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DISTRICT II

January 29, 2025

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You are hereby notified that the Court has entered the following order:

2024AP2429 Abbotsford Education Association v. Wisconsin Employment Relations Commission (L.C. # 2023CV3152)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Kristi Koschkee, a public-school teacher in Wisconsin, moves to intervene as an appellant in this appeal pursuant to WIS. STAT. RULE 809.13 (2021-22).[1] Koschkee advises this court that following an equal protection challenge to Act 10, the circuit court found a constitutional violation as to "certain narrow categories of employees," which did not include her. As a remedy for the constitutional violation, Koschkee states the circuit court "struck down all of Act 10 as to every municipal employee," which included Koschkee. Koschkee states she enjoys the protections offered by Act 10 and contends the circuit court's broad remedial order "threatens [her] First Amendment rights and undoes Act 10's other protections for general municipal employees like her." Koschkee argues she has an interest in the appellate proceedings to protect her rights, which she asserts can no longer be adequately represented by the existing parties because "[n]either the Legislature nor the other state defendants[-appellants] have equivalent First Amendment rights that are threatened here, much less standing to raise them on appeal."

We held Koschkee's motion to allow the parties to file a response. *See* WIS. STAT. RULE 809.13. Appellant Wisconsin State Legislature[2] filed a response supporting Koschkee's permissive intervention motion, stating it is not prejudiced by Koschkee's intervention and granting Koschkee's motion promotes judicial economy. We received no response from the remaining appellants, who are the state agencies and officials responsible for enforcing the

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] The circuit court permitted the Wisconsin State Legislature to intervene as a party.

challenged provisions of Act 10. The respondents, who are public employees in the general employee group and labor organizations who represent or wish to represent public employees in that group, filed a response opposing Koschkee's motion.

The respondents first take issue with Koschkee's characterization of the circuit court's actions in this case. They strongly dispute Koschkee's assertion that the circuit court's constitutional-violation determination was limited to a narrow category of employees and assert the court considered an appropriate remedy for the violation it found.

As to Koschkee's intervention motion, the respondents argue she waived her right to move for permissive intervention in this court because she failed to do so in the circuit court. They accuse Koschkee of engaging in "procedural maneuvering" by filing her permissive intervention motion with this court. Alternatively, the respondents argue Koschkee failed to satisfy the permissive intervention factors—specifically, that she failed to establish a claim or defense that shares a common question of law or fact with the instant appeal. *See* WIS. STAT. § 803.09(2). They also argue the appellants adequately represent her interests in this appeal.

Pursuant to WIS. STAT. RULE 809.13, a person that is not a party to an appeal may petition to intervene, and this court may grant the petition upon a showing that the petitioner's interest satisfies the requirements of WIS. STAT. § 803.09(1), (2), or (2m). As a threshold matter, we reject the respondents' assertion that Koschkee waived her right to move this court for permissive intervention because she failed to do so in the circuit court. WISCONSIN STAT. RULE 809.13 specifically contemplates: "[A] person who is not a party to an appeal may file in the court of appeals a petition to intervene in the appeal." Koschkee filed her motion pursuant to statute. We therefore will consider Koschkee's intervention motion on the merits.

Here, Koschkee moved for permissive intervention, pursuant to WIS. STAT. § 803.09(2).[3] Whether a party should be permitted to permissively intervene is a discretionary determination. ***Braun v. Vote.org***, 2024 WI App 42, ¶37, 413 Wis. 2d 88, 11 N.W.3d 106, *review denied* (WI Dec. 10, 2024) (No. 2023AP76). We consider three factors in making this discretionary determination: (1) timeliness of the motion; (2) whether the "movant's claim or defense and the main action have a question of law or fact in common"; and (3) "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." ***Id.***; *see also* § 803.09(2). Further, although we consider these permissive intervention factors, in the exercise of our discretion, we "need not permit a movant to intervene simply because the movant meets each of these factors." ***Braun***, 413 Wis. 2d 88, ¶37.

We begin with the first factor, the timeliness of Koschkee's intervention motion. "There is no precise formula to determine whether a motion to intervene is timely." ***State ex rel. Bilder v. Delavan Twp.***, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). "The question of timeliness must necessarily be left to the discretion of the [court]." ***Id.*** "The critical factor is whether in view of all the circumstances the proposed intervenor acted promptly." ***Id.*** "A second factor is whether the intervention will prejudice the original parties to the lawsuit." ***Id.***

Koschkee argues her present intervention motion is timely. She points out that she moved to intervene in this appeal four weeks after the circuit court denied her intervention

[3] WISCONSIN STAT. § 803.09(2) provides, in relevant part:

> Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common …. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

motion (so that she could file her own notice of appeal for this appeal) and before any briefs have been filed. She also argues her intervention will not prejudice the original parties because she is prepared to meet the existing briefing deadline.

In further support, Koschkee argues she should be permitted to permissively intervene because of her actions involving intervention in the circuit court. She advises that, at the beginning of the underlying lawsuit, she filed an anticipatory intervention motion, alerting the circuit court she would move to intervene as of right if it became apparent that her interests were no longer adequately represented by existing parties. Once the circuit court struck Act 10, Koschkee states she moved to intervene as of right in the circuit court, *see* WIS. STAT. § 803.09(1), but that court denied her motion as untimely.[4] Koschkee argues that her actions in the circuit court should not impact the timeliness of her present permissive intervention motion. She states that because the circuit court's constitutional-violation determination was narrow, she reasonably anticipated that the remedy would also be narrow. According to Koschkee, she moved for intervention as soon as that court "contraven[ed] bedrock remedial principles" by striking down the entirety of Act 10 even though it "found no equal protection violation as to most municipal employees."

As stated above, the respondents strongly dispute Koschkee's version of the circuit court's actions. The respondents assert that because they asked the circuit court to strike down Act 10 as a remedy following that court's constitutional-violation determination, Koschkee should have reasonably anticipated the circuit court may enter an order that would affect her

[4] Koschkee has separately appealed the denial of her intervention motion. That appeal is pending as appeal No. 2025AP114.

rights. They argue she should have moved to intervene earlier and her present motion is untimely. The respondents also argue that allowing Koschkee to intervene would be prejudicial to the parties because we would be considering Koschkee's new arguments without the benefit of any record or decision below.

We conclude that in view of the procedural history of this case as well as Koschkee's explanation to this court regarding the timing of her motion, Koschkee's permissive intervention motion was timely filed. We observe that Koschkee has been involved in the underlying litigation since almost the beginning, proactively notified the circuit court she may need to intervene, and then tried to intervene as of right when she determined her interests were no longer adequately represented by existing parties. We also conclude that Koschkee's intervention will not prejudice the original parties to the lawsuit. Briefing is currently in process and Koschkee will maintain the briefing schedule so as not to affect the respondents' deadline to file their briefs. Further, we remind the parties that "[a] challenge to the constitutionality of a statute presents a question of law that we review de novo." ***Metropolitan Assocs. v. City of Milwaukee***, 2011 WI 20, ¶21, 332 Wis. 2d 85, 796 N.W.2d 717.

We also resolve the third factor—"whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," in favor of Koschkee's permissive intervention motion. *See* ***Braun***, 413 Wis. 2d 88, ¶37. As we determined above, there will be no delay because Koschkee will meet the existing briefing schedule and the original parties will not be prejudiced because our review in this case is de novo. We therefore conclude Koschkee's intervention would not "unduly delay or prejudice the adjudication of the rights of the original parties." *See* WIS. STAT. § 803.09(2).

We next turn to the second factor—whether the "movant's claim or defense and the main action have a question of law or fact in common." *See* WIS. STAT. § 803.09(2). This is a disputed issue among the parties. Koschkee advises that, similar to the other appellants, she "seeks to defend the constitutionality of 2011 Wisconsin Act 10 under the Equal Protection Clause," "argue that the Circuit Court's remedy sweeps far broader than necessary to resolve the only constitutional violation the Court found," and to "show the Circuit Court's remedy violates her First Amendment rights."

The respondents argue that Koschkee does not have a claim or defense in common. They note Koschkee has conceded that she "is not asserting a First Amendment *claim* in this dispute." They also suggest that Koschkee's participation will expand the scope of this appeal to consider new arguments and create unnecessary complexity in this case. They suggest Koschkee should bring her own lawsuit to make whatever claims she deems appropriate.

We conclude the defenses and arguments Koschkee raises in her motion relate directly to the propriety of the order under appeal and they have a "question of law or fact in common." *See* WIS. STAT. § 803.09(2). Koschkee is not raising an independent claim regarding the propriety of the circuit court's decision. Her interest is similar to that of the other appellants in that she proposes to offer arguments to defend the constitutionally of Act 10 and to address the effect of the remedial order. She also is in a unique position to offer perspective on the First Amendment implications of the circuit court's order. Koschkee satisfies the second factor for permissive intervention.

Although we determine Koschkee satisfies the three factors for permissive intervention, it does not follow that permissive intervention will be automatically granted. *See* ***Braun***, 413

Wis. 2d 88, ¶37. The determination is left to our discretion. ***Id.*** Here, Koschkee offers additional reasons why she believes participation in this appeal is appropriate and would be beneficial. Koschkee argues that her participation in the appeal will put the litigation on track to be finally resolved. She explains that if she is denied permissive intervention there could be "satellite or subsequent litigation" over the circuit court's denial of her mandatory intervention motion, including "the impact of reversal in Ms. Koschkee's intervention appeal" and "whether this proceeding should be stayed until that appeal is resolved." She also anticipates potential further litigation on "whether the ultimate ruling in this case violates Ms. Koschkee's First Amendment rights." Finally, Koschkee explains that because the other appellants are government entities, "she is in the best position to aid this court in its resolution of any First Amendment questions."

The respondents argue that Koschkee's interests are adequately represented by the other appellants in this appeal and argue this weighs against permissive intervention. They also argue that if we permit Koschkee to intervene "nothing would stop any—indeed, every—public employee in the state from seeking intervention here."

We are persuaded by the additional reasons Koschkee offers in support of her permissive intervention motion. We seek to avoid piecemeal litigation and to be both aware of and resolve all issues surrounding the circuit court's determination at once. As for whether Koschkee's interests are adequately represented, the respondents correctly observe this is a factor for intervention as of right. *See* WIS. STAT. § 803.09(1). In any event, Koschkee advised this court that her interests can no longer be adequately represented by the existing parties because "[n]either the Legislature nor the other state defendants[-appellants] have equivalent First Amendment rights that are threatened here, much less standing to raise them on appeal." We

believe the position Koschkee offers in this appeal will assist this court in making its determination. We also do not share the respondents' concern that there will be no limit to the parties who seek to permissively intervene in this case. *See* ***Braun***, 413 Wis. 2d 88, ¶37 ("[A] court, in exercising its discretion, need not permit a movant to intervene simply because the movant meets each of these [permissive intervention] factors.").

Because Koschkee has satisfied the factors needed for permissive intervention and has offered this court additional persuasive reasons as to why we should permit permissive intervention, in the exercise of our discretion, we grant Koschkee's motion. We conclude Koschkee has shown her interest satisfies the requirements of WIS. STAT. § 803.09(2). *See* WIS. STAT. RULE 809.13.

Separately, Koschkee has moved to expedite this court's determination on her permissive intervention motion. Given the timing of our decision, we grant her motion. Therefore,

IT IS ORDERED that the motion to intervene is granted and Kristi Koschkee may intervene in this appeal as an appellant. The clerk of this court shall amend the caption to designate Kristi Koschkee as an intervenor-appellant.

IT IS FURTHER ORDERED that Koschkee's motion to expedite this court's determination on her permissive intervention motion is granted.

NEUBAUER, J. (*dissenting*).

I would deny Kristi Koschkee's petition to intervene in this appeal because she has not established all of the requirements for permissive intervention under WIS. STAT. RULE 809.13

and WIS. STAT. § 803.09(2). Specifically, she has not shown that the argument she wishes to raise in this appeal shares a common question of law or fact with the main action.

From its inception, this case has involved an equal protection challenge to a distinction drawn by the Wisconsin Legislature between "public safety" employees and "general" employees in 2011 Wisconsin Act 10 (Act 10). Respondents commenced this action in November 2023, alleging that this distinction violated the equal protection guarantee in article I, section 1 of the Wisconsin Constitution. In their complaint, respondents identified numerous statutory provisions which, in their view, rest on this allegedly unconstitutional distinction and asked that the circuit court declare them unconstitutional and enjoin their enforcement.[5]

In July 2024, the circuit court issued a decision concluding that Act 10's disparate treatment of "public safety" employees and "general" employees lacked a rational basis and therefore violated our state constitution's equal protection guarantee. In a subsequent decision issued in December 2024, the court identified specific provisions in Act 10 that would be invalidated under the court's ruling.

Koschkee wishes to intervene in this appeal in order to inject an issue into this proceeding that was not raised by her or any party in the circuit court. As described in her petition, she seeks to challenge the remedy imposed by the circuit court on the ground that it "violates [her] First Amendment right not to associate with or support union activities," citing

[5] As the circuit court recognized, Koschkee's assertion that she did not (and could not) anticipate the scope of relief awarded by the circuit court is irreconcilable with the breadth of relief requested in the complaint and arguments made throughout the circuit court proceeding seeking to strike the Act 10 provisions as to the "general" employee group, including prior to the court's final decision regarding the remedy.

the United States Supreme Court's decision in ***Janus v. AFSCME, Council 31***, 585 U.S. 878 (2018).[6] Koschkee argues that her defense shares a common question of law with the main action because she intends to show that the court's decision violates her First Amendment rights. She also contends that she is not "expanding the scope of this lawsuit" because she is not asserting an affirmative claim for relief under the First Amendment.

These arguments are not persuasive. Koschkee's First Amendment argument is separate from and tangential to the equal protection challenge at issue in this case. Koschkee has not explained how her First Amendment argument rests on a question of law that is common to the other parties' arguments. To the contrary, as Koschkee herself acknowledges, the appellants and the legislature do not "have equivalent First Amendment rights that are threatened here, much less standing to raise them on appeal." Koschkee offers no explanation beyond a bald assertion of commonality. And by seeking to raise a defense heretofore not raised in the case grounded in

[6] Koschkee could have, but did not, raise her First Amendment argument in the circuit court. Koschkee moved to intervene as of right in the circuit court but asked that her motion be held in abeyance until it became clear that the defendants and the Wisconsin Legislature, which was allowed to intervene, did not adequately represent her interests. The court agreed to hold her motion in abeyance but allowed her to participate in the litigation as an amicus curiae and file a "brief on each dispositive motion or matter relating to remedy." Koschkee filed one brief that supported the arguments made by the appellants and the legislature as to Act 10's constitutionality but did not raise any arguments grounded in her First Amendment rights. After the court concluded that Act 10 was unconstitutional, Koschkee did not file a brief on the issue of the proper remedy.

Following the circuit court's decision invalidating Act 10, Koschkee renewed her request to intervene, which the court denied as untimely. In the court's view, Koschkee had not acted timely because she had "waited until the legal issue was resolved to seek intervention" despite knowing that "the arguments she would make were not being presented or could not be presented by others." ***See State v. City of Chicago***, 912 F.3d 979, 986 (7th Cir. 2019) ("where the intervenor 'has known all along that its interests are directly pitted against' those of the parties, then the mere fact that the precise outcome of the litigation was unexpected does not restart the timeliness analysis" (citation omitted)). Koschkee's failure to seek intervention sooner in the circuit court leaves this court (and possibly our supreme court) without the benefit of a decision from the circuit court on the merits of her First Amendment argument. Moreover, Koschkee is not without proper recourse, as she could seek amicus curiae status, or file a separate challenge to the extent that pre-Act 10 status is reinstated.

a different constitutional provision, Koschkee is indisputably attempting to enlarge the scope of the appeal. Koschkee provides no legal authority for the notion that a *nonparty* is legally entitled to intervene in an appeal to raise a separate and distinct constitutional challenge than that at issue between the parties—much less a challenge that was not raised in the circuit court.

Koschkee also asserts that her defense shares a common question of law with the main action because she intends to argue the circuit court's remedy is overbroad. But her overbreadth argument rests on her contention that the circuit court's remedy violates her First Amendment rights. As explained above, this *distinguishes*, rather than establishes commonality between, her defense and the arguments which are likely to be advanced by the appellants and the legislature.

Finally, Koschkee contends that she "seeks to defend the constitutionality of … Act 10 under the Equal Protection Clause." But she has not shown that the appellants and the legislature will not adequately present this argument in the appeal. Though inadequacy of representation is not a requirement for permissive intervention, we have previously recognized its relevance when applying WIS. STAT. § 803.09(2). *See* ***Milwaukee Bd. of Sch. Dirs. v. Milwaukee Tchrs. Educ. Ass'n***, 143 Wis. 2d 591, 600, 422 N.W.2d 149 (Ct. App. 1988); *see also* ***Rise, Inc. v. WEC***, No. 2022AP1838, unpublished slip op. ¶¶49-50 (WI App July 7, 2023) (concluding that circuit court did not erroneously exercise its discretion in denying permissive intervention where court concluded that proposed intervenors' interest would be adequately represented by existing parties).

Setting aside her First Amendment defense, nothing in Koschkee's petition suggests that she would offer unique equal protection arguments on appeal, or that her interest in challenging the circuit court's decision would not be adequately represented by the existing parties who also

seek that outcome. The absence of an interest that would not be adequately represented by the existing parties weighs in favor of our exercising our discretion to deny Koschkee's petition. *See* ***Menominee Indian Tribe v. Thompson***, 164 F.R.D. 672, 678 (W.D. Wis. 1996) ("When intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears."). Thus, even if Koschkee had met the criteria for permissive intervention in WIS. STAT. § 803.09(2), we would be within our discretion to deny her petition. *See* ***Braun v. Vote.org***, 2024 WI App 42, ¶37, 413 Wis. 2d 88, 11 N.W.3d 106, *review denied* (WI Dec. 10, 2024) (No. 2023AP76).[7]

Samuel A. Christensen
Clerk of Court of Appeals

[7] Denial of Koschkee's motion would not foreclose her from seeking leave to present her arguments on appeal as an amicus curiae. *See* WIS. STAT. RULE 809.19(7); ***Helgeland v. Wisconsin Muns.***, 2006 WI App 216, ¶21, 296 Wis. 2d 880, 724 N.W.2d 208, *aff'd*, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1.