STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

VICTORIA MARONE

Plaintiff,

v. Case No. 13-CV-004154

MILWAUKEE AREA TECHNICAL COLLEGE DISTRICT,

Defendant,

AMERICAN FEDERATION OF TEACHERS, LOCAL 212, WFT, AFL-CIO,

Intervenor-Defendant.

PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION TO AMERICAN FEDERATION OF TEACHERS, LOCAL 212's MOTION TO DISMISS

INTRODUCTION

The collective bargaining agreement (the "CBA") between American Federation of Teachers, Local 212, WFT, AFL-CIO (the "Union") and the Milwaukee Areal Technical College ("MATC") violates Act 10, and Ms. Marone requests that this Court declare the rights of the parties with respect to the CBA. The Union has moved to dismiss the complaint on three grounds: (1) non-justiciability; (2) the Union is allegedly exempt from liability for claims under Section 133; and (3) comity. This Court should reject each of these arguments and Ms. Marone should be permitted to proceed with her claim asking the Court to invalidate the CBA.

I. THIS IS A JUSTICIABLE DISPUTE.

The Union sets forth the elements for determining justiciability in Wisconsin for declaratory judgment claims:

> (1) There must be a justiciable controversy—that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it;
>
> (2) The controversy must be between persons whose interests are adverse;
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> (3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest; and
>
> (4) The issue involved in the controversy must be ripe for judicial determination.

(Union Br. 2-3, citing *Loy v. Bunderson*, 107 Wis. 2d 400, 409, 320 N.W.2d 175, 181 (1982).)

Applying these four elements for "justiciability" establishes that this case is justiciable. First, Ms. Marone asserts a claim of right (not to be bound by an illegal contract) against parties who have an interest in contesting her claim (MATC and the Union). Second, Ms. Marone's interests are adverse to those of MATC and the Union (otherwise MATC and the Union would not be contesting her claim). Third, Ms. Marone has a legally protectable interest in the legality of a contract to which she is a party. The declaratory judgment statute could not be more clear: "Any person interested under a . . .written contract . . . or whose rights, status or other legal relations are affected by a . . . contract . . . , may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder." § 806.04(2). Fourth, Ms. Marone's claim is ripe for determination. The CBA is illegal today, and will go into effect soon without action from this Court. It was the product of collective bargaining that has already occurred, and that bargaining was illegal under Act 10 when it occurred.

Although the Union does not parse the four elements of justiciability in its brief and does not specify which of the elements it claims are missing in this case, it appears that the Union disputes the third and fourth elements. The Union's argument is wrong and directly refuted by the applicable case law.

With respect to the third element, *i.e.*, a legally protectible interest, the Uniform Declaratory Judgments Act resolves this issue. Ms. Marone is a "person interested under a . . . written contract . . . or whose rights, status or other legal relations are affected by a . . . contract." § 806.04(2). As a result, she "may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder." *Id.* The declaratory judgment statute, itself, grants her a legally protectable interest.

Moreover, *Loy* is the leading case on this issue. The Union even cited *Loy* for its statement of the standard for justiciability. (Union Br. 3.) But the Union then disregarded the facts and holding in *Loy*. In *Loy*, the trial court was asked to declare the parties' rights under a *proposed* contract in which an insured, Truesdill, and his insurance company, General Casualty, agreed to pay Loy $20,000, and in return receive a release for the policy limits of $50,000. The proposed contract left intact Loy's cause of action against the "excess" insurer, Travelers, for any sums above $50,000 and within the $500,000 limits of the Travelers policy. The idea was that Truesdill and his primary insurer would be released from a pending lawsuit by paying $20,000 and the plaintiff could continue the lawsuit against Travelers as the excess insurer for damages between $50,000 and $500,000. 107 Wis. 2d at 404-05. Truesdill and General Casualty asked the trial court to declare that the proposed contract was valid and would have the intended effect. *Id.* at 406. The trial court issued the declaration and Travelers appealed, contending that the dispute was not justiciable. The Court of Appeals agreed with Travelers but the Wisconsin Supreme Court reversed.

The Supreme Court explained that even though the document being construed in that case was unsigned and merely a *proposed* agreement, it was still appropriate for the trial court to

declare the parties' rights under the document (*i.e.*, the dispute was justiciable). *Id.* at 414-15. The Supreme Court relied upon the following passage from *Lister v. Board of Regents of University of Wisconsin System*, 72 Wis. 2d 282, 307, 240 N.W. 2d 610 (1976):

> The underlying philosophy of the Uniform Declaratory Judgments Act is to enable controversies of a justiciable nature to be brought before the courts for settlement and determination prior to the time that a wrong has been threatened or committed. The purpose is facilitated by authorizing a court to take jurisdiction at a point earlier in time than it would do under ordinary remedial rules and procedures. As such, the Act provides a remedy which is primarily anticipatory or preventative in nature.

Loy, 107 Wis. 2d at 415.

This rule applies directly to this case. Ms. Marone is seeking to declare the parties' rights under a contract that takes effect on February 16, 2014. The Uniform Declaratory Judgments Act is specifically intended to allow her to seek relief in this situation. She is entitled to ask this Court to declare rights under a contract not yet in effect in the same way the parties did in *Loy* for a contract that was not yet even signed. She seeks a declaration in advance of the effective date of the CBA that the contract is illegal (and, thus, that she need not be worried about its effect on her employment once it becomes effective). That is well within her rights under the Uniform Declaratory Judgments Act, as pointed out in *Loy* and *Lister*.

The Union is wrong when it contends that Ms. Marone should be barred from proceeding because she has not yet attempted to individually bargain or attempted to seek a waiver from the Union. (Union's Br. 4.) The Union cites no authority that this conduct renders her claim non-justiciable and whether or not she has taken these steps is irrelevant because the conduct does not go to any of the elements of justiciability. Ms. Marone seeks a declaration that the CBA is illegal so that she does not need to worry about how to protect her rights if the contract goes into effect. That is a justiciable claim. Moreover, unless the Court declares that the CBA is illegal,

neither of these acts would be legally permitted because negotiating contracts with individual employees that are inconsistent with the CBA would be a breach of the CBA by MATC and Wis. Stat. § 111.70(3)(a)4[1] provides that it is a prohibited practice for MATC to seek an individual contract with an employee while collective bargaining is in progress. Thus, unless MATC and the Union agree that the CBA is illegal, Ms. Marone could not seek to bargain individually either while MATC and the Union were negotiating or after the CBA was agreed to. Until the uncertainty as to the legality of the CBA is resolved, neither of these actions would be necessary or appropriate.

The Union also asserts that the matter is not justiciable because it is not ripe. The Union argues that the dispute is not ripe because the Wisconsin Supreme Court has not yet decided the appeal in the *Madison Teachers* case. (Union Br. 5.) But the Union again cites no case law for the proposition that this renders the dispute non-justiciable, and the argument is illogical. The legal issue before this Court is whether the contract entered into between MATC and the Union is unlawful and therefore void. There is ample precedent and authority for the Court to rule on that issue.

First, there are the Wisconsin Statutes, themselves. Act 10 places limitations on collective bargaining between local governmental entities and public employee unions. Wis. Stat. § 111.70(4)(mb)(1) specifically limits the subject of authorized collective bargaining to wages, and prohibits bargaining with respect to any other factors or conditions of employment:

> A municipal employer is <u>prohibited from bargaining collectively</u> with a collective bargaining unit containing a general municipal employee <u>with respect to . . . any</u>

[1] The Union does not accurately cite Wis. Stat. § 111.70(3)(a)4 at the bottom of page 4 of its brief. That section actually forbids an employer from negotiating individual contracts with individual employees while it is bargaining collectively unless the individual contracts explicitly state that they will be preempted by a subsequent CBA. Thus, that section of the statute would not in any way have permitted Ms. Marone to negotiate a separate individual agreement inconsistent with the CBA.

> 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.

(Emphasis added.)

MATC violated this statute when it bargained collectively with the Union on topics other than wages. The CBA covers matters that go far beyond what is permitted by Act 10. (Kamenick Aff. ¶4, Ex. A; produced by MATC as Document No. MATC 00032-87.[2]) The CBA included the following subjects, among others, which are prohibited subjects of bargaining under Wis. Stat. § 111.70(4)(mb):

- The content, costs and contributions for employee health insurance (MATC 00032-38.)
- Pension contributions (MATC 00039, 00062.)
- Faculty requirements relating to "On-line Delivery" of course content (MATC 00040, 00063.)
- Selection of faculty for summer school assignments (MATC 00041.)
- Full-time and Part-time faculty levels (MATC 00042-44.)
- Creation of a "Coaching Committee" for gathering student feedback and peer coaching of faculty (MATC 00045-47, 00065-66.)
- Rules on seniority as it affects assignments and restrictions on teaching overloads (MATC 00048-50.)

It is undisputed that the CBA contains provisions expressly prohibited by Act 10. Moreover, it is clear that those provisions were "collectively bargained." In October 2012, MATC, in its own words, opened "bargaining with members of Local 212, which represents full- and part-time faculty and paraprofessionals." (Kamenick Aff. ¶5, Ex. B; produced by MATC as Document No. MATC 00028 (emphasis added).) On December 4, 2012, MATC sent a notice to

[2] The factual materials cited in this section of the brief are set forth in the Kamenick Affidavit filed by Ms. Marone on September 26, 2013 in support of her motion for summary judgment.

the public that MATC and the Union would "reopen their collective bargaining agreements … and reconvene collective bargaining" on December 5, 2012. (Kamenick Aff. ¶5, Ex. B; produced by MATC as Document No. MATC 00025 (emphasis added).) MATC met with the Union on December 5, 2012 to exchange initial proposals and then commenced negotiations. (*Id*.) These acts of engaging in collective bargaining were blatantly illegal under Act 10.

In addition, the record is clear that the unlawful collective bargaining between MATC and the Union led to the ultimate CBA that was reached by MATC and the Union. MATC's own Resolutions acknowledge that fact. The February 26, 2013, MATC Resolutions state: (1) the parties negotiated (*i.e.*, bargained), (2) they came to a tentative agreement, (3) the union ratified the tentative agreement, (4) the MATC Board reviewed the agreement, and (5) per the Resolutions, MATC approved the agreement. (Kamenick Aff. ¶6, Ex. C.)

There is no reason that the Court cannot apply Wis. Stat. § 111.70(4)(mb)(1) to this conduct in order to rule on this dispute. Moreover, Act 10 has been repeatedly upheld as constitutional. The U.S. Court of Appeals for the Seventh Circuit dismissed all challenges to Act 10 on federal constitutional grounds in *WEAC v. Walker*, 705 F.3d 640 (7th Cir. 2013). The parent organization of the Union was a losing party in that case. Thereafter, on September 11, 2013, the U.S. District Court of the Western District of Wisconsin upheld Act 10 against a related constitutional challenge, dismissing that case as well. *Laborers Local 236, AFL-CIO v. Walker*, 2013 WL 4875995 (W.D. Wis. Sept. 11, 2013). Then, on October 23, 2013, the Dane County Circuit Court, the Honorable John Markson presiding, upheld Act 10 against another constitutional challenge brought by state employees and a union representing them, dismissing that case. *Wisconsin Law Enforcement Association v. Walker*, Dane County Circuit Court No. 12CV4474.

While it is true that in *Madison Teachers Inc v. Walker*, Dane County Case No. 11-CV-3774, the Honorable Juan Colas, Dane County Circuit Court, held that parts of Act 10 are unconstitutional, that decision by Judge Colas has been appealed and has been certified by the Court of Appeals to the Wisconsin Supreme Court, where it is currently pending. Unlike the federal opinions cited above, the opinion of the Dane County Circuit Court has no precedential value. *See Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826, 832 (Ct. App. 1993) *aff'd*, 193 Wis. 2d 50, 532 N.W.2d 124 (1995) ("circuit court decision is neither precedent nor authority"); *Raasch v. City of Milwaukee*, 2008 WI App 54, ¶8, 310 Wis. 2d 230, 240, 750 N.W.2d 492, 497 ("[A]lthough circuit-court opinions may be persuasive because of their reasoning, they are *never* 'precedential.'") (emphasis in original).

Further, the Dane County Circuit Court erred in *Madison Teachers* by conflating the constitutional right to associate with the statutory privilege of collective bargaining. Indeed, the United States District Court for the Western District of Wisconsin recently rejected the very constitutional argument accepted by the Dane County Circuit Court in *Laborers Local 236, AFL-CIO v. Walker*, No. 11-cv-462, 2013 WL 4875995 (W.D. Wis. Sept. 11, 2013 as did Judge Markson (another Dane County Circuit Court judge) in *Wisconsin Law Enforcement Ass'n*.

Thus, the state of the law is that Act 10 is constitutional and was violated by the collective bargaining between MATC and the Union. In order to protect Ms. Marone, this Court can and should rule on this issue sooner rather than later in order to minimize the effect of MATC's illegal conduct on Ms. Marone.

II. MS. MARONE HAS A VIABLE CLAIM UNDER SECTION 133.03.

The Union contends that Ms. Marone's claim under Wis. Stat. § Section 133.03 should be dismissed based upon the Union's argument that the Union is exempt from liability under Wis.

Stat. §§133.08 and 133.09. But Ms. Marone is not attempting to hold the Union liable under Section 133.03. Ms. Marone is not seeking damages from MATC and did not sue the Union - the Union intervened. But even if §§133.08 and 133.09 apply to a declaratory judgment action, the Union misses the entire point of Ms. Marone's claim.

Section 133.03 forbids agreements in restraint of trade, as does section 1 of the Sherman Act. Ms. Marone agrees with the Union that these state and federal antitrust statutes serve the same purposes, and federal court interpretations of the Sherman Act are controlling precedent for Wisconsin courts in their interpretation of Section 133.03. *See, e,g., Grams v. Boss*, 97 Wis. 2d 332, 346, 294 N.W.2d 473, 480 (1980) ("We have repeatedly stated that sec. 133.01, Stats., was intended as a reenactment of the first two sections of the federal Sherman Antitrust Act of 1890 . . . and that the question of what acts constitute a combination or conspiracy in restraint of trade is controlled by federal court decisions under the Sherman Act."); *State v. Waste Management, Inc.*, 81 Wis. 2d. 555, 569, 261 N.W.2d 147, 153 (1978) ("[T]he broad variety of anticompetitive practices prohibited by the Sherman Act are illegal under the state act.")

But the Union's argument regarding the exemption under §§133.08 and 133.09 falls apart once the Court examines federal law on this issue. Historically, the U.S. Supreme Court held that the organized and concerted activities of employees to bargain as a unit with respect to the terms and conditions of their individual employment violated the Sherman Act as agreements in restraint of trade. *See, e.g., Loewe v. Lawlor*, 208 U.S. 274 (1907). Thus, such activity would also constitute a violation of Section 133.03 Wis. Stats.

In order to permit collective bargaining, Congress passed the Clayton Act (and the Wisconsin legislature passed §§133.08 and 133.09), which provided an exception to the antitrust laws for lawful labor agreements. Congress clarified and expanded this exception in the Norris-

Laguardia Act of 1932, and subsequent court decisions have clarified the labor exemption by making it clear that it applies to the concerted activities of labor unions to the extent that their activities fall within the core labor market issues that are the subject of statutorily authorized collective bargaining. *See, e.g., U.S. v. Hutcheson*, 312 U.S. 219 (1941); *Connell Constr. Co. v. Plumbers & Steamfitters, Local Union No. 100*, 421 U.S. 616 (1975).

However, but for this legislative exemption, collective bargaining is unlawful as a matter of antitrust law. Collective bargaining by employees has the purpose and effect of eliminating competition among them and, absent the application of statutory labor market exemptions, the conduct of an employer in negotiating with a union would constitute an unlawful restraint of trade and thus violate the antitrust laws. "Among the fundamental principles of federal labor policy is the legal rule that *employees may eliminate competition among themselves* through a governmentally supervised majority vote selecting an exclusive bargaining representative." *Wood v. NBA*, 809 F 2d. 954, 959 (2nd Cir. 1987) (emphasis added). Markets in which employees offer their services to employers are no different from other markets for antitrust purposes. *See, e.g., In re NCAA I-A Walk-on Football Players Litigation*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005); *Law v. NCAA*, 902 F. Supp. 1394 (D. Kan. 1995), aff'd, 134 F.3d 1010 (10th Cir. 1998). Agreements that restrict competition in labor markets are unlawful unless they are clearly related to and necessary to facilitate the authorized collective bargaining activity of legitimate labor unions. *See, e.g., Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

Like federal law, Wisconsin antitrust laws create an exemption for the otherwise anticompetitive conduct that occurs in the context of *lawful* labor negotiations. Section 133.09 specifically provides that Chapter 133 shall "be so construed as to permit collective bargaining…by associations of employees." This exception cannot apply, however, to

circumstances in which the State of Wisconsin has by statute expressly *forbidden c*ertain employers and employees from engaging in collective bargaining. As noted above, Act 10 made it unlawful for MATC to collectively bargain with the Union, except for base wages. Their negotiations on other subjects and the subsequent CBA are not exempt from Wisconsin antitrust law, and under the well-established principles of antitrust jurisprudence described above they constitute an unlawful agreement in restraint of trade.

Section 133.14 Wis. Stats. provides that any agreement that "is founded upon, is the result of, grows out of or is connected with" a violation of § 133.03 "shall be void." The CBA is just such an agreement. Given that it is an illegal labor agreement, it cannot receive the protections from the antitrust laws to which legal labor agreements are entitled.

III. Ms. Marone's Claim Should Not be Dismissed Based on Principles of Comity.

The Union asserts that Ms. Marone's claim that the CBA is illegal could have been brought before the Wisconsin Employment Relations Commission ("WERC"), and that as a result this Court should dismiss this case based on principles of comity. The Union's argument fails on two levels. First, this is not a case over which WERC has jurisdiction. Second, even if WERC has concurrent jurisdiction, this is a legal – as opposed to a factual – dispute; it should be decided by the Court.

A. WERC Does Not Have Jurisdiction over this Dispute.

The Union does not cite to any section of the Wisconsin statutes that grants WERC jurisdiction to decide a claim by an employee that a CBA between a municipal employer and a union is illegal and void. WERC has jurisdiction over both "unfair labor practices" and "prohibited practices." The list of "unfair labor practices" over which WERC has jurisdiction pursuant to § 111.07 are set forth in § 111.06 Wis. Stats. None of these cover this claim. The

list of "prohibited practices" over which WERC has jurisdiction pursuant to § 111.70(4)(a) (the section relied upon by the Union at page 9 of its brief) are set forth in § 111.70(3). Although the Union does not specify which subsection of § 111.70(3) it contends applies and gives WERC jurisdiction, the one that the Union is presumably relying upon is § 111.70(3)(a)1., which states that:

> (a) It is a prohibited practice for a municipal employer individually or in concert with others:
>
> 1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2) [which includes the right of employees not to be forced into a union]

But there are potential problems with Ms. Marone bringing a claim against MATC and the Union under §111.70(3)(a)1. First, it is not clear that this subsection applies to the claim in this case. Put another way, would MATC and the Union stipulate that if the CBA is illegal that there has been a violation of §111.70(3)(a)1, or would they say that even if the contract violates Act 10 in some way there still has not been a violation of §111.70(3)(a)1. If they would not stipulate, wouldn't that lead to the conclusion that they believe the conduct does not violate §111.70(3)(a)1 (and as a result would not be within WERC's jurisdiction)? Second, the claim could only be made against MATC, and not against the Union. It is only a "prohibited practice" for a municipal employer – and not for a collective bargaining agent – to engage in the conduct described in §111.70(3)(a)1. Third, it is not clear that WERC could grant the relief sought, *i.e.*, a declaration that the CBA is void. Section 806.04 only gives power to a "court of record" to grant declaratory relief. Fourth, there are timing issues. Because the CBA becomes effective on February 16, 2014, sending the dispute to WERC would almost certainly mean that the issue will not be resolved on a timely basis, whereas if this Court keeps the case, then once the Court decides the motions to dismiss (and assuming that the Court denies the motions as requested by

Ms. Marone) the Court could turn immediately to Ms. Marone's motion for summary judgment filed back in September.

This case does not involve the typical employer/union dispute that is the subject of WERC proceedings. It is a legal dispute between an employee and her employer involving the interpretation of Wisconsin statutes and the effect of those statutes on a contract. This is a case for a court and not for WERC.

B. Because this Is a Legal and Not a Factual Dispute It Should Be Decided by the Court.

Even if the Union is correct that WERC has concurrent jurisdiction in this dispute, this Court should still keep this case based upon applicable Wisconsin law. The statute granting WERC the power to prevent unfair labor practices states explicitly, and right up front, "nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction." Wis. Stat. § 111.07(1).

The Union cites the leading case on the issue, *Wisconsin Collectors Ass'n, Inc. v. Thorp Fin. Corp*., 32 Wis. 2d 36, 145 N.W.2d 33 (1966). In *Thorp*, the Wisconsin Supreme Court confronted the so-called primary jurisdiction issue for the first time. In determining whether a court should defer to an administrative agency in a matter in which there is concurrent jurisdiction the Supreme Court said:

> The court must consider which course would best serve the ends of justice. If the issue presented to the court involves exclusively factual issues within the peculiar expertise of the commission, the obviously better course would be to decline jurisdiction and to refer the matter to the agency. On the other hand, if statutory interpretation or issues of law are significant, the court may properly choose in its discretion to entertain the proceedings.

32 Wis. 2d at 44-45.

Here, there are few, if any, factual disputes and none that are within the expertise of WERC. The dispute is a legal one involving statutory interpretation, the very type of dispute that

the Wisconsin Supreme Court said should be decided by a court when there is concurrent jurisdiction.

In that regard this case is very similar to *City Firefighters Union, Local 311 v. City of Madison*, 48 Wis. 2d 262, 179 N.W. 2d 800 (1970). In that case, the plaintiffs were a union and three officers of the union who brought a declaratory judgment action requesting a judgment that certain conduct by the Fire Chief constituted a breach of contract. The defendant asserted that the claim was within the primary jurisdiction of WERC under Section 111.70. The Wisconsin Supreme Court, relying on *Thorp*, held that there were primarily legal issues relating to statutory construction involved and, as a result, there was no reason for the court to defer to the agency. 48 Wis. 2d at 271.

This dispute is precisely the type that is appropriate for a court to decide as opposed to an administrative agency. It involves issues of statutory construction and it requires relief that only a court of record can give under Section 806.04. There is no reason to send it to WERC for resolution.

CONCLUSION

For the above reasons, Ms. Marone requests that the Union's Motion to Dismiss be denied, and that this Court order briefing to resume on Ms. Marone's Motion for Summary Judgment.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiff

Date: 12/23/13

Richard M. Esenberg, WI Bar No. 1005622
414-727-6367; rick@will-law.org
Thomas C. Kamenick, WI Bar No. 1063682
414-727-6368; tom@will-law.org
Michael Fischer, WI Bar No. 1002928
414-727-6371; mike@will-law.org

Charles J. Szafir, WI Bar No. 1088577
414-727-6373; cj@will-law.org
Brian W. McGrath, WI Bar No. 1016840
414-727-7412; brian@will-law.org
Wisconsin Institute for Law & Liberty, Inc.
1139 East Knapp Street
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385