IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WISCONSIN DEPARTMENT OF CORRECTIONS,

OPINION AND ORDER

Plaintiff,

03-C-0710-C

v.

ROGER LUDER, GARTH ANACKER, JAMES ARMSON, WILLIAM ARVIDSON, RAYMOND BANDEKO, JR., BRYON BASS, VICTORIA BASS, DANIEL BAVINCK, RANDALL BECKER, JOHN BELL, LEONARD BELOW, RAYMOND BERGLUND, KEITH BLOSS, TREVOR BOARDMAN, MARY BOBIAK, BRIAN BONOVETZ, KENNETH BORTZ, JR., ROGER BRICKNER, CHRISTINE BROOKS, PATRICK BURROUGHS, TODD CALKINS, JUDY CIMAROLI, DOUGLAS CRARY, JUDITH DELFRATE, CURTIS DELONG, ROBERTA DEVRIES, DANA DITTBERNER, DANIEL DITTBERNER, DONALD DITTBERNER, DAVID DOLAJECK, RICHARD DOLAJECK, RAYMOND DOUCETTE, SCOTT DROSTE, RICHARD DYKSTRA, RICHARD ELLET, DAVID EWING, GARY FULMER, RUSSELL GRAACK, WILLIAM GRAHAM, WILLIAM GREENE, DENNIS D. HAZEL, RICHARD HELLEY, DONALD HENDRICKSON, TIMOTHY HIGBEE, LINDA HINICKLE, MATTHEW HINZE, LINDA HODGKINS, JEFFERY HOFFMAN, MARK HOLDEN, JOHN HOLTON, MARK

ISAACSON, TIMOTHY JACKSON, DAVID JAMES, DALE
JARVI, DENNIS JOHNSON, CHARLES
JONES, PATRICIA JONES, CHARLES KALINA, STEPHEN
KAMINSKI, RONALD KAST, WESLEY KATSMA,
ANTHONY KAVCICH, DENNIS KERL,
NEIL KNAPTON, RODNEY LABLANC,
TERRY LEEGE, DAVID LEHMAN, ROBERT LETTMAN,
CAROL LUETKENS, JAMES LUETKENS,
CHARLES LULLING, STAN MADAY,
BRIAN MARTIN, ROBERT MAWBEY, PATRICK MAY,
DENNIS MAYS, JR., WILLIAM MEILLER, SHERRY
MIKULAK, RAYMOND MILLONIG, JR., ROBERT
MORRIN, TERESA MUELLER, ROBERT MUNRO, LESTER
NEUMAN, JON PATZLSBERGER,
DALE PAUL, DEBORAH PERO, CHRISTIAN
PETERSEN, LEE PILLSBURY, BLAINE PONKOW,
ROSS POPE, ALAN PULVER,
ALAN RHODE, MICHAEL RICKEY, JOHN
ROUGHT, KALLY RYAN, ROY SALZWEDEL,
CHRISTOPHER SAVIANO, JOHN SAWYER, JR.,
HAROLD SCHMIDT, RAYE SCHNELLER,
DAVID SCHUBRING, STEVEN SEVERSON,
JOHN SHIMPACH, JENNIFER SICKINGER,
MICHAEL SLANEY, JAMES SLOVIK, FRANK SMILEY, JR.,
RICHARD SOLIS, WAYNE STEINER,
JAMES STONE, RON SWENSON, BRIAN T. SYNNOTT,
DANIEL TETZLAFF, RONALD TETZLAFF,
TERRY TETZLAFF, JOHN THALACKER,
MAURY THILL, RORY THOMAS,
VICTOR TRIMBLE, PETER WALKER,
SUSAN WALL, TODD WANTA, DAVID WARNKE,
CHRISTINA WECH, DANIEL WECH, RICHARD
WECH, JOHN WHYTE, and PETER WIGGLESWORTH,

Defendants.

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Plaintiff Wisconsin Department of Corrections filed this suit in December 2003, seeking a permanent injunction against defendants (employees of the department) restraining them from pursuing a case in state court against the department for overtime pay that they contend was wrongfully withheld from them. The case is before the court on plaintiff's motion for a preliminary injunction staying all further proceedings in the state court case until this court has had an opportunity to rule on the motion for a permanent injunction.

For the sole purpose of deciding the pending motion, I find the following facts.

FACTS

Plaintiff Wisconsin Department of Corrections is an agency of the state of Wisconsin. Defendants are employees of plaintiff. On July 23, 1999, defendants sued Jeffrey Endicott and others, all supervisory employees of plaintiff, in the Circuit Court for Dane County, Wisconsin. Defendant employees sought overtime pay under the Fair Labor Standards Act; they did not file any claim for the pay under state law. Endicott and the other named defendants removed the state court case to this court and moved to dismiss the claims. After I denied their motion to dismiss in part, they appealed to the Court of Appeals for the Seventh Circuit, which held that the suit against them was barred by the Eleventh Amendment and remanded the case to this court for dismissal with prejudice. Luder v.

Endicott, 253 F.3d 1020 (7th Cir. 2001).

On February 23, 2000, while the 1999 federal suit was pending, the current defendants (and others who have since withdrawn from the suit) filed another suit against the department in the Circuit Court for Dane County, asserting a claim for overtime pay under state law. They asked the state court to stay proceedings until the Supreme Court of Wisconsin had decided the viability of their state law claims. (Presumably, the parties mean that the state supreme court was deciding the viability of claims like theirs in a similar case; they do not say.) When the supreme court found the claims viable, defendant employees asked the circuit court for another stay pending the outcome of the appeal of the federal case in the court of appeals.

On August 7, 2001, plaintiff department wrote to the state circuit court, arguing that the claim preclusion effects of the federal judgment barred the state suit. On November 14, 2002, the state circuit court held that claim preclusion barred the employees from pursuing their overtime pay claim in state court. The court entered judgment for the department. On December 27, 2002, the circuit court reconsidered its November 14 decision, concluding that the Seventh Circuit had not made a decision on the merits when it held the federal suit barred by the Eleventh Amendment. Plaintiff department sought a supervisory writ from the Wisconsin Court of Appeals, which denied the application on the ground that plaintiff department had not shown a clear legal right to the writ. Plaintiff filed a petition for a

supervisory writ with the Supreme Court of Wisconsin; the court denied the petition on July 9, 2003. The circuit court has set the state case for trial starting April 26, 2004.

OPINION

Defendants contend that plaintiff is not entitled to the injunctive relief it seeks because principles of issue preclusion and the Full Faith and Credit Act, 28 U.S.C. § 1738, prevent plaintiff from litigating in federal court its claim that the state court is barred from proceeding on defendants' suit; plaintiff is barred by the doctrine of laches from litigating this issue so many years after it learned of the federal court's decision that the federal claims are barred by the Eleventh Amendment; plaintiff has not shown the existence of "the most extraordinary circumstances" that would justify the issuance of an injunction, see Ramsden v. Agribank, FCB, 214 F.3d 865 (7th Cir. 2000); the court has a duty to refrain from issuing an injunction under the principles of comity; and plaintiff has failed to show that it has a reasonable probability of success on the merits of its claim preclusion argument. Plaintiff disputes the legal and factual basis for each of defendants' contentions.

Because the Ramsden case is central to most of defendants' arguments, I will start with it. Ramsden was a state court case brought by the purchasers of a farm against the seller and others. The purchasers contended that the seller had failed to tell them that the farm water was contaminated with benzene and that they had been injured when the

benzene contamination caused them cancer and led to the death of their cattle. The case was removed to federal court and the parties conducted discovery. Shortly before the date set for trial, defendants moved for dismissal of the case on the ground that plaintiffs lacked any admissible evidentiary support for their claim that the benzene contamination had caused their own health problems and those of their livestock. When defendants' motion was granted, plaintiffs resumed prosecution of an action they had brought originally in a second state court. (This case had been quiescent, pending resolution of the Ramsdens' appeal of the state court's decision to dismiss one of the defendants; when the state court of appeals overturned the dismissal, it was remanded to the state court for further proceedings.) Defendants moved for dismissal of the state court suit on the ground of claim and issue preclusion; the state court denied the motion, finding that although the elements of claim preclusion were present, principles of fairness and equity barred application of the doctrine to the state court action.

Defendants returned to federal court, seeking and obtaining an injunction against further proceedings in the state court; plaintiffs appealed and were successful in persuading the Court of Appeals for the Seventh Circuit that comity concerns made the issuance of a federal injunction improper. The court of appeals conceded that the state court's determination of the claim preclusion issue was not sufficiently "final" to have preclusive effect in another court of the same state, cf. Parsons Steel, Inc. v. First Alabama Bank, 474

U.S. 518, 524-25 (1986) (holding that federal court is bound by state court determination of claim preclusion defense that is sufficiently final to bind another court in the same state). Nevertheless, it concluded, even when a court has the statutory power to enjoin a state court proceeding, it should not exercise that authority when the state court has "expressly and unambiguously" decided a claim preclusion defense, Ramsden, 214 F.3d at 871, absent a showing of extraordinary circumstances, id. at 872, which must be something more than the cost and inconvenience of a second proceeding. The court added that the defendants were not stripped of a remedy: they might have been able to demonstrate extraordinary circumstances and they might still have an opportunity to appeal the state trial court's decision up through the state's appeals process. Id.

The initial question is whether Ramsden applies to plaintiff. Plaintiff contends that it does not and that the court need not even consider its applicability. Plaintiff starts out by suggesting that as an arm of the state, it may not even be covered by the terms of the Anti-Injunction Act, 28 U.S.C. § 2283, which generally prohibits federal courts from enjoining state court proceedings. Plaintiff extrapolates this position from Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957), a case in which the Supreme Court held that the Act did not apply to the United States. "The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that

we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone." Id. at 226.

It is difficult to see how Leiter Minerals supports plaintiff's position. The holding is not as wide ranging as plaintiff suggests. Leiter Minerals does not stand for the proposition that federal courts are authorized to enjoin any action involving or affecting the federal government; rather, it is limited to cases in which there is a risk of impairment of the rights of the United States or a sacrifice of its proper dignity as sovereign. Id. at 227 (explaining why Court had ruled in United States v. Bank of New York & Trust Co., 296 U.S. 463 (1936), that district court had acted properly in denying government's request for injunction against distribution of funds held in custody of state court in connection with liquidation of three Russian insurance companies whose funds government claimed by assignment). More important, the federal and state governments do not have the same sovereign interests in all situations. The interest of a *state* governmental entity in avoiding state court proceedings is entirely different from the interest of a *federal* governmental entity in avoiding state court proceedings.

The Anti-Injunction Act was enacted to avoid unnecessary conflict between state and federal court systems, not to protect state governments from litigating in their own courts. Therefore, it is not surprising that plaintiff has found no cases in which a court has held that the Act does not apply to state governments.

Conceding that the court is not likely to adopt its position on the applicability of the Act to state governments, plaintiff argues that this court is not bound by the same comity concerns that led the court of appeals to hold in Ramsden that federal courts should refrain from enjoining the relitigation of cases in state court if a state court has rejected a claim preclusion defense. First, plaintiff is a state entity and not a private party; second, plaintiff has exhausted all of its state appellate avenues, unlike the defendants in Ramsden; and third, plaintiff will be able to establish the kind of extraordinary circumstances that the court of appeals said might outweigh the normal comity concerns. None of these arguments is persuasive.

There is no obvious reason why a federal court should not consider comity concerns when the party moving for an injunction is a state government. The *comity* at issue is that between the federal and state *courts,* not between the federal court and the state government. If anything, the implied insult to the state court would be greater if the federal court were to agree with the state government that the state court could not fairly decide matters relating to its own state government.

Although plaintiff contends that it has exhausted its state court remedies, all it has exhausted are the avenues open to it before trial. The Wisconsin Court of Appeals and the Supreme Court of Wisconsin have held only that plaintiff is not entitled to a supervisory writ, not that they agree with the circuit court's decision. Furthermore, although it is not

entirely clear from Ramsden, it is unlikely that the court of appeals meant to say that if a party appealed a state trial court ruling on claim preclusion unsuccessfully to the highest court in the state, it would then be entitled to an injunction against state court proceedings. Such a reading would be at odds with the court's quotation of the language in Parsons Steel, 474 U.S. at 524-25, to the effect that even a mistaken rejection of a res judicata defense by the state court does not justify "the highly intrusive remedy of a federal court injunction against the enforcement of the state-court judgment," and "inefficient simultaneous litigation in state and federal courts on the same issue" is "one of the costs of our federal system."

Finally, the only "extraordinary circumstances" that plaintiff can cite are the ordinary, predictable costs and inconveniences of litigation. Plaintiff contends that litigation involving large numbers of correctional officers poses a security risk if officers must be away from their posts at the state's correctional institutions for significant periods of time. Plaintiff alleges that to date, the state court has shown no consideration for this risk or given plaintiff any leeway in its pretrial preparation. Whether this is true or not, it does not follow that the court will not accommodate plaintiff's legitimate concerns about institutional safety. It is not likely that the state courts are any less sensitive than the federal courts to potential risks to the safety and well-being of the inmates and employees of the state prisons.

To succeed on a motion for a preliminary injunction, a movant must make an initial showing that it has a likelihood of success, no adequate remedy at law and the prospect of

suffering irreparable harm if the injunction does not issue. Hodgkins ex re. Hodgkins v. Peterson, No. 01-4115, 2004 WL 99028 (7th Cir. Jan. 22, 2004). Once the movant has made this showing, the court must balance the harm that the non-moving party will suffer if the injunction is granted against the harm the movant will suffer if the injunction is withheld. Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 895 (7th Cir. 2001). The first showing is the crucial one; if a movant cannot show even a negligible chance of success, a court need not consider the other factors. Id. at 896-97. For the reasons set out above, I cannot find that plaintiff can make even this minimal showing. Therefore, I will deny its motion for a preliminary injunction without examining the other factors. In view of this conclusion, it is unnecessary to discuss plaintiff's contention that the state court erred in characterizing the decision of the Court of Appeals for the Seventh Circuit as a decision based on lack of jurisdiction rather than as a decision on the merits of the employees' claims against the Department of Corrections, defendants' contention that plaintiff's motion for injunctive relief is barred by the doctrine of laches and whether the state court decisions denying plaintiff's motion for dismissal of the state court action on claim preclusion grounds have preclusive effect upon this court.

ORDER

IT IS ORDERED that plaintiff Wisconsin Department of Corrections' motion for a

preliminary injunction staying state court proceedings in a case brought against the department by certain of its employees, Luder v. Wisconsin Department of Corrections, Dane Cty. No. 00CV0502, is DENIED.

Entered this 13th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge