UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

TIMOTHY ALLEN MORRISON, II by and through his next friends, TIMOTHY MORRISON and MARY MORRISON; TIMOTHY and MARY MORRISON; BRIAN NOLEN; and DEBORA JONES	)	
Plaintiffs	)	
v.	)	Civil Action No. 05-38-DLB
BOARD OF EDUCATION OF BOYD COUNTY, KENTUCKY	)	**ELECTRONICALLY FILED**
Defendants	)	
SARAH ALCORN, WILLIAM CARTER, DAVID FANNIN, LIBBY FUGETT, TYLER McCLELLAND, and JANE DOE	)	
Proposed Intervenor-Defendants	)	

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, Sarah Alcorn, William Carter, David Fannin, Libby Fugett, and Tyler McClelland (the "GSA movants") and Jane Doe[1] (collectively "movants") seek to intervene as defendants in this action and to file an answer in intervention. The GSA movants are parties to a consent decree with defendant Board of Education of Boyd County (the "Board"), which requires the Board to train students and teachers at Boyd County Middle and High Schools about how to avoid harassment of lesbian, gay, bisexual, and transgender individuals. In addition, the consent decree requires the inclusion of an anti-harassment policy in the Boyd County

[1] "Jane Doe" is a pseudonym. Movants are filing a separate motion to allow Jane Doe to proceed pseudonymously in this litigation.

Middle and High School handbooks. This action alleges that the training and anti-harassment policy are unconstitutional. As parties to the consent decree, the GSA movants have a substantial legal interest in the outcome of this litigation, an interest that would be impaired should they be denied intervention. Movant Jane Doe is the parent of a student in the Boyd County Middle School and she has an interest in ensuring that the school continue to conduct anti-harassment training so that her child will be safe at school. Movants are filing this motion in a timely fashion and are not adequately represented by the original parties to this action. Therefore, they are entitled to intervention as of right pursuant to Fed. R. Civ. P. 24(a)(2). Movants also qualify for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2).

Movants have sought consent from plaintiffs and defendant to this motion. Defendant said it would not oppose this motion. Plaintiffs said that they wish to review the papers before informing the Court of whether or not they oppose.

SUMMARY OF FACTS

In January of 2003, the Boyd County High School Gay Straight Alliance and several Boyd County High School students, including Sarah Alcorn, William Carter, David Fannin, Libby Fugett and Tyler McClelland filed suit against the Board asserting claims under the Equal Access Act; the First Amendment; the Equal Protection Clause; and the Kentucky Education Reform Act (the "GSA litigation"). As a result of that litigation, a consent decree was entered into and signed by the Court on February 10, 2004, which requires anti-harassment training for teachers and students at Boyd County Middle and High Schools. *See* Consent Decree in *Boyd County High School Gay/Straight Alliance v. Board of Education*, Civil Action No. 03-17-DLB at 3-6. The

consent decree also requires the inclusion of a policy in the Boyd County Middle and High School handbooks "prohibiting harassment and discrimination based on actual or perceived sexual orientation or gender identity." *Id.* at 6.

On February 15, 2005, plaintiffs Timothy Allen Morrison II, Timothy Morrison, Mary Morrison, Brian Nolen, and Debora Jones filed this action asserting that the training and anti-harassment policy undertaken pursuant to the consent decree violate their constitutional rights. The Board filed its Answer on March 14, 2005.

ARGUMENT

I. Intervention as of Right

In this Circuit, a district court considers four factors when deciding whether to allow a movant to intervene as a matter of right:

> (1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court.

Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997) (citing *Cuyahoga Valley Ry. Co., v. Tracy,* 6 F.3d 389, 395 (6th Cir. 1993)). *See also Americans United for Separation of Church and State v. City of Grand Rapids,* 922 F.2d 303, 305 (6th Cir. 1990).

Movants meet the criteria for intervention as of right. First, movants are filing shortly after issue was joined and before any substantive proceedings have occurred in the action. The Court has yet to set a discovery time line or tentative trial date much less hold any hearings in this case, which is still in its infancy. Second, as parties to the consent decree that forced the Board to conduct the trainings at issue in this action, the

GSA movants have a substantial legal interest in whether the trainings will be implemented. Movant Jane Doe has a substantial legal interest in ensuring that the trainings occur because her child attends the Boyd County Middle School and the trainings will help keep her child safe. Third, movants' interest in defending the district's ability to conduct the trainings will be impaired should they be denied the right to intervene. Finally, movants' interests are not adequately represented by the other defendant in this action, the Board, as the Board and the movants were opponents in the litigation leading to the consent decree and the Board cannot be counted on to defend the training to the same extent as movants will.

A. Timeliness

Where, as here, a motion to intervene is filed early in an action, the motion is timely. *See Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998), *rev'd on other grounds,* 188 F.3d 394 (6th Cir. 1999) (motion filed four months after complaint and case in its earliest stages); *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1993) (motion filed two weeks after complaint). *See also Jansen v. City of Cincinnati*, 904 F.2d 336, 339-40 (6th Cir. 1990) (motion filed four months after complaint before decision on pending motion for summary judgment). Only where the intervention motion is made much later do courts consider the motion to be untimely. *See, e.g.*, *Stupak - Thrall v. Glickman*, 226 F.3d 467, 473-74 (6th Cir. 2000) (motion to intervene filed after discovery period closed, all witnesses had been identified, and dispositive motion deadline only seven weeks away). *See also United States v. Tennessee*, 260 F.3d 587, 593 (6th Cir. 2001) (motion to intervene untimely when filed so late that all substantive issues had been decided by the district court and all that was left was final approval of

Community Development Plans entered into by the state as a consequence of the litigation).

Here, movants filed this motion while the case is in its earliest stages. The complaint was filed on February 15, 2005; the Board filed its Answer on March 14, 2005, and plaintiffs filed a motion for a preliminary injunction on March 28, 2005. Movants filed their motion to intervene on this date, just a few days later, along with their proposed answer in intervention. The Court has yet to set a timeline for discovery, schedule a tentative trial date, or hold any hearings in this case. Movants will be able to satisfy the only deadline established so far by this Court, which requires that any papers in opposition to Plaintiffs' motion for preliminary injunction be filed by April 29, 2005. In short, the case is still in the earliest of stages and no party will be prejudice by allowing the movants to intervene now.

B. Substantial Legal Interest

The Sixth Circuit has adopted "a rather expansive notion of the interest sufficient to invoke intervention of right." *Michigan State AFL-CIO*, 103 F.3d at 1245 (citing *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991)). *See also Bradley v. Milliken,* 828 F.2d 1186, 1192 (6th Cir. 1987). The term interest is construed "liberally" such that the intervenor need not even have the same standing necessary to initiate a lawsuit. *Id.* In *Michigan State AFL-CIO*, the court held that the proposed intervenor, the Michigan Chamber of Commerce, had a substantial legal interest in litigation challenging Michigan's Campaign Finance Act. 103 F.3d at 1247. The court noted that the Michigan Chamber of Commerce was:

> (1) a vital participant in the political process that resulted in legislative adoption of the 1994 amendments in the first place, (2) a repeat player in

> Campaign Finance Act litigation, (3) a significant party which is adverse to the challenging union in the political process surrounding Michigan state government's regulation of practical campaign financing, and (4) an entity also regulated by at least three of the four statutory provisions challenged by plaintiffs."

Id. The court noted that although the case may be a close one, close cases should be resolved in favor of intervention. *Id.*

The fact that the plaintiffs in this action challenge the constitutionality of anti-harassment trainings that are required by the consent decree in the GSA litigation means that the GSA movants have a substantial legal interest in this litigation. In *Jansen*, a group of white employees sued the Cincinnati Division of Fire for race discrimination in 1989, and a group of African American applicants and employees sought to intervene in order to defend an earlier consent decree to which they were parties. 904 F.2d at 338-39. Previously, in 1973, two African American applicants had sued the City of Cincinnati alleging racial discrimination in its hiring process for firefighters. *Id*. at 338. The parties entered into a consent decree that established an affirmative action program governing the hiring and promoting of minorities within the Division of Fire. *Id*. In determining whether the proposed intervenors had a substantial legal interest in the 1989 case, the Sixth Circuit noted that the proposed intervenors were parties to the consent decree challenged in the action. *Id.* at 342. The court held that because the litigation "requires an interpretation of the consent decree negotiated by the proposed intervenors and the City when they were in the midst of an adversarial relationship[,]" the proposed intervenors had a significant legal interest in the interpretation of the consent decree and therefore in the litigation itself. *Id.*

In this case, movants and the Board are parties to a consent decree in the GSA litigation that requires the Board to implement anti-harassment trainings and policies. Because plaintiffs in this action seek to limit or eliminate those trainings and policies, the GSA movants have a substantial legal interest in this case.

Movant Jane Doe has a substantial legal interest in this case because she wants her child to be safe in school and the Board's trainings will help achieve that end. Because she is concerned for her child's safety at school, because the trainings will help protect her child's right to equal access to an education, and because she is concerned that the Board may not fully defend the trainings, she has a substantial legal interest in whether the anti-harassment trainings may continue. *See* Declaration of Jane Doe (attached to movants' Motion for Protective Order).

C. Impairment

The burden of showing that the proposed intervenor's legal interests will be impaired if litigation is allowed to continue without their intervention is minimal. *Grutter,* 188 F.3d at 399 (citing *Michigan State AFL-CIO*, 103 F.3d at 1247)). *See also Purnell,* 925 F.2d at 948. In *Michigan State AFL-CIO*, the Sixth Circuit held that "[t]his court has already acknowledged that potential stare decisis effects can be a sufficient basis for finding of impairment of interest." 103 F.3d at 1247 (citing *Linton v. Commissioner of Health & Env't*, 973 F.2d 1311, 1319 (6th Cir. 1992)). *See alsoJansen*, 904 F.2d at 342 ("We join other circuits in holding that the possibility of adverse stare decisis effects provides intervenors with sufficient interest to join an action.") (citations omitted).

In *Jansen*, the Sixth Circuit noted that if the proposed intervenors were not allowed to intervene, this would "impede [their] ability to enforce the provisions of the consent decree regarding hiring decisions, use of separate eligibility lists and maintenance of the minority composition goals." *Id*. at 342. Similarly, in this case, since the training programs at issue here are at the core of the consent decree in the GSA litigation, keeping movants out of this case would impede their ability to ensure that the trainings occur. And, unless movant Jane Doe is allowed to intervene, she will not be able to protect her interest in ensuring that her child has full access to a non-discriminatory school environment.

D. Inadequate Representation

To satisfy this last prong of the intervention as of right standard, a potential intervenor must show that the existing parties to the litigation will not adequately represent his or her interest, *see Michigan State AFL-CIO*, 103 F.3d at 1247, but the burden of proof is minimal, *see Jansen, 904* F.2d at 343. *See also Grutter*, 188 F.3d at 400. A showing of potential inadequate representation is sufficient. *Id.* "One is not required to show that the representation will in fact be inadequate. For example, it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Michigan State AFL-CIO*, 103 F.3d at 1247 (citations omitted).

In *Grutter*, the Sixth Circuit held that the potential intervenors, minority applicants to the University of Michigan, were not adequately represented by the University of Michigan in a challenge to their affirmative action program since the

University is unlikely to present certain pieces of evidence such as evidence of past discrimination by the University. 188 F.3d at 401.[2]

In *Jansen*, the court noted that the proposed intervenors were parties to the consent decree under challenge and the City entered into this consent decree only as a result of litigation. 904 F.2d at 343. "The [proposed intervenor] cannot be required to look for adequate representation to one who is his [or her] opponent . . ." *Id*. (citing 7C Charles Alan Wright, et al., *Federal Practice and Procedure*: Civil 2d § 1909 at 321-323 (1986)). The court noted that the City failed to rely on specific sections of the consent decree when filing its answer in the litigation and that the City was unlikely to admit to alleged violations of the consent decree in its defense even though these violations may be factually relevant. *Id*. "The City and the proposed intervenors agree that race-conscious hiring was authorized by the consent decree, but they differ regarding the rationale for such conclusion." *Id*. The court further noted that the City has an interest in protecting its role as employer and the proposed intervenors have an interest in enforcing the consent decree. *Id*. "These differences in interest pose more than a mere disagreement over litigation strategy." *Id* (citation omitted).

This case is similar to *Jansen* in that the GSA movants, like the proposed intervenors in *Jansen*, are parties to a consent decree entered into with the Board as a result of litigation. Hence, like the proposed intervenors in *Jansen,* if movants were to rely on the Board to represent their interests, they would be relying on an opponent. In addition, as in *Jansen*, the movants and the Board may take opposing points of view on

[2] The court in *Grutter* noted that some circuits impose upon potential intervenors a higher standard of proof of inadequate representation when the other party is a governmental entity. 188 F.3d at 400. The *Grutter* court held, however, that "this circuit has declined to endorse a higher standard for inadequacy when a governmental entity i[s] involved." *Id.*

relevant issues such as whether training under the consent decree is mandatory or what the trainings must cover. While the Board's interests may be served simply by finding an end to this dispute, without regard for how it is resolved, all of the movants share a separate interest in ensuring that the trainings are as effective as possible. Thus they should not be forced to rely upon the Board to protect their interests.

II. Permissive Intervention

Even if a party is denied the right to intervene as of right under FRCP 24(a), it can seek permissive intervention under FRCP 24 (b). To qualify for permissive intervention, a potential intervenor must, as with intervention of right, file its motion to intervene in a timely manner. *Michigan State AFL-CIO*, 103 F.3d at 1248; *Bradley,* 828 F.2d at 1193. In addition, the applicant for intervention must show that its claim shares at least one question of law or fact with the issues already under litigation. *Michigan State AFL-CIO*, 103 F.3d at 1248; *Bradley*, 828 F.2d at 1193. The Court must then decide within its discretion whether the motion to intervene will "unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* at 1194 (quoting *Meyer Goldberg, Inc v. Goldberg*, 717 F.2d 290, 294 (6th Cir. 1983)). *See also Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 161 (6th Cir. 1987); *Brewer v. Republican Steel Corp.*, 513 F.2d 1222, 1224-25 (6th Cir. 1975).

Even if movants are denied intervention as of right, they should be granted permissive intervention under Fed. R. Civ. P. 24(b)(2). Movants filed this motion in a timely manner. In addition, as parties to the consent decree requiring the training and anti-harassment policy under challenge, the movants seek to raise questions of law and

fact that are already part of this action. Finally, allowing intervention would cause no undue prejudice or delay for the original parties to this action.

CONCLUSION

For these reasons, the Court should grant movants' motion for intervention and allow the filing of their proposed answer in intervention.

Respectfully submitted,

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* Motion for Admission *Pro Hac Vice* pending.