STATE OF WISCONSIN | CIRCUIT COURT BRANCH 42 | MILWAUKEE COUNTY

VICTORIA MARONE
Plaintiff,
v.

MILWAUKEE AREA TECHNICAL COLLEGE DISTRICT
Defendant,

Case No. 13-CV-004154

Hon. David A. Hansher

v.

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

JOINT REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S AND INTERVENOR-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT ON GROUNDS OF MOOTNESS

The undisputed ***material*** facts establish that this court should dismiss the claims in the above-captioned matter as moot and any further discovery is not required.[1] Further discovery cannot create a disputed issue of ***material*** fact regarding the expiration of the alleged contract (February 14, 2015, by its terms) or refute that Milwaukee Area Technical College District ("MATC") and American Federal of Teachers, Local 212, WFT, AFL-CIO ("Local 212") (collectively, the "Defendants"), as parties to the alleged contract, agree that the alleged contract did not come into existence.[2] Adjudicating Victoria Marone's claims regarding the status or

[1] The present summary judgment motion is appropriately before this court as both MATC and Local 212 requested the ability to address all relevant grounds for asserting the present claims are moot, including through the submission of evidence to establish their contentions, and the court permitted the Defendants' to submit such a motion. (Aff. of McGrath, Ex. 1, pp. 5, 12-14).

[2] Once the party moving for summary judgment demonstrates that there is no genuine issue as to any *material* fact and that it is entitled to a judgment as a matter of law, the opposing party may avoid summary judgment only by setting forth specific evidentiary facts showing that there is a genuine of issue of material fact for trial. *See Tews v. NHI, LLC*, 2010 WI 137, ¶4, 330 Wis.2d 389, 793 N.W.2d 860; Wis. Stat. §802.08(3).

legality of the alleged contract or the Defendants' process of creating the alleged contact has no practical effect on Marone, given that the only relief she can secure is a declaration that a contract, which the parties have denied exists and that would have expired, is void.

UNDISPUTED *MATERIAL* FACTS

Despite Marone's attempts to introduce disputed issues of fact, Marone cannot dispute certain, dispositive facts that are relevant to this motion. Most importantly, it is undisputed that the alleged "contract" that Marone contends existed had a one-year term, from February 16, 2014 to February 15, 2015. (Compl. ¶23). Even if this document were an enforceable and valid contract, it is undisputed that it expired on February 14, 2015.

Moreover, MATC and Local 212, the parties to the alleged contract, agree that a contract never came into being. (Aff. of McColgan, ¶11,12); (Aff. of Shansky, ¶¶18-22). MATC and Local 212 also agree that the alleged contract was never implemented. (Aff. of McColgan, ¶¶13-16); (Aff. of Shansky, ¶¶19-21). Finally, it is undisputed that MATC voluntarily and unilaterally continued some, but not all, of the terms and conditions of employment reflected in the document after the prior collective bargaining agreement expired on February 15, 2014. (Aff. of McColgan, ¶¶13-16); (Aff. of Shansky, ¶¶19-21).

REPLY ARGUMENT

I. The Claims Are Moot Because The Alleged Contract Has Expired.

Marone's claims are moot because declaring that the alleged contract is void or that the Defendants' process in negotiating the alleged contract is illegal has no practical effect, because the contract already would have expired and can no longer have an impact on Marone's rights. Marone is not entitled to such declarations simply because she would like to secure them. Resolving Marone's claims will not impact Marone. In addition, this case does not constitute an

exception to the general rule on mootness, because a declaration is not necessary to guide the parties' future dealings. Therefore, this court should find that the issues are moot.

A. The Claims Are Moot Because Marone Is Not Entitled To Relief Other Than A Declaration That The Alleged Contract Is Void.

This case involves a complaint for declaratory judgment. Marone seeks to have MATC and Local 212's negotiations declared illegal and the resulting alleged "contract" declared void. Marone urges that she is entitled to this declaratory relief, because MATC's and Local 212's conditional negotiations allegedly violated Act 10 and Wis. Stat. §133.03(1).

This declaration, however, would be meaningless, as the only relief or damages Marone can obtain from a declaration that the Defendants' acts were illegal is a declaration that the contract is void, a practical consequence of no import as the Defendants do not contend that it exists either. It also is a declaration that is precluded by precedent, since the court of appeals already had ruled that – at all times relevant to this Complaint - conditional negotiations in the wake of Act 10 were lawful. Marone's own Complaint is premised on a document that expressly establishes that the parties' agreement was conditional and she does not dispute this.

Marone does not allege damages were suffered by her as a result of the Defendants' actions. Marone has not claimed that she sought or even wanted different terms and conditions of employment or that she tried to negotiate her own contract. Marone only seeks declaratory relief.[3] The Declaratory Judgment Act does not automatically provide for damages. *See* Wis. Stat. §806.04. Any requested declaration regarding the alleged illegality of the parties' negotiations is merely a vehicle for declaring the alleged contract void. Therefore, the only relief Marone ultimately can obtain is a declaration that the alleged contract is void.

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[3] Moreover, this court has held that Marone is not entitled to costs or attorneys' fees from MATC pursuant to Ch. 133.03, Wis. Stats. (10/7/14 Decision & Order, p. 13). Also, Marone has not alleged that she is entitled to any damages, fees or costs from Local 212.

Furthermore, Marone has not offered any legitimate explanation on how a declaration regarding the legality of MATC's and Local 212's acts impacts her in any way. Marone cannot contend that a declaration regarding an allegedly unlawful contract has some real effect on her. If the alleged contract actually had ever been a contract, it would now be expired; a fact that cannot be disputed, regardless of further discovery.

As a result, Marone is currently in exactly the same position that she would be in if the court required the parties to litigate this case to a conclusion and, ultimately, declared the alleged contract void. The "contract" does not exist and does not have any effect on Marone, whether this case is litigated for another two years or is dismissed today. Therefore, the issues before this court are moot because their resolution has no practical effect on Marone, and the court can and should dismiss the claims without further litigation. *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis.2d 685, 608 N.W.2d 425; *State ex rel. La Crosse Tribune v. Circuit Court for La Crosse Cnty*, 115 Wis.2d 220, 228, 340 N.W.2d 460 (1983).

B. Marone Does Not Have An Absolute Right To The Requested Declarations.

Marone argues that she has an absolute right to a declaration regarding the status of the alleged contract and legality of the Defendants' actions, as though declaratory judgments are always available whenever someone – in her view – follows an unlawful process or enters into an unlawful agreement. This is not the case.

First, courts are not to resolve or allow parties to continue to litigate issues when the resolution will have no practical effect on the parties or the issue is one which circumstances have rendered purely academic. *Litscher*, 2000 WI App 61, ¶3; *La Crosse Tribune*, 115 Wis.2d at 228. Declaratory judgments are not simply trophies and our courts could not function if parties were permitted to treat them as such. There is no serious contention that declaring the

alleged contract void or the actions in forming the contract illegal addresses an actual (as opposed to academic) dispute, where the contract has expired and has no effect on the parties.

Second, courts may, but are not required to use their discretion to decide issues that would otherwise be moot where the issues are of public importance and likely to arise again, especially where the issues are of first impression as in *Kabes v. School District of River Falls*, 2004 WI App 55, 270 Wis. 2d 502, 677 N.W.2d 667. For example, in *State ex rel. Badke v. Village Board of Greendale*, 173 Wis. 2d 553, 569, 494 N.W.2d 408 (1993), and *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶ 19, 278 Wis. 2d 388, 692 N.W.2d 304, cited by Marone, the courts determined that a declaration as to the legal status or illegality of certain acts related to Wisconsin's Open Meeting Law, §19.81, Wis. Stat. et seq., would be appropriate, even though the relief sought was already obtained by the plaintiff. These cases are distinguishable from the issue presented here.

In *Badke*, Village Board members were regularly attending Plan Commission meetings and voting on issues without providing notice of public open meetings. The controversy continued despite a revote on the issues at subsequent properly noticed open meetings because the court wanted to instruct the governmental body that it could not hold secret meetings to discuss proposals, wait until someone filed a complaint, and then hold a valid open meeting to vote on the issue. 173 Wis. 2d at 569.

The undisputed evidence before the court in this case is that MATC and Local 212 began discussions only after rulings from various courts placed the scope of the statutory obligation to bargain in limbo. The undisputed evidence also establishes that the court of appeals ruled that conditional negotiations were absolutely lawful while the appellate courts resolved the state of limbo that local governments had been placed in. Finally, it is undisputed that, once the previous

contract expired, the conditional agreement was not implemented and, when the Supreme Court ruled, it was clear that it never would be. The alleged contract never existed and, if somehow it did, it was null and void.

Similarly, in *Lawton*, the court of appeals recognized a need to determine whether a vote to remove a town's plan commission member that was initiated by a "walking quorum," without notice of a meeting, was illegal. An important feature of this case concerns a provision of the Open Meetings Law, §19.97(4), Wis. Stat., which specifically gives private citizens the right to prosecute Open Meetings Law violations on behalf of the state when the Attorney General does not and to seek certain remedies, such as civil forfeitures. 2005 WI App 16, ¶¶14-15.

However, Wis. Stat. § 19.97(4) has no application here, despite Marone's contention. (Pl.'s Br. p. 9). The statutory provision only allows for citizens to prosecute Open Meetings Law violations when the Attorney General does not do so; it has no application to purported violations of Wis. Stat. §111.70.

Moreover, *Badke* and *Lawton* do not stand for the general "rule" proposed by Marone that a declaratory judgment claim relating to allegedly unlawful conduct by a public body does not become moot by subsequent action of the public body. (Pl.'s Br. p. 10) The rulings in those cases were specific to violations under the open meetings law, as well as the express statutory right and public policy imperative to provide for "private attorney general" prosecution.

Marone counters that the procedural history of this case prevented her from securing declaratory relief earlier and, for this reason, the fact that the alleged contract would now be expired should not affect her ability to seek a ruling that the contract is void. However, the court moved the case "as quickly as possible pending a decision of the Wisconsin Supreme Court, . . .," because the court recognized the decision was relied upon by the parties in prior motions to

dismiss and for judgment on the pleadings. (Aff. of McGrath, Ex. 3, p. 9); (Dkt. 43). The court stayed a decision on those motions until the Wisconsin Supreme Court's decision, after which the parties resumed the proceedings. (Dkt. Nos. 43-65). Thus, MATC and Local 212 did not drag their feet until this alleged contract expired (the subsequent action alleged by Marone).

In addition, the cases cited by Marone for the proposition that MATC's and Local 212's actions will likely be repeated, *Lacroix v. Kenosha Unified School District*, Kenosha County Case No. 13-CV-1899, and *Blaska v. Madison Unified School District*, Dane County Case No. 14-CV-2578, are distinguishable and citation to them – in this context – borders on silliness. Both cases involve incidents of alleged illegal collective bargaining that occurred prior to the Wisconsin Supreme Court's decision resolving the limbo-status of Act 10 and involve circumstances where the unions and employers sought to defend the legality of the contracts. Here, the union and employer deny that the contract ever came into existence. Notwithstanding these obvious distinctions, the court in *Lacroix* just issued its decision on the issue of the legality of collective bargaining while the constitutionality of Act 10 was pending decision before the Wisconsin Supreme Court.

A decision by this court on the issue is not necessary to teach parties how to act in the future and the issue presented here is not one of first impression. *LaCroix v. Kenosha Unified Sch. Dist Bd. of Educ.*, No. 13-CV-1899 (Kenosha Cnty Cir. Court, Mar. 19, 2015). The parties to this case have also never maintained that an actual agreement exists or that it can be enforced on technical grounds notwithstanding Act 10 and, consequently, Marone's citation to cases where this was contested is not appropriate. Therefore, this court can make a determination, based upon the undisputed (and indisputable) facts that all of Marone's claims are moot. Any declaration regarding the status of the alleged contract or the process undertaken to form the

alleged contract have no practical effect on Marone since the effect of an expired contract and a void contract are the same: they have no effect at all.

II. The Claims Are Moot Because The Parties Agree The Alleged Contract Did Not Come Into Existence.

It is undisputed and cannot credibly be disputed that MATC and Local 212, as parties to the alleged contract, agree that the alleged contract did not come into existence and did not implement the alleged contract. As such, there are no practical effects of declaring that the alleged contract is void or that the Defendants' process of forming the alleged contract is illegal given that the alleged contract does not have an impact on Marone's rights. Therefore, Marone's claims are moot and must be dismissed by the court.

A. It Is Undisputed That The Parties Agree The Alleged Contract Did Not Come Into Existence.

MATC and Local 212 agree that the alleged contract was not an enforceable contract and the Defendants' stipulation should be given dispositive effect. Because MATC and Local 212 - as parties to the alleged contract - agree that they had no contract, Marone cannot force them to have a contract notwithstanding their mutual intent because, under established Wisconsin law, a contract cannot be enforced by a person that is not a party to it. *Goossen v. Estate of Standaert*, 189 Wis.2d 237, 249, 525 N.W.2d 314 (Ct. App. 1994); *Abramowski v. Wm. Kilps Sons Realty,* 80 Wis.2d 468, 472, 259 N.W.2d 306 (1977).

Marone completely ignores this dispositive fact and corresponding principle of law, does not refute the law cited in support of the Defendants' position, and attempts to misdirect the court to focus on immaterial issues of fact regarding what the parties believed during negotiations and subsequent discussions between the parties about what to do while waiting for a decision from the Wisconsin Supreme Court regarding Act 10's constitutionality. What is

material is that MATC and Local 212 both agreed, when the prior contract expired and confirmed when the Wisconsin Supreme Court's ruling was received that the alleged contract – a conditional agreement – would not and never did come become enforceable.

A declaration that the alleged contract is void or that the process undertaken to create that contract was illegal has no practical effect on Marone under the law. Accordingly, Marone's claims are moot.

B. It Is Undisputed That The Alleged Contract Was Not Implemented.

Marone tries to discredit the dispositive nature of the Defendants' stipulation that the alleged contract never came into existence by saying that the Defendants implemented the alleged contract. However, the plaintiff concedes the exact opposite.

It is undisputed that certain terms of the alleged contract were never implemented when the one-year term for the alleged contract commenced. (Pl.'s Br. pp. 21-22). It also is undisputed that certain terms in the alleged contract were handled differently during the one-year term at issue. It is further undisputed that MATC undertook a process during the term of the alleged contract to create an entirely different employee handbook. Marone does not dispute any of this.

Although Marone bemoans limitations on the conduct of discovery, any discovery could not alter the inescapable consequence of the indisputable evidence on this point. The claim that the alleged contract was implemented can be dispensed with by way of example.

For instance, it is undisputed that dues and fair share were included in the one-year conditional agreement for 2014-2015. (Compl. Ex. D). If the conditional agreement were, in fact, an actual contract and had indeed been implemented, Marone's compensation would have been subject to dues and fair share deductions. However, MATC did not deduct dues or fair

share from employee paychecks as of February 15, 2014. (Aff. of McColgan, ¶13). Marone—with a full and fair opportunity to do so—does not dispute the fact that dues and/or fair share deductions were not made from her paycheck for the last year. Yet she is still, inexplicably, prepared to represent to this court that MATC implemented the conditional agreement as an enforceable contract for the one-year period at issue.

These facts are dispositive. If, in fact, this alleged contract were in effect and had been implemented, it would not be possible for MATC to simply ignore any number of sections of the alleged contract. The fact that not all of the terms of the agreement were implemented establishes that there was no binding contract because—if there were a binding contract—all of its terms necessarily would had to have been implemented by MATC. The equally implausible companion suggestion that MATC must be held to have implemented a contract if it did not immediately change all wages, hours, and conditions of employment when the prior contract expired on February 15, 2014, is simply not a serious point of contract law or a realistic understanding of human resources. Employers routinely do things like maintain employees' benefits after a labor contract expires and this mere fact certainly does not mean that a new labor agreement is in place.

Instead of establishing a disputed issue of *material* fact on these points (because she cannot do so), Marone attempts to argue there are disputed issues of fact regarding whether Local 212 and MATC illegally re-negotiated the terms of the alleged contract at a later point in time and illegally implemented, essentially, an amended contract.[4] (Pl.'s Br. p. 21-22).

[4] The Defendants object to Marone's categorization of the Defendants' discussions in February 2014 as illegal collective bargaining. Marone conflates two definitions of collective bargaining described by the Wisconsin Supreme Court in *Madison Teachers, Inc. v. Walker*, 2014 WI 99, 358 Wis.2d 1, 851 N.W.2d 337– one constitutionally protected and the other statutorily proscribed. The documents attached to Marone's affidavit fall squarely in the former constitutionally protected category. *Madison Teachers, Inc.*, 2014 WI 99, ¶18 (emphasis added). MATC and Local 212 disagreed about the nature of MATC's legal obligation to respond, but the

Notwithstanding the fact that this position constitutes a new claim - the Complaint relates solely to MATC's actions between November 12, 2012 and February 26, 2013 – Marone's position unwittingly proves that the alleged contract about which she complains was not implemented. (Compl. ¶30). Any alleged dispute over "facts" relating to any alleged re-negotiation or creation of an amended contract is not material to the mootness issues at hand and does not create a disputed issue of material fact as required for Marone to survive summary judgment. *See Tews*, 2010 WI 137; Wis. Stat. §802.08(3).

CONCLUSION

For the reasons stated herein, and in the Defendants' initial Joint Memorandum In Support Of Defendant's And Intervenor-Defendant's Motion for Summary Judgment Dismissing Plaintiff's Complaint On Grounds Of Mootness, Marone's claims must be dismissed in their entirety as moot.

Dated: April 2, 2015

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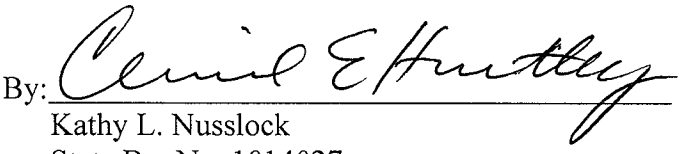
By: 
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disagreement was of no consequence because MATC voluntarily responded to Local 212's advocacy. Local 212's advocacy and MATC's voluntary response were legal.

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