STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | DANE COUNTY

J. B. VAN HOLLEN,

Plaintiff,

v.

Case No. 08-CV-4085

GOVERNMENT ACCOUNTABILITY BOARD, et al.,

Defendants.

ATTORNEY GENERAL J. B. VAN HOLLEN'S OMNIBUS RESPONSE TO MOTIONS FOR INTERVENTION

Plaintiff J. B. Van Hollen, acting in his official capacity as Attorney General of the State of Wisconsin, opposes the following motions to intervene that have been filed in this action:

Motion by the Democratic Party of Wisconsin to Intervene

Motion to Intervene filed by Madison Teachers, Inc., American Federation of Teachers-Wisconsin and Madison Firefighters Local 311

The basis for opposing these motions is set forth below.

This lawsuit is between the Attorney General and a group of public defendants charged with enforcing the state's election's laws. Simply put, the issue is whether Defendants are excused from complying with the minimum requirements of the Help America Vote Act of 2002 ("HAVA") for voter registration applications received prior to August 6, 2008. Under Wisconsin law, the Defendants are obligated to ensure that Wisconsin remains in compliance with all election laws, both state and federal. Wis. Stat. § 5.05. The Attorney General, on the other hand, has the statutory authority to commence legal action to compel compliance with the election laws, including compliance with Wis. Stat. § 5.05. *See* Wis. Stat. § 5.07.

As an initial matter, a party seeking to intervene must do so as a party plaintiff or defendant. However, when a state officer charged with enforcing the law sues a state agency for failing to carry out its own legal obligations, private political interests have no role. They can't intervene as a plaintiff or defendant because they don't have the same statutory rights and obligations as the governmental interests.

The Attorney General does not believe that political concerns should be brought to bear on this case. The law should guide the court without input on how its decision might help or hinder the political objectives of partisan interests. "As United States Supreme Court Chief Justice John Roberts has stated, a judge's job is like an umpire's, 'to call balls and strikes and not to pitch or bat,' to make calls according to the rules, not according to the voices of a partisan crowd." *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 17, 307 Wis. 2d 1, 745 N.W.2d 1. Because the proposed interveners represent political or partisan interests, their involvement would simply do nothing but distract the court from the task at hand.

DISCUSSION

Intervention is governed by Wis. Stat. § 803.09. Under that provision, intervention may be allowed as a matter of right or, in the court's discretion, permissively. As the Wisconsin Supreme Court has stated:

> Broadly speaking, a court determines whether an outside entity should intervene in or join an existing lawsuit by striking a balance between allowing the original parties to a lawsuit to conduct and conclude their own lawsuit and allowing others to join a lawsuit in the interest of the speedy and economical resolution of a controversy without rendering the lawsuit fruitlessly complex or unending. Whether to order intervention or joinder turns on judgment calls and fact assessments.

Helgeland, 307 Wis. 2d 1, ¶ 6. In the present case, this balance must be struck so that a prompt resolution between the existing parties can be achieved.

I. THERE IS NO RIGHT TO INTERVENE.

A right to intervene is established only if a movant can establish that: (a) the motion is timely; (b) the movant's interests are sufficiently related to the subject of the action; (c) disposition of the action may harm the movant's ability to protect that interest; and (d) the existing parties do not adequately represent the movant's interest. *Helgeland*, 307 Wis.2d 1, ¶ 38. Although the movants may have, arguably, proceeded in a timely fashion, none of the other elements are established.

As for element (b), movants claim they have an interest in this case because their members vote and, if HAVA is enforced, some members might be inconvenienced on election day. There is no credible argument, however, that any eligible voter who complies with the law can be or will be kept from casting a ballot. The question of whether voting will be convenient enough or easy enough is not before this court. The requirements to vote have already been established by Congress and the Wisconsin Legislature and no challenge has been raised as to the validity of any statute.

If, as it appears, these movants are claiming an interest in avoiding the applicable legal requirements to cast a vote—including any requirements that might be viewed as inconvenient—they have no legally protected interest and no right to intervene. Even if an individual's right to vote in federal elections were at issue in this case, the only possible interest of the movants would be the right to vote, in accordance with applicable laws.

Moreover, under element (c) disposition of this action will not, and cannot impair any interest in the right to vote for one simple reason: The Attorney General is merely asking Defendants to comply with the minimum requirements of applicable law in a uniform and non-discriminatory manner.

As for the final element of intervention by right, movants also fail. Any legitimate interest in this lawsuit is well-represented. It is true that the Attorney General refuses to carry the water of any outside interest and will not pursue this action with the best interests of any intervener in mind. The Defendants are likewise obligated to carry out their official duties without regard to the particular interests or leanings of any private interest. However, this independence does not mean that the legally protected interests of the movants will be unrepresented. In fact, it is because the parties have public responsibility for enforcing the election laws that the movants' interests are adequately represented. As stated in *Helgeland*, "if a party is charged by law with representing the movant's interest, a ***compelling showing*** should be required to demonstrate that the representation is not adequate." 307 Wis. 2d 1, ¶ 86 (emphasis added).

The *Helgeland* case is directly on point. In that action, the Court held that the Attorney General adequately represented the interests of the proposed intervenors because of the responsibilities imposed on that office by law. The proposed intervenors argued that the Attorney General could not represent their interests because of her personal views on the issue. This argument was rejected:

> In the absence of any showing to the contrary, we must presume that [Attorney General] Lautenschlager has fulfilled her duty as attorney general to put aside her personal and political beliefs in defending against Helgeland's action attacking the constitutionality of a statute. An attorney general's statements of personal or political beliefs, without more, do not constitute a showing that the attorney general will violate the statutory duties of the office.

307 Wis. 2d 1, ¶ 95. In the present case, there is an even stronger reason to deny intervention because public officials on both sides of the lawsuit are charged with protecting the legitimate interests of Wisconsin's voters.

Again, the only legitimate interest the movants can possibly assert is the right of their members to vote in accordance with existing law. That interest is well-represented in this action. If the movants' concern is that compliance with the law is burdensome or inconvenient, their remedy must come through Congress and the Wisconsin Legislature, not this court.

In determining whether intervention is required, it is also proper to consider whether the asserted interest is somehow unique or special. *Helgeland*, 307 Wis. 2d 1, ¶ 71. In this case, any interest of voters in a political party or union is the same as that of any other voter. In *Helgeland*, the original action involved a constitutional action by state employees who claimed that health benefits were improperly denied to same-sex partners. A group of municipalities and others who also paid health benefits sought to intervene in the action. In denying intervention as a matter of right, the Court stated:

> [T]he municipalities' interest in the present case is not a unique or special interest but rather, as Justice Butler's concurrence demonstrates, one that other municipalities or other entities or individuals could claim in almost any action challenging the constitutionality of a state statute, or that any employer could claim when an action before a court affects a similar contract or threatens to increase costs that employers are obligated to pay on behalf of their employees.

The same is true in the present case. Conceivably, every organization and every adult individual has an interest in seeing that the right to vote in federal elections, as defined by applicable law, is protected. Neither Democrats nor Republicans, labor nor management, or any other interest has any greater right than any other. Thus, if one political party or special interest organization were permitted to intervene, the court would, as a practical matter, be required to allow anyone and everyone to intervene.

The current parties to this action have the ability, the motivation and perhaps even a legal duty to develop and present the opposing arguments on the minimum requirements imposed by the Help American Vote Act of 2002 ("HAVA") and on the issue of whether Wisconsin is required to

treat all voter registrations received after January 1, 2006, in a uniform and non-discriminatory manner. Under the circumstances, the Court can trust that all issues will be fully aired and that it will receive all the input it needs to make an informed judgment without adding additional parties. Outside input from private interests can do nothing but cause delay, confusion and distraction.

II. DISCRETIONARY INTERVENTION IS NOT APPROPRIATE.

Permissive intervention is governed by Wis. Stat. § 803.09(2), which gives the court discretion to grant a timely motion to intervene when "a movant's claim or defense and the main action have a question of law or fact in common." The rules also provides, however, that "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Wis. Stat. § 803.09(2).

The Attorney General does not dispute that the movants want to address a common issue. However, intervention will clearly cause delay and confusion and can only serve to prejudice the parties and the public. Even if the movants agree to an expedited schedule, additional parties and additional attorneys can only mean more filings, more motions, more argument and more of everything else that a lawsuit entails.

The parties and the public have a right to the prompt resolution of this action. If additional work is required of the Defendants and local election officials, they need to know as early as possible. If the non-compliant status quo is to be maintained, the parties and the public also have a right to know as soon as possible before the election.

There have been suggestions that compliance with HAVA will cause confusion and delay on election day. While the Attorney General disagrees, the best way to deal with this concern is to resolve the issues as soon as possible.

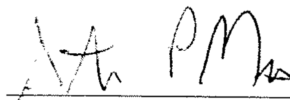
Finally, Defendants have suggested that the Attorney General delayed bringing this lawsuit and, as such, should not be entitled to demand expedited proceedings. Nothing could be further from the truth. It was not until early to mid-August that the Defendants declared their intent to disregard HAVA's requirements for voter registrations received before August 6, 2008. At that point the Attorney General promptly contacted Defendants to urge compliance with the law. In a letter dated August 28, 2008, Defendants refused. (Complaint, ¶ 32.) It was only then that a decision to seek court intervention was reached.

CONCLUSION

Movants have shown no right to intervene. Their involvement would be counterproductive and contrary to the interests of the current parties and the public. Accordingly, intervention must be denied. However, if intervention is allowed, the court should permit broad intervention on both sides of the issues and should not let the addition of more parties delay a prompt resolution.

Dated this 19th day of September, 2008.

J. B. VAN HOLLEN
Attorney General



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