STATE OF WISCONSIN DANE COUNTY CIRCUIT COURT
BRANCH 12

JODY HELGELAND, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF EMPLOYEE TRUST FUNDS, *et al.*,

Defendants.

Case No. 05-CV-1265

Hon. David T. Flanagan

PLAINTIFFS' BRIEF IN OPPOSITION TO THE WISCONSIN STATE SENATE AND ASSEMBLY'S MOTION TO INTERVENE

The Wisconsin State Senate and Assembly (collectively, the "Legislature") have moved to intervene in this action. The Legislature's motion to intervene misrepresents the nature of Plaintiffs' claims and, more fundamentally, misconceives the proper separation of powers under our system of government. While the Legislature asserts that "[t]his case involves a political battle that the Plaintiffs have brought to this Court under the guise of an equal protection claim," Intervenors' Br. at 10,[1] the Legislature has it backwards. This case involves the equal protection claims of eight Wisconsin state employees and their life partners. Plaintiffs seek this Court's assistance in determining whether denying them access to partner health care benefits and other work-related benefits offered to married state employees and their spouses violates the state constitution. There is nothing political about this so-called "battle"; it is a legal question.

[1] References to "Intervenors' Br." are to the "Brief of Wisconsin State Senate and Assembly in Support of Motion to Intervene as Defendants," filed June 8, 2005.

Further, the state statute denying such benefits to Plaintiffs is being vigorously defended by the Attorney General of the State of Wisconsin, the party charged under Wisconsin law with defending the constitutionality of all state statutes, and the Legislature's motion to intervene is plainly an effort to politicize plaintiffs' legal claims. For these reasons, as discussed more fully below, Plaintiffs respectfully submit that the Legislature's motion to intervene should be denied.

DISCUSSION

I. INTERVENTION AS OF RIGHT IS INAPPROPRIATE.

Under Wisconsin law, intervention as of right is appropriate upon timely motion, only where the "movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties." Wis. Stat. § 803.091(1). Here, Plaintiffs do not dispute that the Legislature's motion to intervene is timely. However, the motion must be denied because the Legislature cannot meet any of the remaining criteria.

A. The Legislature has no legally recognizable interest in the subject matter of this litigation.

Determining whether a proposed intervenor's interest relates to the transaction which is the subject of the action involves a "pragmatic approach," which is "'primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Armada Broadcasting, Inc. v. Stirn,* 183 Wis. 2d 463, 472, 516 N.W.2d 357 (1994) (citation omitted). Under this pragmatic approach, however, the interest sought to be advanced by intervention still must be legally protected. *See, e.g.*, *State ex rel.*

Bilder v. Township of Delevan, 112 Wis.2d 539, 547, 334 N.W.2d 252 (1983).[2] Intervention is appropriate only where the proposed intervenor has "'an interest of such direct and immediate character that the [prospective party] will either gain or lose by the direct operation of the judgment.'" *City of Madison v. WERC*, 2000 WI 39, ¶ 11, n.9, 234 Wis. 2d 550, n.9, 610 N.W.2d 94 (2000) (citation omitted). Here, the Legislature claims an interest in "defend[ing] [its] legislative prerogative to establish budgets and social policy." Intervenors' Br. at 3. While Plaintiffs do not doubt that the Legislature has a general interest in establishing the state budget and in setting social policy, this interest does not warrant intervention in this action.

First, the Legislature's abstract interest in the budgetary process is far too attenuated to justify intervention as of right. The Legislature has not and cannot cite any case to support its argument that hypothetical costs create an interest that may be protected by intervening in an on-going lawsuit. Notably, the few Wisconsin cases that do allow intervention by the legislature or individual legislators do so in the limited context of voting apportionment, in which the legislature obviously has a direct interest. *See e.g.*, *Jensen v. Wis. Elections Bd.*, 2002 WI 13, 249 Wis. 2d 706 (2002); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964); *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856 (E. D. Wis. 2001). There is also no limiting principle to the Legislature's argument. If its general interest in establishing the state budget is sufficient to allow intervention here, the Legislature would be entitled to intervene in any case that might possibly result in an increase in cost to the State, such as routine pension disputes involving state employees, contract disputes with businesses supplying products to a

[2] Relying on *Bilder*, the Legislature claims that "[a]n intervenor need not have a legally protectable interest in the proceedings in order to meet the 'interest' factor." Intervenors' Br. at 6. However, *Bilder* did not hold that the interest necessary for intervention need not be legally protectable. *See Bilder*, 112 Wis. 2d at 547 ("The question remains whether the newspapers' legally protected interest is sufficiently related to the transaction which is the subject of the action to justify the newspapers' intervention in this case as a matter of right."). Instead, the court found that the intervening newspapers' interest in access to a court file *was* legally protectable, and that intervention was appropriate because that interest was directly implicated by the defendant's efforts to seal the file in the on-going litigation. *See id.* at 547.

state agency, or even "slip and fall" tort cases on state property. Such an undifferentiated "interest" cannot be said to be "direct and immediate."

Second, while the Legislature may, as a general matter, have an interest in setting social policy for the State of Wisconsin, this action does not implicate that interest in any direct or immediate way. Plaintiffs seek a declaration that excluding domestic partners from the definition of dependants for purposes of certain employee benefits is unconstitutional. As the Legislature acknowledges, Intervenors' Br. at 1, it has had ample opportunity to address that issue legislatively. But, having failed to remedy the discrimination in Wisconsin law by providing equal employment benefits to all similarly situated state employees, the question is now a matter for the Courts to answer. The cases relied upon by the Legislature to support its contention that it is "entrusted in establishing public policy for the State," *see* Intervenors' Br. at 5-6, are thus inapposite because none of those cases found a constitutional violation. *See, e.*g., *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 545, 576 N.W.2d 245, 254 (1998) ("This court will not impose its independent view of public policy on duly enacted legislation absent a constitutional violation."). As discussed below, courts are fully competent to determine legal questions, and whether or not the current system of benefits is constitutional is a quintessentially legal issue.

Finally, although the Legislature attempts to couch its "interest" in terms of budgets and state policy, it is plain that its real interest is in opining on the legal issue in this case – whether the Wisconsin constitution prohibits the State as an employer from discriminating against gay and lesbian employees with respect to employment benefits. As discussed below, the Legislature's interest in that legal question is identical to the interest of the Defendants to this action, and does not warrant intervention.

B. Resolution of this litigation will not impair or impede the Legislature's ability to set the state budget or determine public policy.

Even if the interests set forth by the Legislature in support of its motion to intervene were legally sufficient, they are not impaired or impeded by this lawsuit. According to the Legislature, if Plaintiffs prevail, it will have no recourse other than to find a way to pay the costs associated with providing domestic partner health insurance. The Legislature also argues that judicial resolution of this matter will somehow usurp its ability to set policy for the State of Wisconsin. Neither of these contentions have merit.

As stated above, the Wisconsin Supreme Court has recently reiterated that intervention is appropriate only if "the intervenor will either gain or lose by the direct operation of the judgment." *City of Madison*, 2000 WI 39, ¶ 11 at n.9, 234 Wis. 2d at 557 n.9 (*quoting Lodge 78, Int'l Ass'n of Machinists v. Nickel,* 20 Wis. 2d 42, 46 (1963)). Here, neither of the interests asserted by the Legislature will be directly impaired by the operation of a judgment in this action.

A judgment in Plaintiffs' favor would not alter the Legislature's prerogative to set the state budget in any way. If the Court rules that Plaintiffs are entitled to domestic partner health insurance benefits because they are similarly situated to married state employees and their spouses, the Legislature will retain the ability to set the budget to accommodate any increase in cost. Within that budgetary authority, the Legislature has the ability to determine, for example, that the fiscal concerns ostensibly driving the Legislature's intervention efforts require modifying the benefits offered to all employees in some limited way. In other words, a judgment in this action requiring that Plaintiffs be treated identically to other similarly situated state employees will require the Legislature to treat Plaintiffs the same as other employees, but it will

not require that the Legislature offer or fund any particular set of benefits for all employees. Thus, it will have no direct or immediate impact on the Legislature's prerogative to set the budget.[3]

Citing *Phillips*, the Legislature also argues that judicial resolution of Plaintiffs' constitutional claims would "infringe [the Legislature's] policymaking authority." Intervenors' Br. at 7. This claim is meritless. The Court of Appeals stated in *dicta* in *Phillips v. Wisconsin Personnel Commission*, 167 Wis. 2d 205, 213 n.1 (Ct. App. 1992), that whether to extend certain employee benefits to "companions of unmarried state employees of whatever gender or sexual orientation . . . is a legislative decision, not one for the courts." However, the reference in *Phillips* to a "legislative decision" relates the court's concern about the judicial creation of a new system to administer domestic partner benefits. Since *Phillips* was decided, a state entity -- the University of Wisconsin system -- now has a system in place that provides certain domestic partner benefits to the partners of state employees. Accordingly, the concern expressed by the court in *Phillips* is inapposite here. More fundamentally, notwithstanding the *dicta* about "legislative decisions," the court in *Phillips* went on to consider the merits of the plaintiffs' statutory and constitutional claims. *See id.* at 215-27. Thus, *Phillips* does not bar to this Court's consideration of Plaintiffs' legal claims and offers no support for the Legislature's argument to intervene in this legal dispute.

In fact, the Iowa Supreme Court recently rejected a similar argument. *See Alons v. Iowa District Court in Woodbury County*, No. 03-1982, __ N.W.2d __, 2005 WL 1413164 (Iowa June 17, 2005). In *Alons*, a group of Iowa legislators represented by the Alliance Defense Fund sought certification to appeal the dissolution of a Vermont civil union by an Iowa district court.

[3] The lack of any real impact on the Legislature's interest in setting the state budget only highlights how attenuated this alleged interest is relative to this lawsuit.

The Iowa Supreme Court expressly rejected the legislators' argument that the lower court had "usurped the power properly belonging to the legislature," holding instead that "the district court was doing what judges do: interpreting the law concerning a case over which it had jurisdiction." *Id.* at * 12. As the court noted,

> It would be strange indeed and contrary to our notions of separation of powers if we were to recognize that legislators have standing to intervene in lawsuits just because they disagree with a court's interpretation of a statute. Generally, "in the absence of statutory directive, a legislator may sue only to challenge misconduct or illegality in the legislative process itself." *Nania v. Borges*, 551 A.2d 781, 785 (Conn. Super. Ct. 1988).

Id. (citations omitted). While *Alons* involved the interpretation of a statute, rather than the state constitution, the court's reasoning is equally applicable here. Indeed, the United States Supreme Court recognized over two hundred years ago that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *Accord Flynn*, 216 Wis. 2d at 544 ("since *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803) courts have had the authority to review acts of the legislature for any conflict with the constitution"). There is thus no showing that adjudicating Plaintiffs' claims in this action would impair or impede the Legislature's authority to set policy within the long-recognized constraints of our divided system of government.

C. The Attorney General is vigorously defending the lawsuit, and any interest the Legislature has in the outcome of this action is more than adequately represented by the existing Defendants.

Finally, intervention should be denied where the existing parties fully represent the proposed intervenor's interest. "Ordinarily a party's representation is deemed adequate to protect the proposed intervenor's interest if there is no showing of collusion between the representative and the opposing party; if the representative does not represent an interest adverse to that of the movant; and if the representative does not fail in the fulfillment of its duty."

Sewerage Comm'n of Milwaukee v. State Dep't of Natural Resources, 104 Wis. 2d 182, 189 (Ct. App. 1981) (citation omitted).

Defendants have answered Plaintiffs' complaint, and deny any constitutional obligation to offer domestic partner benefits to state employees with same-sex partners. This is the same position that the Legislature wishes to argue to this Court, and this identity of interest is a sufficient basis to deny the Legislature's motion. *See Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App. 221, ¶ 24, 247 Wis. 2d 708, 725 (Ct. App. 2001) ("If there is already a party in the case making the same claim a proposed intervenor wishes to assert, the trial court would be justified in denying the motion to intervene unless the existing parties were not adequately representing the claim."). Further, there is no merit to the Legislature's unsupported suggestion that the Attorney General will not adequately defend the state statutes at issue here.

Although the Legislature recognizes that there is a presumption that "the Attorney General will fulfill her duty of defending the constitutionality of the statutes at issue," Intervenors' Br. at 8, the Legislature claims that there is an "adversity of interest" because (1) the Governor and the Attorney General allegedly have indicated support for providing domestic partner benefits in the past, and (2) a spokesperson for the Attorney General was quoted by a reporter as stating that this issue is "a matter best left up to the courts." *Id.* at 7-8.[4] This "evidence," however, falls far short of overcoming the presumption that the Defendants – the state entities responsible for administering state employee benefit plans – and the Attorney General – who is statutorily charged with defending the constitutionality of the laws of Wisconsin – will fully represent the State's interest in this action.

[4] Because, as discussed above, this is a legal matter, suggesting that resolution of a constitutional question is a matter for the courts cannot be taken as evidence of a position on the merits of Plaintiffs' claims.

Courts have long recognized that the Attorney General has a particular obligation to defend the laws of the state against constitutional challenge. In *White House Milk Co. v. Thomson*, 275 Wis. 243, 81 N.W.2d 725 (1957), a group of milk producers sought to intervene in a lawsuit brought by milk purchasers challenging a Wisconsin law regulating the price of dairy products. The lawsuit was defended by the attorney general. *Id.* at 246-47. The intervening milk producers argued that intervention was necessary because the attorney general had previously written a letter expressing his view that the statute was unconstitutional and declining to prosecute an alleged violation of the statute. *Id.* at 249-50. This showed, they argued, that he could not fairly represent their interest in upholding the statute. *Id.* The court rejected this argument:

> Public officers are always presumed, in the absence of any showing to the contrary, to be ready and willing to perform their duty; and until it is made to appear that they have refused to do so, or have neglected to act under circumstances rendering this equivalent to a refusal, there is no occasion for the intervention of the citizen for the protection of himself and others similarly situated.
>
> This court cannot assume, because the attorney general nearly six years ago expressed a doubt as to the constitutionality of [the law], and at that time declined to institute a prosecution under such statute, that he will not at this time properly and diligently defend the action. Likewise, we cannot conceive of the attorney general failing to perform his duty of appealing, if the trial court should adjudge [the law] unconstitutional. The issue of the validity of such statute is of such statewide concern that he would be derelict in his duty if he did not appeal an adverse judgment. We must presume that he will perform his duty until such time as we are presented with convincing evidence to the contrary.

Id. at 250. As the court observed, "it is [the Attorney General's] duty to uphold the constitutionality of the attacked statute. In so doing he is acting in a representative capacity in behalf of all the people of the state . . . ." *Id.* at 247.

Courts have also recognized that "[t]he general notion that the Attorney General represents 'broader' interests at some abstract level is not enough" to warrant intervention. *Daggett v. Comm'n on Gov't Ethics and Elec. Practices*, 172 F.3d 104, 112 (1st Cir. 1999) (citations omitted).[5] Here, the Legislature argues, citing *Daggett*, that the presumption that the defendants will adequately represent their interest should apply only when the goals of the intervenor and the defendants are the same. *See* Intervenors' Br. at 9, n.5. However, *Daggett* held that "[w]here the party seeking to intervene has the same *ultimate* goal as a party already in the suit, courts have applied a presumption of adequate representation." 172 F.3d at 112 (emphasis added) (quoting *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir.1979)). Defendants and the Legislature share the same ultimate goal: upholding the constitutionality of current Wisconsin law. Because the Legislature's interest does not diverge from that of Defendants, there is no basis for intervention. *See, e.g.*, *Delaware Valley Citizens' Council For Clean Air v. Commonwealth of Pennsylvania,* 674 F.2d 970, 974 (3d Cir. 1982) (denying state legislators motions to intervene on grounds that there was "no divergence between [the legislators'] position and the position of the Commonwealth....").

In summary, the Legislature is not entitled to intervention as of right where, as here, its interest is attenuated, and, more fundamentally, there has been absolutely no showing that the Attorney General, on behalf of Defendants, will not defend the constitutionality of current Wisconsin law.

[5] "Because Wis. Stat. § 803.09 is based upon Fed. R. Civ. Pro. 24, [the Court] may look for guidance at case law and commentary regarding motions to intervene in federal court." *Roth v. La Farge School Dist. Bd. of Canvassers*, 2001 WI App. 221, ¶ 20, 247 Wis. 2d 708, 722 (Ct. App. 2001).

II. PERMISSIVE INTERVENTION IS ALSO INAPPROPRIATE WHERE THE INTERVENORS' INTEREST IN THE PROCEEDINGS IS ALREADY PROTECTED BY THE NAMED DEFENDANTS.

Alternatively, the Legislature claims that even if it is not entitled to intervention as of right, this Court should grant it permissive intervention. This argument too should be rejected.

Permissive intervention is appropriate where the "movant's claim or defense and the main action have a question of law or fact in common." Wis. Stat. § 803.09(2). The Legislature contends that there are "[c]ommon questions of law and fact at issue in the main action and that will be addressed by the Legislature." Intervenors' Br. at 9. Notably, the Legislature does not and cannot articulate any independent "claim or defense" that relates to this action. In fact, it has no claim or defense separate from that which is already being fully represented by Defendants, namely, upholding the constitutionality of the Wisconsin statutes defining dependant for purposes of employee benefits. "Where the proposed intervenor merely underlines issues of law already raised by the primary parties, permissive intervention is rarely appropriate." *United States v. Am. Institute of Real Estate Appraisers*, 442 F. Supp. 1072, 1083 (N.D. Ill. 1977); *see also Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 573 (8th Cir. 1998) (denying intervention where the intervenors' "proposed answer to the complaint did not raise any claim or defense that was different from those of the existing parties."); *Hallco Mfg. Co. v. Quaeck*, 161 F.R.D. 98, 103 (D. Or. 1995) ("Where proposed intervenors would present no new questions to the court, a motion for permissive intervention is properly denied.") (*citing Oregon Envtl. Council v. Oregon Dep't of Envtl. Quality*, 775 F. Supp. 353 (D. Or. 1991)).[6]

[6] To the extent that the Legislature wishes to raise legal arguments, it could be permitted to file an amicus brief. *See, e.g.*, *Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984) ("Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.").

Permissive intervention also should be denied where, as here, the addition of the intervenors would result in delay. *See* Wis. Stat. § 803.09(2). ("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."). Allowing the Legislature to intervene necessarily will cause delay because "[a]dditional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, briefs, arguments, motions and the like which tend to make the proceedings a Donnybrook Fair." *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc*., 51 F. Supp. 972, 973 (D. Mass. 1943). Additional delay is particularly inappropriate here because resolution of the legal issues in this case is of vital importance to Plaintiff state employees and their Plaintiff life partners, many of whom are living without necessary healthcare. "[W]here, as here, the interests of the applicant in every manner match those of an existing party and the party's representation is deemed adequate, the district court is well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous and that *any* resulting delay would be 'undue.'" *Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982) (emphasis added); *accord Maine v. Norton*, 203 F.R.D. 22, 25 (D. Me. 2001) ("adding another party to the case to assert the same arguments would only result in delay and complication of the proceedings without serving to advance additional rights").

Thus, for the same reasons that the Legislature is not entitled to intervention as of right, its request for permissive intervention should be rejected. *See California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986) ("given our conclusion that [the proposed intervenor's] interests are adequately represented by existing parties, we cannot say that the district court abused its discretion in concluding that . . . intervention would be redundant and

would impair the efficiency of the litigation."); *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.").

CONCLUSION

This lawsuit involves the equal protection claims of eight Wisconsin state employees and their partners. Defending this action are the state entities charged with administering employee benefits for state employees, represented by the Attorney General. Because the Legislature has offered no interests that suffice to justify intervention in this action or that would be directly impaired by a judgment in this action, and because there has been no showing that the Attorney General, who shares the ultimate goal of the Legislature, will not adequately advocate for that goal, Plaintiffs respectfully request that this Court deny the Legislature's motion to intervene.

Respectfully submitted,

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