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Dane County Circuit Court Judge Denies Motion to Dismiss and Hints at Issuing Decision Overturning Act 10

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On Wednesday, July 3, 2024, Dane County Circuit Court Judge Jacob Frost issued the Court's decision denying a motion to dismiss constitutional challenges to 2011 Act 10. Even though the Wisconsin Supreme Court and the United States Court of Appeals for the Seventh Circuit have both upheld the constitutionality of Act 10, the Dane County Circuit Court found those decisions did not address the specific issues before it involving equal protection challenges under Wisconsin's State Constitution.

In denying the motion to dismiss the lawsuit challenging Act 10, the Court stated:

> Because nobody could provide this Court an explanation that reasonably showed why municipal police and fire and State Troopers are considered public safety employees, but Capitol Police, UW Police and conservation wardens, who have the same authority and do the same work, are not. Thus, Capitol Police, UW Police, and conservation wardens are treated unequally with no rational basis for that difference. Act 10 therefore violates their rights to equal protection under the law and I declare those provisions of the Act relating to collective bargaining modifications unconstitutional and void.

But the Court also made the following broad statement giving great ambiguity as to the intentions of the Court:

> The Legislature made clear that they would not strip away the collective bargaining rights of public safety employees for fear of the danger to society this might cause. The problematic provision of Act 10 is its definition of the public safety group. I could strike only that group and uphold Act 10 as an across the board reduction of collective bargaining rights for all public employees equally. However, that is exactly what the Legislature avoided doing. I must not sever the law in a way that enacts what the Legislature imperfectly attempted to avoid. It is clear that the Legislature would not have enacted Act 10 with the same reductions as applied to the rights of general employees also applied to public safety employees. I therefore must strike all aspects of Act 10 that relate to the improper unequal treatment of public safety and general employees, meaning I must strike all of the collective bargaining changes in the Act.

> However, as 2011 Act 10 also made changes to a variety of other statutes on other issues, I can and must sever the modification of collective bargaining rights provisions which I am striking from those sections of the Act relating to other issues.

As a result of this decision, the Court directed the parties to do the following:

> I order the parties to file a letter or memorandum to the Court as to whether the Court should issue judgment on the pleadings in light of this Decision or take some other action to bring this action to a final judgment. As part of that discussion, Plaintiffs should address what sections of Act 10 must be severed and struck under my ruling and Defendants shall respond on this issue as well.

The decision places all Wisconsin public-sector employers into a holding pattern as no definitive ruling has been made by the Court, the breadth of the Court's intended actions is unclear, and the Court's jurisdiction is limited to Dane County. Moreover, we expect the decision to be appealed and tied up in the appellate courts. Accordingly, the following are issues all public sector employers should consider at this time:

• **Do Not React.** The Court's decision so far has changed nothing in the law. Until the Court provides clarity of its decision, any reaction by employers is premature and imprudent. Who the decision affects is unknown. It is also unknown what the response will be from the Wisconsin Employment Relations Commission as to enforcement of the decision. Frankly, these questions may remain somewhat unknown even after a final decision is issued by the Court as it will take time for employers and employees alike to determine whether the remaining aspects of Act 10 are compatible moving forward given the broad sweeping changes the Court identified as forthcoming in its decision.

• **Your Employees May Not Want to Go Back.** While some employees may have interest in returning to the old bargaining realm, some will not and prefer dealing with their employer directly. Payment of union dues is also a distant memory or non-occurrence for some employees, and adding another cost in the form of union dues, particularly coming off a period of inflation, may not be palpable to some employees. Even if employees have a desire to pursue newfound bargaining rights, issues of recognition of the union and what constitutes the status quo for bargaining remain to be determined. Employees may be required to file Petitions for Election with WERC, the employer and representative will need to address the proper scope of the collective bargaining unit, and elections may need to occur before even undertaking the issue of bargaining. Additionally, those employers and collective bargaining representatives who have an agreement covering total base wages may have a contract bar to negotiating a different agreement during the term of the contract.

• **The Appeals Should be Interesting.** The decision tries to distinguish itself from two Seventh Circuit Court of Appeals decisions and one Wisconsin Supreme Court decision upholding the constitutionality of Act 10. In particular, the Court held a *"rational basis exists for the distinction between most of the general employee group versus the public safety group. The equal protection defect lies in the selective exclusion of certain employees that should be, but inexplicably are not, in the public safety group."* Yet earlier in its decision the Court cited to the Wisconsin Supreme Court regarding the standard to consider, stating: *"If we cannot identify any such articulated rationale, it is the court's obligation to construct one."* The Supreme Court statement cited to by the Circuit Court seems to prohibit a court from legislating from the bench. Despite this, the Circuit Court found a violation, but then failed to construct a rationale that would work to address that violation. The Court even cited the rational reasons provided by Counsel for the defendants and Legislature but then dismissed those reasons—essentially disagreeing with the merits of them while offering no alternatives. Additionally, when analyzing the different categories outlined under the WRS, the court did not seem to understand that Act 10 applied to those with existing bargaining rights separate from those that did not. Instead, the Circuit Court decision relied on a nuanced theory interpreting protective service distinctions, including relying on Wisconsin Statute § 40.02(48), even though that statute differentiates treatment of public safety employee eligibility for protective service occupant status. The Court's analysis also ignores the fact that, even before Act 10, the long-standing collective bargaining law treated general and transit employees under Wis. Stat. § 111.70 different from public safety employees under Wis. Stat. § 111.77, differentiated City of Milwaukee public safety employees from non-Milwaukee public-safety peers, and treated State of Wisconsin general and public safety employees different under Wis. Stat. § 111.81. Given these pre-Act 10 distinctions, is the entire collective bargaining system and Wisconsin Retirement System ripe for challenge as being unlawful both pre- and post-Act 10 under the Circuit Court's theories and interpretation of the law? Has the Court unintentionally created a possible result that all of collective bargaining is illegal, including police, fire and transit bargaining? Could the Legislature cure the distinctions identified by the Court by simply adding bargaining rights for the historically excluded narrow group of public-safety protective service employees rather than undoing Act 10's collective bargaining changes as a whole?

• **There May Be Other Court Challenges.** Dane County is one of 72 counties in Wisconsin. The Dane County decision is not binding authority any circuit court in Wisconsin must follow. A circuit court in any other County could entertain a similar case and rule differently.

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