538. In rejecting the Secretary's argument, the Court noted in part that while the Secretary was charged with protecting the individual's rights against his union, the Secretary also had "an obligation to protect the 'vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.'" *Id.* at 538-39 (quoting *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 475 (1968)). These two duties, the Court concluded,

> may not always dictate precisely the same approach to the conduct of the litigation. Even if the Secretary [were] performing his duties, broadly conceived, as well as [could] be expected, the union member [might] have a valid complaint about the performance of 'his lawyer.' Such a complaint, filed by the member who initiated the entire enforcement proceeding, should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2).

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presumption under *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007) requiring a showing of gross negligence or bad faith.

Id. at 539.

Thus, having *a* goal in common – in *Trbovich* protecting the individual's rights against the union – is not enough if the parties have other goals that are not in common. In that situation a conflict may exist and the individual is entitled to intervene to protect goals and interests that are not shared.

Here, Ms. Koschkee has at least two goals that are not in common with the Defendant. First, she seeks to protect her First Amendment rights in not participating in the recertification process. It is obvious that the Defendant does not share this goal. Although the Defendant has filed a motion to dismiss the complaint, his lawyers have not even raised the argument that Ms. Koschkee is most interested in making, *i.e.*, that under Plaintiffs' theory she and other non-union employees have a First Amendment right which must be protected. *See* Def's Mem. of Law in Support of his Mot. to Dismiss 21-24, ECF #14. This is not a hypothetical difference of opinion, since a lawyer adequately representing Ms. Koschkee would certainly have raised her primary argument in the motion to dismiss. There is an obvious conflict, here, where the Defendant's apparent goal is to prevail without a ruling protecting Ms. Koschkee's First Amendment rights. Ms. Koschkee's goal is different and adverse.

Second, Ms. Koschkee has an interest in negotiating with and entering into agreements with her employer on her own behalf. In that regard, she sits across the table from her municipal employer for purposes of individual bargaining. Her employer is an entity created by the State of Wisconsin. And, of course, the State of Wisconsin is represented by Defendant's counsel herein. This Court should not ask Ms. Koschkee to effectively place her fate in the hands of the attorney for her employer. The prospects for a conflict of interest are apparent.

Here Ms. Koschkee has identified both separate goals and serious conflicts. For these same

reasons representation is inadequate.

For the foregoing reasons, Ms. Koschkee is entitled to intervene as of right in this lawsuit.

IV. Alternately, The Court Should Permit Intervention Under Rule 24(b) of the Federal Rules of Civil Procedure

The Defendant argues that this Court should not exercise its discretion to allow permissive intervention because doing so would "complicate" the case and Plaintiffs argue that Ms. Koschkee's participation would not be "productive" or "beneficial" to the lawsuit. But as pointed out in the introduction this is a multi-sided dispute and by their nature such disputes can be complicated and the Plaintiffs would no doubt see anyone who opposes their position as not being productive or beneficial. That does not mean that one party to the dispute (with differing interest than all of the others) should be denied a seat at the litigation table.

The Defendant also suggests a blanket rule that permissive intervention always be denied whenever a proposed intervenor fails to rebut the presumption of adequate representation. While it is easy to see why a government entity would advocate a rule like this, it is a nonstarter. It ignores the fact that granting permissive intervention is a matter of the district court's "discretion," *see* F.R.C.P. Rule 24(b)(3); the rule the government suggests would take that discretion away. And it ignores the fact that permissive intervention is obviously provided as an *alternative* to intervention of right—that is, as an option in situations where the factors of intervention of right (such as the presumption of adequate intervention) have not been met.

In determining whether to grant permissive intervention, this Court should consider that Ms. Koschkee brings a symmetry to this case which will contribute to the adversarial process and benefit the Court in its study of the issues. As discussed, workplaces involve employers and employees, with employees broken into union members and union non-members. Currently only two of these three groups are represented in this suit. Permitting intervention will ensure that the

issues receive a fully adversarial presentation and analysis from all of the parties to the dispute. This reasoning, and the argument already set forth above discussing how Ms. Koschkee's interests differ from those of the state, disproves the Plaintiffs' argument that Ms. Koschkee's "participation will not provide the court with any information or insight beyond what the State can provide." Pl.'s Resp. in Opp. to Mot. to Intervene 4, ECF #27.

For these reasons, this Court should exercise its discretion to permit Ms. Koschkee to intervene.

CONCLUSION

Proposed Intervenor-Defendant Kristi Koschkee requests that this Court grant her motion to intervene, either by intervention as of right under Fed. R. Civ. P. 24(a)(2), or, in the alternative, by permissive intervention under Fed. R. Civ. P. 24(b).

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