Marquette Law Review

Volume 59
Issue 2 *1976 (Number 2)*

Article 8

Labor Law

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The court in *Collicott*, however, did not resolve the more important question of precisely what is an uninsured driver or, more specifically, whether an *underinsured* driver is an uninsured driver as to an unsatisfied claim. These questions remain open for future resolution by the Wisconsin Supreme Court.

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LABOR LAW

The Wisconsin Supreme Court, in *Milwaukee Deputy Sheriffs' Association v. Milwaukee County*,[1] addressed the issue of whether, after a petition for final and binding arbitration has been filed pursuant to Wisconsin Statutes section 111.77(4)(b), a party to the negotiations may amend its final offer to include a proposal not previously subject to the negotiation process.

The Association and the County were in the process of negotiating a contract for 1973 when the association filed with the Wisconsin Employment Relations Commission (WERC) for binding arbitration under section 111.77(4)(b), alleging that an impasse had been reached. WERC appointed an officer who held two meetings with the parties. Thereafter the County modified its "final offer," by incorporating a proposal for a two, rather than a one year contract. The matter of a two year contract had not been mentioned during the negotiations before the petition for binding arbitration was filed. When WERC directed the parties to submit their final offers, the County submitted its amended final proposal, and the County's package, with the two year contract, was eventually accepted.

The trial court overturned the arbitrator's decision, and the supreme court affirmed. The court held that to allow an arbitrator to consider issues raised for the first time in binding arbitration would be contrary to the purpose behind binding, compulsory arbitration which is to resolve negotiable differences by narrowing the issues to be resolved. The court determined that for binding arbitration to be effective, no new matters presented for the first time after the filing of a petition for arbitration shall be accepted as it "flies directly into the teeth of the statute."[2] The court also pointed out that to allow such

1. 64 Wis. 2d 651, 221 N.W.2d 673 (1974).
2. *Id.* at 658, 221 N.W.2d at 676.

proposals to be considered would render all negotiations previous to binding arbitration meaningless. Therefore, the court vacated the arbitrator's award as having exceeded his statutory power.[3]

In *State ex rel. Department of Public Instruction v. ILHR*,[4] the court was faced with the question of whether one state agency, the Department of Industry, Labor and Human Relations (DILHR) has jurisdiction over other state agencies in discrimination cases. Pursuant to a complaint of sex discrimination by an employee of the Department of Public Instruction (DPI), DILHR served DPI with a notice of hearing. DPI then brought the present action to have the jurisdictional question resolved.

While admitting that the scope of the Wisconsin Fair Employment Practices Act[5] is broad and to be liberally construed, the court pointed out that the state is not a body expressly included in the Act and, therefore, DILHR "has no jurisdiction over the employment practices of DPI."[6]

It was shown that the State had been explicitly included in other employment statutes,[7] but not the Fair Employment Act, and that a general regulatory statute like the one at issue would not apply to the State unless expressly included in the statutory scheme. The court, therefore, concluded that DILHR could not continue to process complaints against the state and urged the legislature to remedy the situation statutorily.

The court also dealt with the issue of federal preemption in *Lodge 76 v. WERC*.[8] In that case, the supreme court determined that where conduct by a union is neither prohibited nor protected by federal legislation, the State is free to regulate such activity if Congress has not "focused upon"[9] the activity, leaving it unregulated.

The employer, Kearney and Trecker, Inc., filed a charge with WERC alleging that the union had violated section

3. WIS. STAT. § 298.10 (1973).

4. 68 Wis. 2d 677, 229 N.W.2d 591 (1975).

5. WIS. STAT. §§ 111.31-37 (1973).

6. 68 Wis. 2d at 684, 229 N.W.2d at 595.

7. WIS. STAT. § 101.01(2)(c) (1973) (the safe place statute); WIS. STAT. § 102.04(1)(a) (1973) (workmen's compensation); WIS. STAT. § 108.02(4)(a) (1973) (unemployment compensation).

8. 67 Wis. 2d 13, 226 N.W.2d 203 (1975).

9. *Id.* at 25, 226 N.W.2d at 209, *citing* Teamsters Union v. Morton, 377 U.S. 252, 259-60 (1964).

111.06(2)(h) of the Wisconsin Statutes by interfering with production. The interference alleged was the encouragement and coercion of employees to refuse overtime in a dispute over the length of the workweek. The union contended that since the alleged activity had not been proscribed by federal regulation, it was permitted and therefore protected by the National Labor Relations Act (NLRA), and was exempt from state regulation.

Citing *UAW v. WERB*[10] and *San Diego Unions v. Garmon*,[11] the Wisconsin court reasoned that the states are preempted from regulating only conduct which is (1) protected by the NLRA; (2) prohibited by the NLRA; or (3) neither protected nor prohibited because of a congressional intent to do so. The court declared that conduct in this third category must have been "focused upon" by federal regulation, even if not specifically prohibited nor permitted. The court determined that a concerted refusal of overtime was a partial strike of a kind not "focused upon" by federal legislation and therefore subject to regulation by the WERC.

Mahnke v. WERC[12] dealt with the determination of the proper procedure for an individual to proceed to the merits of a grievance when a grievance procedure provided for in the collective bargaining agreement has not been exhausted. The plaintiff, Harold Mahnke, filed an unfair labor practice suit against his employer, the Louis Allis Company, for allegedly violating section 111.06(1)(f) of the Wisconsin Statutes which declares it an unfair labor practice to "violate the terms of a collective bargaining agreement."[13] Mahnke had been discharged for a poor attendance record, having missed 100 days of work over a two and one-half year period due to health reasons. His union took the grievance through four of the five steps contractually provided for, but refused to take it to arbitration. The company defended at the trial court level by alleging that Mahnke was discharged for a just cause and that, as his grievance had not been advanced to the fifth step by his union, his complaint could be processed no further. The court stated the controlling issue to be:

> Where an employee alleges that his employer has discharged

10. UAW v. WERB, 336 U.S. 245 (1949).
11. San Diego Unions v. Garmon, 359 U.S. 236 (1959).
12. 66 Wis. 2d 524, 225 N.W.2d 617 (1975).
13. WIS. STAT. § 111.06(1)(f) (1973).

> him in violation of the collective bargaining agreement and that his union has failed to proceed to arbitration under the terms of the collective bargaining agreement, does the employee have the burden of proof to establish a want of fair representation on the part of the union before he can proceed to the merits of his claim?[14]

The court determined that although there was no expressed agreement by the employer and the collective bargaining agent that the grievance procedure was to be the exclusive remedy for handling complaints, the court believed that such a presumption existed. Relying on *Vaca v. Sipes*,[15] the court indicated that where the employer and the union, being the only parties capable of implementing the advanced stages of a grievance arbitration procedure, refuse to advance a claim, it would be inequitable to allow an employee's grievance to go without remedy because of the union's wrongful refusal to press the charge. The court adopted the rule that where a grievance procedure has not been exhausted, it must be shown by the employee bringing suit that the union failed in its duty of fair representation before he can prosecute his claim against the employer. The employee must demonstrate that the union's decision was "arbitrary, discriminatory, or in bad faith."[16]

The court determined that the burden in similar unfair labor practice cases shall fall first upon the employer to show that the existing grievance procedure has not been exhausted. When that burden is satisfied, the burden shall fall upon the employee to prove that his union breached its duties of fair representation to him before he can proceed to the prosecution of his claim against the employer.

In *Mahnke*, the court also set out the various considerations a union must entertain in determining whether to press a grievance or not. Relying on *Vaca*,[17] the court said a union must:

> . . . take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of success in arbitration. . . . [A] decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation.[18]

14. 66 Wis. 2d at 529, 225 N.W.2d at 620-21.
15. 386 U.S. 171 (1967).
16. 66 Wis. 2d at 531, 225 N.W.2d at 622.
17. 386 U.S. 171 (1967).
18. 66 Wis. 2d at 534, 225 N.W.2d at 623.

The court remanded the case for a determination of whether the union failed in its duty of fair representation by the standards set out in the opinion.

In *State v. WERC*[19] the court held that an administrative order of WERC denying the employer state's motion to dismiss was not a "decision" within the meaning of chapter 227 of the Wisconsin Statutes, and therefore was not appealable. The employer and union filed motions to dismiss claimant Guthrie's unfair labor practice charge which alleged that he was dismissed without just cause and that his union had breached its duties of fair representation by not taking his grievance to arbitration within the time permitted. The defendants' motions were denied on the ground that the Wisconsin Statutes require a full hearing of "contested cases."[20]

At the hearing, held January 30, 1973, evidence was introduced that Guthrie had been discharged without just cause and that his union had represented him fairly. Upon adjournment the examiner took under advisement motions to dismiss by both defendants, as well as a motion by the employer to have a ruling first on the fair representation issue. On February 6, the employer moved for summary judgment. The examiner on March 12, 1973, ruled all previous motions premature since the fair representation and just cause questions were comingled and ordered further hearings. The employer then petitioned WERC to review the order for further hearings, which petition was also ruled premature, as was a subsequent appeal of the employer's summary judgment motion.

The supreme court, relying on a 1973 Wisconsin case[21] determined that the State, as the employer, could not appeal an order of WERC, as it was not an appealable decision under Wisconsin Statutes, chapter 227. The court also pointed out that the denial of the State's motions did not "directly affect the legal rights, duties or privileges of a person."[22] The court reasoned that the State's rights, duties and privileges had not been affected, since it could still argue the issue of exclusiveness of the grievance procedure at the continued hearing, and then have the opportunity to appeal a subsequent adverse determination by the WERC.

19. 65 Wis. 2d 624, 223 N.W.2d 543 (1974).
20. WIS. STAT. §§ 227.01(2) and 227.04 (1971).
21. Pasch v. Dept. of Revenue, 58 Wis. 2d 346, 206 N.W.2d 157 (1973).
22. State v. WERC, 66 Wis. 2d 534, 634, 223 N.W.2d 543, 547 (1974).

The court also denied the employer's request for a declaratory judgment, based on section 269.56 of the Wisconsin Statutes. The employer had asked the court to declare its motion to dismiss, and petition to review the order denying the motion, the proper procedure to be followed in actions of this kind. The court reasoned that use of declaratory judgments under section 269.56 was intended to expedite litigation, not to interrupt it for purposes of intermediate review. The court affirmed the view that the exclusive vehicle for review of such cases is the procedure provided by chapter 227, and not a declaratory judgment.

The supreme court entertained the issue of recognition orders as an alternative to cease and desist orders in *WERC v. Evansville*.[23] Basing its decision on the guidelines of the 1969 United States Supreme Court case of *NLRB v. Gissel Packing Co.*,[24] the court affirmed WERC's order requiring the City of Evansville to recognize the Teamsters' Union as collective bargaining representative despite the absence of a valid representation election.

An election was held, after which the union filed objections. At the post-election hearing, it was determined that the city had committed prohibited practices during the pre-election campaign in violation of the Wisconsin Statutes.[25] The WERC examiner found that the nature of the prohibited practices was so extreme that a mere cease and desist order would be inadequate to restore an atmosphere conducive to a fair election. He based his decision on three incidents. First, the mayor and common council sent letters threatening a loss of benefits to employees if the union won the election. Second, a coercive conversation between a municipal employee and his supervisor occurred within the hearing of other employees. The supervisor demanded to know whether the employee was a member of the union, stating that if he did not tell him, he would find out one way or another. Third, a meeting of public works department employees was called by the director of public works, during which the director stated that the election of the union as collective bargaining agent would do nothing to insure job security and might induce the city to subcontract certain work done

23. 69 Wis. 2d 140, 230 N.W.2d 688 (1975).
24. 395 U.S. 575 (1969).
25. WIS. STAT. § 111.07(4) (1973).

by the department.

The court determined that although these incidents had not totally destroyed the possibility of a fair election, they were of such a nature as to be suspect of undermining the majority strength of the employees, all but one of whom had signed authorization cards prior to the threats. The court indicated that the employer was responsible for clouding the antiseptic conditions required for a fair election, and should not be rewarded for prohibited practices by simply requiring another election to be held. The court noted that *Gissell* required an administrative finding that there was only a slim possibility that traditional cease and desist orders would protect the privileges of the employees before a recognition order might be issued as an alternative. Based on the finding that the city had threatened loss of benefits with a union, promised benefits without a union, and threatened subcontracting and potential elimination of jobs, the court found that the recognition order of WERC was valid under section 111.07(4) of the Wisconsin Statutes.

The court also dealt with the subsidiary issue of the duration of the recognition order by stating that the order would be valid for one year, commencing the day of its decision, and that the employer's statutory right[26] to assert a good faith doubt as to the union's majority status would be suspended for one year from the effective date of the recognition order.

Madison Joint School District v. WERC[27] represents a decision of potentially far reaching effect. Justice Day wrote the majority opinion which upheld the WERC and Circuit Court findings that by refusing to bargain in good faith with an exclusive bargaining agent, and by interfering with the right of employees to bargain collectively with the agent of their choice, the school board had violated Wisconsin's Municipal Employment Relations Act (MERA).[28]

The Madison Joint School District No. 8 was in the midst of negotiations with Madison Teachers, Inc. (MTI) in which a "fair-share" provision and binding arbitration of nonrenewal of teacher contracts and dismissal of teachers were at issue. At a public meeting of the school board, a non-union teacher who

26. WIS. STAT. § 111.70(3)(a)4 (1973).
27. 69 Wis. 2d 200, 231 N.W.2d 206 (1975).
28. WIS. STAT. § 111.70(3)(a)1, 4 (1973)

had circulated a petition against the fair-share provision was allowed to speak during a public portion of the meeting. He proposed a one-year deferral of any such fair-share provision and, alternatively, an impartial study of such a proposal. Other people spoke during this public portion of the meeting, including the president of MTI. Subsequently in executive session, the board drafted a proposal, eventually accepted by MTI, which included an arbitration provision, but explicitly refused to incorporate the fair-share (agency shop) proposal. MTI eventually filed the unfair labor practice complaint with WERC, which was the subject of this action.

The majority opinion, citing *Board of School Directors of Milwaukee v. WERC*,[29] re-emphasized the rule that a majority bargaining representative is not only the representative of the majority, but is to be the exclusive bargaining representative of all employees, "members or non-members, of the bargaining unit."[30] The court realized that this principle of exclusivity might infringe upon the first amendment rights of those not within the majority, but felt that such infringement was justified because the ". . . gravity of evil was considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor management relations."[31]

The majority hinged its decision on a determination that the speech of the minority teachers at the public portion of the school board meeting was "negotiating" as defined in *Board of School Directors of Milwaukee v. WERC*:

> [T]o communicate or confer with another so as to arrive at a settlement of some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise about something: come to terms [especially] in state matters by meetings and discussions.[32]

In concluding that the public portion of the school board meeting was part of the negotiating process, the majority viewed the present status of the negotiations and the circumstances surrounding the meeting as controlling. The court noted that an impasse had been reached, that the meeting was

29. 42 Wis. 2d 637, 168 N.W.2d 92 (1969).

30. Madison Joint School District v. WERC, 69 Wis. 2d 200, 209, 231 N.W.2d 206, 211 (1975).

31. *Id.* at 212, 231 N.W.2d at 213.

32. *Id.* at 212-13, 231 N.W.2d at 213.

picketed by the majority union, that union members were present at the meeting and that union representatives addressed the board on subjects of the collective bargaining negotiations. The context of the meeting, rather than the nature of the non-union teacher's statement, was held to be determinative. Thus, the court held that the teacher's statement was an attempt to circumvent the majority representative, and the action of the school board in listening to the statement was found to be an unlawful refusal to bargain with the exclusive bargaining representative.

In a vigorous dissent Justice Robert W. Hansen, joined by Justices Beilfuss and Connor T. Hansen, found that the majority decision went far beyond enforcement of the Municipal Employment Relations Act by denying "constitutional assurances as to freedom of speech and petition"[33] to the minority teachers. The minority opinion declared that the right to speak at the public portion of a school board meeting extends to all the public, including all teachers. Justice Hansen also pointed out that if a balancing of interests is to be performed, the statutory restriction, not the constitutional guarantee, must yield. The dissent rightfully feared the "chilling effect"[34] of a decision which adopts an interpretation of "matters subject to collective bargaining" so broad as to deny any teacher or individual the right to state his position on a matter of community interest and well-being.

During the term the court announced two important decisions in the area of sex discrimination. The first, *Yanta v. Montgomery Ward and Co., Inc.*,[35] dealt with the issue of whether a complainant could maintain a civil suit for damages against her employer who had been found to have discriminated against her on the basis of sex.

The plaintiff, Delores Yanta, sought damages for lost wages, emotional anguish, personal inconvenience, legal fees and harm to character and reputation. In her discrimination suit brought by the Department of Industry, Labor and Human Relations (DILHR), only prospective relief had been awarded. She was ordered reinstated to her position.

In the civil suit, the supreme court allowed back pay under

33. *Id.* at 217, 231 N.W.2d at 215.
34. *Id.* at 222, 231 N.W.2d at 218.
35. 66 Wis. 2d 53, 224 N.W.2d 389 (1975).

Wisconsin Statute section 111.36(3)(b), despite the fact that this provision was not enacted into law until after the discrimination against the plaintiff occurred.[36] The court made a policy determination that a defendant should be required to compensate a plaintiff for causing the kind of harm that a statute was created to prevent—the loss of wages described in Wisconsin Statutes section 111.31. The court found that the complaint stated a cause of action for damages, in that it sought the recovery of lost wages. This is the first time the court had sustained such a cause of action. The court limited the recovery, however, by denying damages for emotional anguish, harm to character and reputation and attorneys' fees, since section 111.31 does not provide compensation for loss or damages of this kind. The court also pointed out that such damages were not recoverable under recent case law.[37]

The *Yanta* case was also the first to delineate the proper statute of limitations for back pay claims in employment discrimination cases by concluding the six-year statute of limitations under Wisconsin Statutes section 893.19(b) was applicable. That section provides a six-year limitations period where liability is imposed by statute, but no other statutorily prescribed limitation is applicable.

Finally, in *Wisconsin Telephone Company v. ILHR*,[38] the Wisconsin Supreme Court held that the Department of Industry, Labor and Human Relations (DILHR) had the authority to decide a contested case of discrimination based upon its statutory authority,[39] despite improperly filed sex discrimination guidelines.

A complaint was filed against Wisconsin Telephone by a blind, pregnant employee who was told by her supervisor that the normal duration of pregnancy was six months. She alleged in her complaints, that she involuntarily signed a request for a six-month leave. When she attempted to return to work three

36. Wis. Laws 1973, ch. 268, effective June 15, 1974.

37. Cedarburg Light & Water Comm. v. Glenn Falls Ins. Co., 42 Wis. 2d 120, 166 N.W.2d 165 (1969)—attorney fees not allowed absent express statutory liability; School District No. 1 v. ILHR Dept., 62 Wis. 2d 370, 215 N.W.2d 373 (1974); Ver Hagen v. Gibbons, 47 Wis. 2d 220, 177 N.W.2d 83 (1970); Alsteen v. Gehl, 21 Wis. 2d 349, 124 N.W.2d 312 (1963)—no recovery for emotional distress absent a severely debilitating emotional response.

38. 68 Wis. 2d 345, 228 N.W.2d 649 (1975).

39. WIS. STAT. § 111.32(5)(g) (1973).

months after her leave began, she was told that no work was available and was not reemployed until after she filed her complaint. DILHR found the employer guilty of sex discrimination and ordered that the employee be granted all seniority to date and disability benefits which would have been allocated had her pregnancy been treated as any other temporary disability. DILHR further required the employer in the future to treat pregnancy disability in the same manner as any other disability.

The supreme court upheld the trial court in overturning DILHR's award based on three procedural defects: (1) insufficient notice under Wisconsin Statutes sections 111.36(3)(a) and 227.09; (2) failure to satisfy the oral argument requirement of Wisconsin Statutes sections 227.12 and 15.06(6), which the court determined required two commissioners to be present; and (3) the invalidity of the department's guidelines on sex discrimination which were not properly filed with the Secretary of State and Reviser of Statutes pursuant to Wisconsin Statutes section 227.023. Despite these defects, the court did not dismiss the action, but rather remanded it to DILHR for further proceedings after upholding the Department's authority to find sex discrimination based on differential treatment without business justification.

The court distinguished a recent United States Supreme Court case, *Geduldig v. Aiello*,[40] which upheld an exclusion from insurance coverage based on pregnancy despite an equal protection challenge. Reasoning that men were receiving no additional coverage under the policy, the Court stated that public policy allowed the state legislature to make exclusions in the interest of keeping the contribution rate minimal for low income employees.

The Wisconsin court held that the *Geduldig* case was based only on the fourteenth amendment and interpreted Wisconsin's sex discrimination statute[41] as not being limited to findings of discrimination based only upon fourteenth amendment violations. It noted that the Wisconsin act is to be "liberally construed"[42] and, therefore, that the Department could rule against practices which merely have a discriminatory impact.

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40. 417 U.S. 484 (1974).
41. WIS. STAT. § 111.32(5)(g) (1973).
42. WIS. STAT. § 111.31(3) (1973).