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STATE OF WISCONSIN

CIRCUIT CO
Branch 10

(414) 277-0656

NE COUNTY

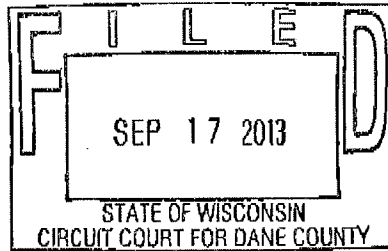
7-8906

Madison Teachers, Inc. et al.,
Plaintiffs

vs.

Scott Walker, et al.,

Defendants



Case No. 11CV3774

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DECISION AND ORDER ON PETITION FOR INJUNCTION

This case is pending in the Supreme Court, on certification from the Court of Appeals. On April 23, 2013 plaintiffs filed a petition for injunctive relief pursuant to Wis. Stat. §806.04(8), and a proposed order to show cause why the petition should not be granted. The petition, and its supporting affidavit and brief, allege that the defendants are taking actions in execution of the laws the court found to be unconstitutional and null and void. On April 29, 2013 the court found the petition to be sufficient, approved the order to show cause and later set a briefing schedule. For the reasons stated below, though the defendants are bound by the court's judgment, even as to non-parties, the court denies the petition for an injunction.

The plaintiffs seek to enjoin the defendants from implementing or enforcing statutory provisions relating to municipal employee collective bargaining that the court found facially unconstitutional. Defendants do not dispute that they intend to implement and enforce those provisions with respect to non-parties. Def. Br. at 13.

I. Jurisdiction or Competency To Proceed. Defendants argue first that the court does not have jurisdiction or competency to act on the petition, because the case is on appeal. In its April 29th decision the court considered this question and concluded that it did have jurisdiction and competency. The arguments and authority offered by the defendants on this point do not persuade the court that its reasoning or conclusion was in error and for the reasons stated in that decision the court finds that it has jurisdiction and competency under Wis. Stat. §808.07(2)(a)2 to grant an

injunction even while the case is on appeal. That authority to grant an injunction is not constrained by the statute and so includes injunctions under §806.04(8).

2. Burden of Proof. In general a party seeking an injunction has the burden of proof, but §806.04(8) shifts that burden to the non-moving party. Although it is §808.07(2)(a)2 that grants the court authority to proceed under §804.06(8), it is §804.06(8) that governs the procedure and burden of proof. That statute places the burden on the defendants to show why the injunction should not be granted.

Defendants argue that the petition should be denied because plaintiffs already have their complete remedy in the declaratory judgment they were awarded and the Governor and WERC's acknowledgment that they may not enforce the provisions found unconstitutional against the plaintiffs. Defendants also argue the related point that "it is of no concern" to plaintiffs if the defendants are enforcing the unconstitutional provisions against others who are not plaintiffs.

Defendant does not argue that a circuit court cannot find a statute unconstitutional on its face and void. Its argument is that the state, its agencies and officers who unsuccessfully defend the constitutionality of a statute can ignore the declaratory judgment of unconstitutionality with respect to all persons except those who were plaintiffs in the lawsuit. In effect, they say, any ruling that a statute is facially unconstitutional is only a ruling that it is unconstitutional as applied to the parties who sued. This emphasis on the identity of the plaintiffs ignores that the declaratory judgment binds the defendants. The plaintiffs do not seek to enjoin non-parties or bind them to the judgment; only to enjoin the defendants who are already bound to the judgment. The defendants do not identify any case holding that state officials who are defendants in an action in which a statute was found to be unconstitutional on its face may continue executing that statute.

Defendants argue that a circuit court decision is not precedential. That is true and irrelevant. A court decision is precedential when it binds another court. The question here is not whether other courts or non-parties are bound by this court's ruling. It is whether the defendants are bound by it. Plainly they are, as all parties to a lawsuit are, and in a case in which the statute was found facially unconstitutional they may not enforce it under any circumstances, against anyone. "*State v.*

Konrath, 218 Wis. 2d 290, ¶20, n. 13, 577 N.W.2d 601, (1998), quoting Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 *Stan. L.Rev.* 235, 236 (1994).

3. Irreparable Harm. The remaining question is whether the requirements for issuing an injunction have been met. "To obtain an injunction, a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of will and injure the plaintiff... the plaintiff must moreover establish that the injury is irreparable, i. e. not adequately compensable in damages. [citations omitted]. *Pure Milk Products Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979). The defendants argue that plaintiffs are not harmed by their actions because they have specifically excluded the plaintiffs from implementation or enforcement of the invalid statutes. In support of this argument they offer evidence that the Wisconsin Employment Relations Commission's decision to implement the annual certification election provisions will not apply to the plaintiffs in this case unless this court's decision is no longer in effect. *Kilpatrick Aff. Ex. B, Def. Br.* at 13. The defendants have met their burden of showing that plaintiffs will not suffer irreparable harm and the plaintiff's have not offered evidence to rebut that showing.

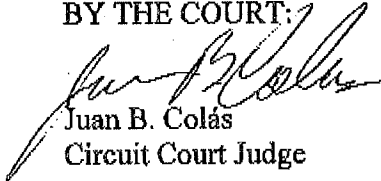
The defendants may be causing irreparable harm to others, who are not plaintiffs in this case. However, the law of injunctions makes clear that the moving party must show irreparable harm to itself, and only if that exists may the court then consider the interests of third parties in fashioning relief. There does not appear to be any authority for the proposition that a plaintiff who is unable to show irreparable harm to itself may obtain an injunction based solely upon harm to others who are not parties. For that reason, though the defendants are bound by the court's judgment, even with respect to their actions toward non-parties, the court cannot issue the requested injunction.

CONCLUSION

For the reason stated above, the petition for an injunction is DENIED. This is a final order as defined by Wis. Stat. §808.03(1) for purposes of appeal.

Dated: September 17, 2013

BY THE COURT:


Juan B. Colás
Circuit Court Judge

Copy: Attys. Pines, Olson, Kilpatrick, Padway BY FAX ONLY