

**IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO**

THOMAS E. BRINKMAN, JR.	:	
3215 Hardisty Avenue	:	
Cincinnati, Ohio 45208,	:	
	:	
Plaintiff,	:	
	:	Case No. CV 2005 11 3736
v.	:	
	:	
MIAMI UNIVERSITY, et al.	:	Judge Pater
501 E. High Street	:	
Oxford, Ohio 45056, et al.,	:	
	:	
Defendants.	:	
	:	

**MEMORANDUM IN SUPPORT
OF MOTION TO INTERVENE**

Jean Lynch, Helenka Marculewicz, Yvonne Keller and Susan Gray (collectively, “Intervenors”), have moved this Court, pursuant to Rule 24 of the Ohio Rules of Civil Procedure, for leave to intervene and to file the attached Answer and Defenses In Intervention. In support of their motion, Intervenors state as follows:

I. INTRODUCTION

Plaintiff’s Complaint aims to invalidate and enjoin the provision of certain health care benefits to employees of Miami University for coverage of their same-sex domestic partners. Plaintiff sues Miami University and its President and Trustees as Defendants (“University defendants”). Unlike the University defendants, Intervenors have a personal stake in this litigation, which directly threatens their economic security, their family health, and the terms and conditions of their employment. Intervenors are University Professor Jean Lynch and her domestic partner Helenka Marculewicz, and Visiting Professor Yvonne Keller and her domestic

partner Susan Gray. Intervenors stand to lose medical and dental coverage to which Professor Lynch is entitled for the benefit of Ms. Marculewicz and to which Professor Keller is entitled for the benefit of Ms. Gray and their second child. Plaintiff's Complaint, if successful, would eliminate these benefits, which are contractual rights and property interests held by Intervenors. Plaintiff seeks a declaratory judgment that the policy which makes Intervenors eligible to receive benefits from Miami University is unconstitutional. Moreover, Plaintiff requests that this Court enjoin Miami University from continuing to offer the benefits upon which Intervenors currently rely for their family medical and dental care.

Intervenors have a right to intervene in this action as defendants for two reasons. *First*, the Declaratory Judgments Act provides that where, as here, a declaratory judgment action is pending, all parties who claim an interest that would be affected by the declaration *shall* be made parties to the action. Here, the declaratory relief sought in Plaintiff's Complaint would invalidate the health care coverage to which Intervenors are currently entitled. Rule 24(A)(1) of the Ohio Rules of Civil Procedure provides that, when another Ohio statute gives a party an unconditional right to intervene, that party may intervene as of right. Thus, Intervenors are proper parties to this litigation.

Second, Rule 24(A)(2) of the Ohio Rules of Civil Procedure provides that, where a lawsuit would, as a practical matter, impede a third party's ability to protect her interest in the property or transaction that is the subject of the lawsuit, the third party is entitled to intervene, unless existing parties adequately represent that interest. Intervenors have such an interest because the Complaint requests that this Court enjoin Miami University from continuing to provide domestic partner health care coverage, which would deprive Intervenors of their current benefits and cause them harm. None of the current parties to the litigation possesses the contract

rights and property interests that stand to be eviscerated should Plaintiff's efforts succeed, and University defendants cannot adequately represent Intervenors' interest in this regard.

Even if this Court did not agree that Intervenors have a *right* to intervene, this is a quintessential case for permissive intervention under Rule 24(B) of the Ohio Rules of Civil Procedure. The Declaratory Judgments Act specifically authorizes declaratory relief for parties like Intervenors who seek to have the validity of their contract rights or the existence of certain rights under constitutional provisions determined. Intervenors would be entitled to file a separate declaratory judgment action, and could do so if intervention were denied, but such a course of action would involve the same questions of law as those posed by the litigation presently before this Court and be unnecessarily duplicative.

Prudential reasons also support granting Intervenors' motion. Without parties to the litigation who count on the benefits under the Miami University policy at issue, the Court will not have a full picture of the relationships being characterized and the rights and interests at stake. Intervenors' personal stake in the litigation demonstrates a concrete application of how the policy has been implemented and what legal and practical effects it has on the recipients of the benefits. Intervenors' participation in this litigation enables the Court to have a fuller background upon which to determine whether or not the Miami University policy, as applied or on its face, is constitutionally defective. Intervenors submit that the Miami University policy is not unconstitutional on its face or as applied to them.

II. FACTS

A. Miami University's Same-Sex Domestic Partner Benefits Policy

Miami University is a state-assisted university located in Oxford, Ohio. For decades, Miami University has offered medical and dental coverage benefits to certain of its faculty and staff, as well as to certain of their dependents. As of July 1, 2004, Miami University has offered health care benefits to eligible faculty and staff members to cover their same-sex domestic partners, as defined by University policy.

To be eligible to receive health care benefits for a domestic partner under Miami University's policy, an employee must execute an affidavit affirming certain facts about his or her relationship that are indicative of commitment. These include taking voluntary responsibility for one another's welfare, intending to remain exclusive domestic partners indefinitely, and indicia of financial interdependence, such as common ownership of a residence, joint bank accounts or credit cards, or the designation of the domestic partner as the beneficiary of the employee's will or Miami University life insurance policy.

Registration for domestic partner health care benefits at Miami University merely qualifies an employee to receive such benefits; it does not make recipients domestic partners, create any legal status or provide benefits in other arenas or in any future workplace.

B. Intervenor's Participation In The Policy

Dr. Jean Lynch is a full-time employee of Miami University. She is a fully tenured Professor in the Department of Sociology and Gerontology at the University's Middleton

Campus.¹ Dr. Lynch and Helenka Marculewicz have been a couple for more than 17 years. Ms. Marculewicz meets the definition of a domestic partner used by Miami University in its rules and policies governing who may qualify to be covered under Miami University's employee benefits plan. Ms. Marculewicz is not a Miami University employee; she is employed by a small non-profit organization.

Shortly after Miami University instituted its policy providing for domestic partner health care benefits in July 2004, Dr. Lynch applied for and was permitted to receive domestic partner coverage for Ms. Marculewicz, which has been important to the couple. In June 2005, for example, Ms. Marculewicz was required to undergo knee replacement surgery. That procedure was covered by the benefits Dr. Lynch and Ms. Marculewicz receive from Miami University.

Intervenors Lynch and Marculewicz have a substantial financial and personal stake in the outcome of this litigation. Ms. Marculewicz works for a nonprofit agency that does not devote any of its budget to health benefits for its employees. Should Ms. Marculewicz lose her domestic partner benefits from Miami University, either Ms. Marculewicz will be without medical and dental benefits or expects to have to pay all premiums for them out of her salary. As she either would have to obtain individual insurance or would be the only employee covered by employer-acquired insurance, the cost to her would be substantial, and the plan is likely to be inferior to her current coverage. Dr. Lynch has worked at Miami University since 1988. Domestic partner benefit coverage for her family is an important consideration in her job satisfaction.

¹ Dr. Lynch began her employment at Miami University as an untenured Assistant Professor in 1988. In or around 1993, Dr. Lynch received tenure and was promoted to Associate Professor. In or around 2003, Dr. Lynch

Dr. Yvonne Keller is a Visiting Assistant Professor in the School of Interdisciplinary Studies. She has worked at Miami University for seven years. Dr. Keller and Susan Gray have been a couple for nearly five years. Ms. Gray meets the definition of a domestic partner used by Miami University in its rules and policies governing who may qualify to be covered under Miami University's employee benefits plan. Ms. Gray is self-employed.

Shortly after Miami University instituted its policy providing for domestic partner benefits in July 2004, Dr. Keller applied for and was permitted to receive domestic partner coverage for Ms. Gray, which has been important to the couple. The health care benefits that the family receives through Miami University's domestic partner benefits policy are critical to Ms. Gray and also made having a second child financially feasible for the couple.

Intervenors Keller and Gray have a substantial financial stake in the outcome of this litigation. Ms. Gray is self-employed, so she is not eligible for health care benefits from an employer or other group policy. Prior to being covered by Miami University's domestic partnership benefits, Ms. Gray purchased health insurance for herself at substantial cost for a plan that was inferior to the coverage available through Miami University. Dr. Keller's and Ms. Gray's second child, currently an infant, is the biological child of Ms. Gray. Should Miami University's health care benefits be discontinued or enjoined, members of Dr. Keller's family will be without medical and dental benefits. The family either will have to purchase them at a substantial cost or look for an employer who will provide them such benefits.

In sum, Intervenors have important interests at stake and a strong desire to see Miami University's domestic partner benefits policy survive this litigation.

received full tenure and was promoted to Professor. Throughout her career at Miami University, Dr. Lynch has been

eligible to receive benefits for herself.

III. ARGUMENT

Rule 24 of the Ohio Rules of Civil Procedure, which governs intervention, should be construed liberally in favor of intervention. *State ex rel. Polo v. Cuyahoga County Bd. Of Elections*, 73 Ohio St.3d 143, 1995-Ohio-269, 656 N.E.2d 1277; *State ex rel. Strategic Capital Investors, Ltd. v. McCarthy* (1998), 126 Ohio App.3d 237, 248, 710 N.E.2d 290.

A. **Intervenors Have A Statutory Right To Intervene.**

Rule 24(A) provides:

Upon timely application anyone shall be permitted to intervene in an action: (1) *when a statute of this state confers an unconditional right to intervene*; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the parties.

Ohio R. Civ. Pro. 24(A) (emphasis added). A person may intervene as a defendant and file an answer and defenses to the complaint. *See generally McKesson Medical-Surgical Minnesota, Inc. v. Medico Medical Equip. & Supplies, Inc.*, No. 84912, 2005 WL 1119801 (Ohio App. 8th Dist. May 12, 2005).

1. **The Declaratory Judgments Act Entitles Intervenors To Be Made Parties To This Litigation Under Rule 24(A)(1).**

The Declaratory Judgments Act provides Intervenors with an unconditional statutory right to intervene. The Act directs that those persons who claim an interest that would be affected by a declaratory judgment must be made parties to the declaratory judgment action, which can only occur by intervention here:

Subject to division B of this section², when declaratory relief is sought under this chapter in an action or proceeding, *all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding.* Except as provided in division (B) of this section, a declaration shall not prejudice the rights of persons who are not made parties to the action or proceeding.

Ohio Rev. Code § 2721.12(A) [in pertinent part; emphasis added].

There is no question that Plaintiff's Complaint seeks a declaration that would affect Intervenor's interests in retaining their domestic partner benefits. Intervenor's contractual rights to receive benefits from Miami University will be compromised if the University were to be enjoined from performance. Intervenor's property right in the benefits would be extinguished if providing those benefits is declared unconstitutional.

Section 2721.12(A) of the Act states that persons "shall be made parties" which makes clear that permitting Intervenor's participation in this litigation is mandatory. *Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5 at ¶ 62 ("It is a well-established rule that when it is used in a statute, the word 'shall' denotes that compliance with the commands of that statute is mandatory."). There are no conditions or exceptions in § 2721.12(A). Because the Declaratory Judgments Act gives Intervenor an unconditional right to become parties to the litigation, Intervenor has an unconditional right to intervene under Rule 24(A)(1).

2. Intervention Under Rule 24(A)(2) Is Warranted Because Intervenor's Unique Interests Are Not Adequately Represented By The Existing Parties.

Alternatively, intervention should be granted as of right under Rule 24(A)(2). Ohio courts consider whether to grant intervention as of right under Rule 24(A)(2) using a three-part

² Division (B) involves declaratory judgments regarding insurance coverage and is not relevant here. See Ohio Rev. Code § 2721.12(B).

test:

1. The intervenor claims an interest relating to the property or transaction which is the subject of the action;
2. The intervenor is so situated that the disposition of the action may as a practical matter impair or impede his or her ability to protect that interest; and
3. The existing parties do not adequately represent his or her interest.

Blackburn v. Hamoudi (1986), 29 Ohio App.3d 350, 352, 29 OBR 479, 505 N.E.2d 1010.

If a party's "interests *might* be compromised by disallowing intervention," the party must be allowed to intervene as a matter of right. *HER, Inc. v. Parenteau*, 153 Ohio App.3d 704, 2003-Ohio-4370, 795 N.E.2d 720 at ¶ 17 (emphasis added); *see also Blackburn*, 29 Ohio App. 3d at 354 ("While the [applicant's] claim may be shown to be without merit, . . . it is not required that the interest be proven or conclusively determined before the motion is granted."); *Najjar v. Twp. of Riveredge* (June 20, 1991), Cuyahoga App. No. 60778 ("[i]t is not required that the applicant's interest be conclusively determined before the motion to intervene will be granted, as the applicant is entitled to his day in court.").

The burden of showing the inadequacy of representation of parties is a minimal one. *See Fairview Gen. Hosp. v. Fletcher* (1990), 69 Ohio App.3d 827, 835, 591 N.E.2d 1312. Only where the interests of the party and the putative intervenor are "virtually identical" should this Court require any heightened showing before allowing intervention. *Toledo Coal. for Safe Energy v. Pub. Util. Comm'n of Ohio* (1982), 69 Ohio St.2d 559, 562 n.5, 433 N.E.2d 212.

Intervenors undeniably have an interest in the health care benefits that Plaintiff's Complaint seeks to enjoin Miami University from providing them, and that interest will be impeded if Plaintiff prevails. Intervenors cannot rely on the existing parties adequately to represent Intervenors' personal interest in receiving benefits. It is *not* determinative under Rule

24(A)(2) that the University defendants adequately will defend their own interests and that doing so may overlap with Intervenors' interests.³ The Rule creates an exception to intervention as of right only where the existing parties adequately would represent *the Intervenors' interests* in the health care benefits program. The University defendants' *institutional* interests in maintaining a domestic partner benefits policy is not the same as the concrete health, financial and employment interests at risk for Intervenors here, and their contract and/or property rights to receive the agreed-to benefits. The University defendants will not lose money from their own pockets or face the possibility of uncovered catastrophic health costs if Miami University's domestic partner benefits policy is invalidated. Because those are the very interests Intervenors seek to protect, they have a right to be a party to the litigation to ensure that those rights are vigorously defended. Intervention as of right is therefore warranted under Rule 24(A).

³ Intervenors will seek to work with the University insofar as possible to avoid duplication. Additionally, counsel for Intervenors have extensive experience in this field which may be of assistance to the Court in this case. In particular, Lambda Legal Defense & Education Fund is participating in numerous cases in Ohio concerning the reach of Article XV, Section 11 of the Ohio Constitution, *e.g.*, *State of Ohio v. Nixon*, No. 22667 (Ohio App. 9th Dist.) (appeal pending) (in which Lambda Legal has appeared as amicus curiae), as well as cases concerning the legality of domestic partner benefits in various parts of the country, *see, e.g.*, *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill. App. 1999) (rejecting taxpayer challenge to City of Chicago's ordinance providing domestic partner benefits for city employees as not ripe for adjudication and holding that ordinance was not an intrusion into statewide public policy) (in which Lambda Legal appeared on behalf of employees who intervened as defendants); *City of Atlanta v. Morgan* (1997), 268 Ga. 586, 492 S.E.2d 193 (upholding City of Atlanta's ordinance providing domestic partner health insurance benefits to city employees as not in conflict with Georgia state law definition of "dependent") (in which Lambda Legal appeared as amicus curiae).

B. In The Alternative, Intervenors Should Be Permitted To Intervene.

Rule 24(B) provides:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when the applicant's claim or defense and the main action have a question of law or fact in common.

Ohio R. Civ. Pro. 24(B) [in pertinent part]. Permissive intervention under Rule 24(B) is to be liberally granted, so as to promote the convenient and prompt disposition of all claims in one litigation. *See City of Cleveland v. Cities Serv. Oil Co.* (N.D. Ohio 1969), 20 Ohio Misc. 179, 47 F.R.D. 543.⁴

Permissive intervention is warranted here for two reasons. *First*, the Declaratory Judgment Act contemplates that parties whose interests will be affected by declaratory relief will be made parties, and so, at the very least, the Act gives a conditional right to intervene. *Second*, Intervenors' defenses (or any affirmative declaratory relief they might seek in a separate action) would share substantial common questions of law with the litigation presently before this Court.

1. The Declaratory Judgments Act Contemplates That Intervenors Should Be Made Parties Because Their Interests Will Be Affected And Possibly Prejudiced By This Litigation.

Section 2721.12 of the Declaratory Judgments Act contemplates that persons situated like Intervenors will be made parties by the Court if not brought in by existing parties. In fact, if Intervenors were *not* permitted to intervene, the Act states that the outcome of this litigation may not be construed to prejudice Intervenors' rights: § 2721.12(A) expressly provides that no

⁴ The Ohio Supreme Court has acknowledged that cases interpreting Federal Rule of Civil Procedure 24 are persuasive authority with regard to Ohio's counterpart Rule 24. *Toledo Coalition for Safe Energy v. Public Utilities Comm'n* (1982), 69 Ohio St.2d 559, 562 n.5, 433 N.E.2d 212.

declaratory relief can prejudice the rights of third parties who are not part of the litigation. If Plaintiff is granted the relief he seeks without Intervenor's involvement, a new lawsuit would likely arise in order for Intervenor's to seek a declaration that their rights under the domestic partner policy at Miami University are not affected by Article XV, Section 11 of the Ohio Constitution. Thus, Intervenor's should be allowed to defend against Plaintiff's action from the start.

2. Intervenor's Defenses Or Claims Share Common Questions Of Law With This Litigation.

Intervenor's defenses to the Complaint share questions of law with the existing constitutional challenge. If this Court were to deny intervention, Intervenor's would have the right to file their own declaratory judgment action. The Declaratory Judgments Act authorizes courts to construe contracts, Ohio Rev. Code § 2721.04, to determine the validity of legal instruments, and to determine how the legal or contractual rights of persons are affected by constitutional provisions, Ohio Rev. Code § 2721.03. Any such action, however, would involve many of the same controlling questions of law as this case, such as a determination of the purpose and proper construction of Article XV, Section 11 of the Ohio Constitution, as well as the legal effects of Miami University's domestic partner benefits policy. Rather than duplicate judicial resources, the sensible approach is for this Court to allow Intervenor's to join this litigation now as party defendants.

The fact that a defendant already in the case may raise some of the same defenses as a potential intervenor does *not* preclude intervention where the plaintiff's claims would affect broader questions and interests than those affecting the defendant already named in the case. *See State ex rel. SuperAmerica Group v. Licking County Bd. of Elections*, 80 Ohio St.3d 182, 1997-

Ohio-347, 685 N.E.2d 507 (permitting a third party to intervene). Thus, the Court should permit intervention at this time under Rule 24(B).

IV. CONCLUSION

Intervenors respectfully request that their motion to intervene as parties defendant be granted and that the Court permit filing of their Answer and Defenses In Intervention.

Respectfully submitted,

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CERTIFICATE OF SERVICE