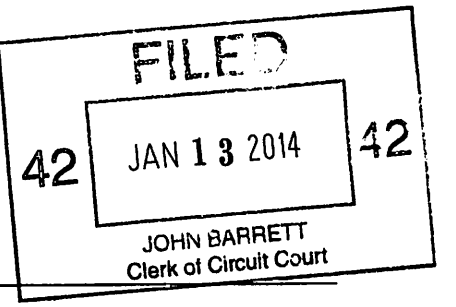
STATE OF WISCONSIN MILWAUKEE COUNTY CIRCUIT COURT
Branch 42

VICTORIA MARONE,
Plaintiff,
v.

MILWAUKEE AREA TECHNICAL COLLEGE DISTRICT,
Defendant, and

AMERICAN FEDERATION OF TEACHERS, LOCAL 212, WFT, AFL-CIO,
Intervenor-Defendant.

Case no. 13-CV-4154
Case code 30701



REPLY BRIEF IN SUPPORT OF THE MOTION TO DISMISS OF INTERVENOR-DEFENDANT AMERICAN FEDERATION OF TEACHERS, LOCAL 212, WFT, AFL-CIO

Intervenor-Defendant American Federation of Teachers, Local 212, WFT, AFL-CIO (Local 212) hereby replies to Plaintiff's response to the motion to dismiss.

I. Plaintiff's Interests are Far Too Speculative and Her Claims are Not Ripe for Adjudication

As *Loy* and other cases teach us, justiciability under the Declaratory Judgments Act requires that, among other factors, Plaintiff must have a legally cognizable claim which is ripe for this Court's adjudication. *Loy v. Bunderson*, 107 Wis. 2d 400, 320 N.W.2d 175 (1982). Plaintiff relies on the plain language of the Uniform Declaratory Judgments Act, providing that a "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. . . ." Wis. Stat. §806.04(2).

And she argues unconvincingly that similar facts in *Loy* control this Court's determination of the viability of her claim. The motion to dismiss raises an inquiry into justiciability that is broader than Plaintiff avers and does not turn simply on the plain language of Wis. Stat. §806.04(2) or the *Loy* facts. The interests of the parties in *Loy* were direct and ascertainable, allowing the Court to determine the scope of the individual's and insurers' duties and exposure. The Supreme Court stated that the Circuit Court was well within its discretion to find the matter justiciable because although "there is some ambiguity, . . . it is clear from the language of the agreement that the clearly understood intent of all the parties to the hearing and to the declaratory judgment proceedings was to reserve the action against Travelers while abandoning it against other defendants." *Loy*, 107 Wis. 2d at 419, 320 N.W.2d at 186.

In contrast, Ms. Marone articulates as her basis for this lawsuit an interest that is too speculative to be justiciable. As she calls on this Court to issue an advisory opinion, the concern is whether Plaintiff's claimed interest "deserve[s] protection against injury, and what should be enough to constitute an injury." *Wisconsin's Environmental Decade, Inc. v. Public Serv. Comm'n,* 69 Wis. 2d 1, 13, 230 N.W.2d 243, 249 (1975). The Supreme Court explained long ago that "[w]hether interests deserve legal protection depends upon whether they are sufficiently significant and whether good policy calls for protecting them or denying them protection." *Id.*

What is Plaintiff's interest? She claims generally it is that, as an MATC employee, she should be free to negotiate individually with MATC regarding her wages and conditions of employment. Notably, Plaintiff has not alleged that she has suffered any harm under the collective bargaining agreement. She has not alleged, for example, that she would have

negotiated better terms with MATC than the Union did. She has not any alleged tangible interest, such as a desire to negotiate better wages than the labor agreement provides, or that she has lost vacation time under the labor agreement, or that she has lost and could negotiate better benefits than provided under the labor agreement. Plaintiff has not alleged that she would have reached a better bargain for herself with the employer if she were free of the labor agreement and had bargained individual terms and conditions of employment with MATC. Plaintiff's general assertion of an interest in individual bargaining, which she has heretofore not pursued, therefore does not provide substantial sufficient, cognizable interest to make her complaint justiciable. She bases this lawsuit on an interest that is far too speculative to be ripe and cognizable by this Court.

Further, as Plaintiff indicates, the viability of the 2014-2015 labor agreement that she seeks to invalidate here will potentially be determined by the Wisconsin Supreme Court in *MTI Inc. v. Walker*, 2012AP2067, 2011CV3774. That case was fully briefed and argued on November 11, 2013. This Court may take judicial notice that, as the electronic public records of the Supreme Court reveal, the parties in *MTI Inc. v. Walker* are now awaiting a decision from the Supreme Court on the merits of the appeal as well as a decision on the November 7th emergency motion for a stay.

http://wscca.wicourts.gov/appealHistory.xsl;jsessionid=4155271312682D4E2E142C557E9B1281C2?caseNo=2012AP002067&cacheId=CF7051307581DC2D000299DAC7DB0DF2FF&recordCount=1&offset=0&linkOnly=false&sortDirection=DESC (last visited Jan. 6, 2014).

Thus, Plaintiff asks this Court to issue an advisory opinion based on her generalized expression of interest in individual bargaining with the employer and on issues awaiting determination by the Supreme Court in *MTI Inc. v Walker*. This Court should dismiss the complaint.

II. Plaintiff Does Not Allege a Cognizable Claim Under Wis. Stat. Chapter 133

Plaintiff also does not allege a cognizable claim under Wis. Stat. §133.03(1) for declaratory relief and her second cause of action should be dismissed.

To support her claim that the collective bargaining agreement between MATC and Local 212 is anticompetitive, Plaintiff recounts the history of antitrust legislation and reaches back to a federal case from 1907, well before federal labor policy was articulated by the National Labor Relations Act and well before the courts recognized labor's early, nonstatutory exemption from antitrust laws in *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965) and *Mine Workers v. Pennington*, 381 U.S. 657 (1965). However, Wis. Stat. §133.07(1) is unequivocal that "[t]he labor of a human being is not a commodity or article of commerce." The identical language is in Clayton Act: "The labor of a human being is not a commodity or article of commerce." 15 U.S.C. §17. Plaintiff ignores the statutory exemptions and the unequivocal expression of policy in both state and federal law. Her focus here is the very nature of collective bargaining. In 1940, the Supreme Court observed the nature of the statutory declaration:

> A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a "restraint of trade." Since the enactment of the declaration in §6 of the Clayton Act that the "labor of a human being is not a commodity or article of commerce . . . nor shall such [labor]

> organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws," it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 502-503 (1940).

Unions have been subject to the antitrust laws when, for example, they combine to create business monopolies and not when they, as here, are engaged in legitimate collective bargaining objectives surrounding wages, benefits and working conditions. For example, in *Connell Constr. Co. v. Plumbers & Pipe Fitters Local 100*, 421 U.S. 616 (1975), the Supreme Court invalidated an agreement that obligated the plaintiff to subcontract work only to firms that had a contract with the defendant union, which did not represent (and had no interest in representing) the plaintiff's employees. As a not-for-profit, public sector employer, MATC is hardly the type of employer whose union-employer agreement represents a scheme to impose direct restraints on and eliminate competition among employers of part-time teachers.

Plaintiff has not alleged any facts to support an anticompetitive scheme and noticeably, Plaintiff has also not cited any law that would bring the MATC/Local 212 collective bargaining agreement within the ambit of the antitrust laws as an illegal restraint of trade and outside the collective bargaining exemption. Instead, Plaintiff cites the following cases in which the facts are inapposite and the holdings irrelevant: *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (statutory antitrust exemption shields multiemployer collective bargaining and employer unilateral implementation of last good faith offer on bargaining impasse); *Wood v. NBA*, 809 F.2d 954 (2nd Cir. 1987) (player salary cap, college draft system and prohibition of player

corporations are not an agreement among horizontal competitors to violate the Sherman Act but multi-employer bargaining authorized by law); *In re NCAA I-A Walk-on Football Players Litigation*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (claim that agreement between NCAA and Division I-A schools resulting in NCAA rule artificially restricts number of football scholarships in restraint of trade survives motion for judgment on the pleadings); and *Law v. NCAA*, 902 F. Supp. 1394 (D. Kan. 1995), *aff'd*, 134 F. 3d 1010 (10th Cir. 1998) (NCAA rule limiting annual compensation of men's basketball coaches across colleges unreasonably restrains trade as horizontal price fixing with anticompetitive effect).

Plaintiff's construction of the MATC/Local 212 conditional labor agreements is a device that is unsuccessful because it ignores the policy underlying state and federal antitrust law and the collective bargaining exemption. As a result, this Court should dismiss with prejudice Plaintiff's second cause of action for its failure to state a claim on which relief can be granted.

Further, Plaintiff's claim under Chapter 133 is strictly derivative of her claim under Sec. 111.70. It is a "make weight" claim only. Ms. Marone's claim that the labor agreement violates the provisions of Chapter 133 can be valid if, and only if, Judge Colas' decision striking down key provisions of Act 10 is reversed by the Supreme Court in *MTI Inc. v. Walker*. If it is upheld, then Wis. Stat. §111.70 authorizes collective bargaining and she concedes that if that is the case there is no violation of Chapter 133. If the Supreme Court reverses Judge Colas' decision, the parties will need to examine the decision to determine whether the agreement that was lawful when it was made remains valid for its duration. Plaintiff can only prevail on this claim if she

prevails on the claim that the labor agreement violated Sec. 111.70 when it was made as a result of the amendments made to Sec. 111.70 by Act 10.

III. Because the WERC Has Concurrent Jurisdiction of the Prohibited Practices Complained of by Plaintiff, this Court Should Dismiss

Because Plaintiff's first cause of action is potentially cognizable as a prohibited practice under MERA, which is within the purview of the WERC, Wis. Stat. §111.70(4)(a), this Court and the WERC have concurrent jurisdiction and this Court may dismiss the complaint on the basis of comity, giving priority to the jurisdiction and administrative expertise of the WERC. Plaintiff cites *City Firefighters Union, Local 311 v. City of Madison*, 48 Wis. 2d 262, 179 N.W.2d 800 (1970), which was a case where the Defendant claimed that the WERC had primary jurisdiction over the claims. The Court disagreed, finding no reason to defer to the agency. In contrast, there is potential concurrent jurisdiction here and Local 212 does not allege that the WERC has primary jurisdiction. Unlike the situation in *Local 311*, the Commissioners have engaged in the defense of Act 10 in both federal and state trial and appellate courts. They have narrowly avoided a contempt finding by the Dane County Circuit Court, which the Court of Appeals refused to stay. This intimate connection with the legal issues underlying Plaintiff's claim here distinguishes this case from *Local 311*. Given that concurrent jurisdiction exists between this court and the agency, the doctrine of comity allows this Court to dismiss this action.

CONCLUSION

On the basis of all of the above and the facts and argument contained in the brief filed in support of the motion, Local 212 respectfully requests that this Court grant the motion to dismiss and order the following:

(a) The complaint in its entirety shall be dismissed with prejudice;

(b) Local 212 shall be awarded its costs, disbursements and attorneys' fees incurred in defending this action and bringing the motion;

(c) Any further relief this Court deems just and equitable.

January 13, 2014

Respectfully submitted,

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