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COURT OF APPEALS
DISTRICT IV

02-12-2013

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2012AP2067

MADISON TEACHER, INC., PEGGY COYNE,
PUBLIC EMPLOYEES LOCAL 61, AFL-CIO and
JOHN WEIGMAN,

Plaintiffs-Respondents,

v.

SCOTT WALKER, JAMES R. SCOTT, JUDITH
NEUMANN and RODNEY G. PASCH,

Defendants-Appellants.

**BRIEF OF *AMICI CURIAE* WISCONSIN COUNTY
MUTUAL INSURANCE CORPORATION
AND COMMUNITY INSURANCE CORPORATION**

On Appeal from the Decision and Final Order Dated September 14, 2012 in Dane
County Circuit Court Case 11-CV-3774, The Honorable Juan B. Colas, Presiding

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INTRODUCTION

The words of the Seventh Circuit Court of Appeals could not have been more powerful: “We now uphold Act 10 in its entirety.” These words were memorialized in the Seventh Circuit’s January 28, 2013 decision upholding Act 10 against claims that Act 10 unconstitutionally imposed limitations on the permissible subjects of collective bargaining, imposed stricter recertification requirements and prohibited payroll deductions for union dues for general municipal employees.

In upholding Act 10’s constitutionality, the Seventh Circuit ruled that Act 10 did not impair any fundamental right—the unions were free to speak as they saw fit and, by necessary extension, to associate with each other notwithstanding any of Act 10’s limitations. Moreover, because no fundamental rights were impacted, the Court applied a rational basis test to Act 10’s provisions which created two classes of employees with bargaining privileges—general municipal and public safety—and upheld these classifications under an equal protection challenge.

Save a significant departure from long-standing state and federal precedent, the union interests offer no reason to depart from the Seventh Circuit’s analysis. The Seventh Circuit’s decision was based on well-settled principles recognizing that public sector collective bargaining is a privilege granted by the legislature, not a fundamental right. The Seventh Circuit properly found that state legislatures

have no obligation to fund or facilitate union activities and may limit public sector collective bargaining as they see fit.

Wisconsin courts have a long history of following the federal courts' lead in constitutional analysis. The First Amendment provisions in the U.S. Constitution afford the same rights and privileges as the co-existent provisions in the Wisconsin Constitution and should be interpreted consistently. Applying this principle, the Seventh Circuit's finding that Act 10 is constitutional should be the beginning and end of this Court's analysis. The circuit court's decision should be reversed and Act 10 should be upheld "...in its entirety."

THE AMICI CURIAE

The *amici curiae* herein, Wisconsin County Mutual Insurance Corporation (WCMIC) and Community Insurance Corporation (CIC) insure over two hundred fifty-one (251) counties, school districts and municipalities in the State of Wisconsin. The local government members and insureds of WCMIC and CIC stand in a unique position as it relates to the circuit court's decision. Local governments, as creatures of the state, are bound by legislative enactments on matters of statewide concern. There can be no doubt that Act 10 is a matter of statewide concern as it dramatically reformed the nature of the relationship between a local government and its employees.

Local governments relied on the changes codified in Act 10, as they were required to do, and made system-wide changes to create efficiencies to counteract the dramatic cuts in state aid, the imposition of hard levy limits and a struggling

economy. For years prior to Act 10, local governments would have been required to either wait for a union to agree to the appropriate “quid pro quo” for the changes or hope an arbitrator agreed with the local government’s decisions. Act 10 allowed local governments to move forward with necessary financial and operational changes without asking for permission to do so. This flexibility in making necessary operational changes has allowed local governments to maintain service and employment levels – two critical pieces to local governments strained to provide services in a difficult economic climate.

With the circuit court’s decision, local governments are thrown into an uncertain environment where general municipal employee unions are making demands and threatening litigation against local governments that were merely complying with the law. The uncertainty, budgetary angst and general unrest could all have been avoided if the circuit court had applied established constitutional precedent and declined the invitation to create a novel constitutional right.

This Court should seize the opportunity to once again restore a measure of certainty to local government employee relations. The Court should uphold the constitutionality of Act 10.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION COMPELS A FINDING THAT ACT 10 IS IN ALL RESPECTS CONSTITUTIONAL.

A. The Seventh Circuit Applied Traditional Constitutional Analysis to Find Act 10 Constitutional in its Entirety.

The Seventh Circuit found Act 10 constitutional based upon the fundamental premise that “Wisconsin was free to impose any of Act 10’s restrictions on all unions.” *Wis. Educ. Ass’n Council v. Walker*, Nos. 12-1854, 12-2011, 12-2058, 2013 WL 203532, at *11 (7th Cir. Jan. 18, 2013) (*citing Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 358-59 (2009); *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 464-65 (1979) (per curiam); *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 287 (1984)). The Court recognized that public employees have no constitutional right to collectively bargain—any privilege granted to do so is created by statute. *Id.* (*citing Smith*, 441 U.S. at 464-65 (no right of public employees to collectively bargain in general)). Because collective bargaining privileges are statutory in nature, the Court found that the legislature could constitutionally extend, regulate and limit the ability of public employees to collectively bargain in accordance with the budgetary and other needs of the State:

Wisconsin is correct that the collective bargaining limitations constitutionally promote flexibility in state and local government budgets by providing public employers more leverage in negotiations.

Id.

Finding that the State may limit public sector collective bargaining under a First Amendment analysis, the Court proceeded to analyze whether the legislature's decision to provide different collective bargaining privileges to general municipal and public safety employees passed constitutional muster under an equal protection inquiry. *Id.* The Court applied rational basis review, which it described as a "compelling deference," and ruled that the different levels of privileges provided to general municipal and public safety employees were in all respects constitutional. *Id.* at *11-14. The Court recognized that the legislature could have rationally determined that it was necessary to differentiate and provide greater bargaining rights to public safety employees in order to avoid labor unrest among public safety employees. *Id.* at *12. Equally important, the Court refused to second guess the line drawn by the legislature between general municipal and public safety groups because it was for the legislature, not the courts, to establish such classifications. *Id.* at *14. The Court declared that a legislature's right to regulate public employee collective bargaining and to create classifications among employee groups, such as non-represented and represented employees, was "uncontroversial." *Id.* at *13.

The Court also upheld Act 10's recertification requirements. *Id.* The Court found that the State had a rational basis in requiring general municipal unions to annually recertify (rather than allowing automatic recertification) in order to ensure that union employees remained committed to the union cause and wished to continue to have the union represent their interests. *Id.*

Finally, the Court upheld Act 10's provisions prohibiting payroll deductions for union dues for general municipal employees. *Id.* at *4. The Court found that nothing constitutionally required the State of Wisconsin to assist general municipal unions in funding the expression of their ideas through payroll deductions. *Id.* at *4. The Court emphasized that the First Amendment only prohibits the government from imposing obstacles on the exercise of First Amendment Rights – it does not require the government to subsidize speech. *Id.* at *4-6.¹

B. This Court Should Uphold the Constitutionality of Act 10 Based on the Seventh Circuit's Decision.

In accordance with the Seventh Circuit's decision, this Court should find Act 10 constitutional in all respects. There is not a single case which holds that collective bargaining between general municipal employees and their municipal employers is a constitutional right guaranteed under the First Amendment, rather, it is a statutory *privilege* that can be modified or even withdrawn.

Act 10, as compared to previous versions of Wis. Stat. § 111.70, *et seq.*, places strict limitations on the subjects that can be bargained with general municipal employees, as well as the amount of any increase in wages (as defined by the statute) that can be negotiated on a collective basis. The legislation further eliminates payroll deductions for union dues for general municipal employees as

¹ The Court relied primarily on the United States Supreme Court's decision in *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358–59, 129 S.Ct. 1093, 172 L.Ed.2d 770 (2009) in upholding Act 10's payroll deduction requirements. In *Ysursa*, the Supreme Court held that "the State's decision not to [allow payroll deduction of union dues] is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit." *Id.*

well as the imposition of fair share dues for unit members. These provisions do not run afoul of the United States or Wisconsin constitutions, but rather reflect the legislature's policy decision to strictly regulate the subject matter which may be collectively bargained, the rules under which bargaining may take place, the union activities which may be subsidized and the monetary obligations which a municipal employer may undertake in a collective bargaining agreement.

The legislature's regulation of collective bargaining in these respects is *per se* constitutional. The changes made to collective bargaining do not impact the ability of union employees to associate, advocate or exercise their rights of free speech in any way, nor could they – the rights of association and free speech do not extend to collective bargaining. As recognized by the United States Supreme Court in *Smith*:

As the Court of Appeals for the Seventh Circuit recognized in *Hanover Township Federation of Teachers v. Hanover Community School Corp.*, 457 F.2d 456 (1972), the fact that procedures followed by a public employer in bypassing the union and dealing directly with its members might well be unfair labor practices were federal statutory law applicable hardly establishes that such procedures violate the Constitution. The First Amendment right to associate and to advocate “provides no guarantee that a speech will persuade or that advocacy will be effective.” *Id.*, at 461. The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. [citation omitted.] But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.

Smith, 441 U.S. at 464-65.

The restrictions imposed on general municipal employee bargaining privileges have a rational basis. At the time Act 10 was passed, the State of

Wisconsin had a three billion dollar (\$3,000,000,000) deficit and local governments were financially in no better position. The legislature determined that the cost of collective bargaining was prohibitive and unsustainable – the costs of employee wages and benefits as reflected in long-term collective bargaining agreements engulfed local government budgets and jeopardized the ability of governments to provide needed services to citizens. The legislature made changes to the statutory scheme of collective bargaining to enhance local governments' ability to manage budgets and achieve financial stability, to ensure that union activities were no longer subsidized by the government and unwilling bargaining unit participants and to certify that general municipal unions have the support of the majority of the bargaining unit members.

The Seventh Circuit upheld the legislature's right to regulate collective bargaining because regulation of collective bargaining, by definition, is constitutional. Based on the Seventh Circuit's decision, this Court must uphold Act 10.

C. The Presence of State Constitutional Claims Does Not Justify Departure from the Seventh Circuit's Analysis.

The Seventh Circuit's decision relating to the constitutionality of Act 10 under the United States Constitution applies with equal force to the analysis under the Wisconsin Constitution. In *State v. Post*, 197 Wis. 2d 279, 541 N.W.2d 115 (1995), the Wisconsin Supreme Court held that "[t]his court applies the same interpretation to the state Equal Protection Clause found in Wis. Const. art. I § 1,

as that given to the federal provision, U.S. Const. amend. XIV § 1.” *Id.* at 318 n.21; *see also State v. Heft*, 185 Wis.2d 288, 293 n.3, 517 N.W.2d 494 (1994). Likewise, Wisconsin courts have consistently held that the Wisconsin Constitution’s freedom of speech clause guarantees the same freedom of speech rights as the First Amendment in the United States Constitution. *See County of Kenosha v. C&S Management, Inc.*, 223 Wis.2d 373, 388, 588 N.W.2d 236 (1999). Finally, with respect to the right to freedom of association, while Wisconsin courts have not specifically stated that the constitutional provisions should be interpreted the same, the rights language contained in the First Amendment to the United States Constitution and Wis. Const. Art. I, § 4 are nearly identical.

Given the significant similarity in language, there is no reason for this Court to depart from the Seventh Circuit’s analysis regarding the constitutionality of Act 10. The decision was based on long-standing United States Supreme Court precedent establishing that collective bargaining is a statutory privilege and that its regulation does not impact or violate any free speech, association or other constitutional rights.

II. THE CIRCUIT COURT’S DECISION IS BASED UPON A FUNDAMENTALLY FLAWED PREMISE.

The circuit court’s finding that Act 10 impacts the fundamental rights of general municipal employees because it requires them to forego rights of “non-represented employees” in order to collectively bargain is simply wrong. The

claim that non-represented employees have any rights whatsoever to bargain with their employers on any subject, thus making them somehow better off than their general municipal employee counterparts, has no legal or factual support.

Under Wisconsin law, non-represented employees are at-will employees who have no rights to negotiate or receive any level of wages or benefits. *See Dunn v. Milwaukee County*, 2005 WI App 27, ¶¶ 10-11, 279 Wis.2d 370, 693 N.W.2d 82. Specifically, non-represented employees have none of the rights general municipal employees enjoy under Act 10. There is no mutual obligation between non-represented employees and their employers to: (1) meet and confer at reasonable times; (2) in good faith; (3) with the intention of reaching an agreement or to resolve questions arising under an agreement; (4) with respect to total base wages. *See Wis. Stat. § 111.70(1)(a)*. There is likewise no mutual obligation to reduce any agreement reached to a written and signed document. *Id.* Non-represented employees have no recourse through the Wisconsin Employment Relations Commission (WERC) and/or the circuit courts to compel a municipal employer to agree to bargain anything or to prevent a municipal employer from unilaterally changing any wage or benefit.

In this same light, non-represented employees do not have any level of security in any wage increases that they receive. While a municipal employer may award an individual employee a wage increase in excess of the CPIU, the employer is not bound to provide that increase in a written contract, may unilaterally take the increase away at any time and may unilaterally reduce the

employee's wages to any level (provided of course that minimum wage requirements are satisfied).

On the other hand, general municipal employees not only enjoy the benefits provided to them under Wis. Stat. § 111.70 to *compel* their municipal employers to collectively bargain total base wages, they also enjoy the ability to receive *individual* wage increases in excess of the CPIU. In this regard, Act 10 only prohibits unions from *collectively bargaining* anything other than total base wages. It does not prohibit individual employees, union or otherwise, from receiving (through negotiation or unilateral employer action) any other form of compensation, such as overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions.

The same analysis applies to Act 10's provisions relating to dues deduction, fair share agreements and recertification elections. General municipal employees enjoy no fewer rights than their non-represented employees with respect to any of these limitations. Non-represented employees have *no* ability to compel their employers to subsidize any groups to which they belong, to compel the government to collect dues from employees who are not part of a particular non-represented employee group or to enjoy any lesser restrictions on collective bargaining in the event they decide to unionize.

The circuit court's strict scrutiny analysis used to invalidate Act 10 not only was unprecedented in constitutional jurisprudence, it would also effectively preclude the Wisconsin legislature from enacting *any* legislation regulating

collective bargaining. Under the circuit court's analysis, all prior versions of the Municipal Employment Relations Act (MERA) would have been deemed unconstitutional because they too "penalized" union members for wishing to assert their free speech and associational rights in the bargaining process. Traditional limitations on the permissible subjects of bargaining and on the allowable term of a collective bargaining agreement in prior versions of MERA would render the laws unconstitutional based on the absence of similar restrictions placed on non-represented employees.

The circuit court's analysis has dangerous implications for any legislation that creates rules and regulations for the receipt of a statutory benefit. Legislatures would be unable to "pick winners" by granting benefits to a class of individuals because the regulations governing the receipt of that benefit would not be similarly placed on those not receiving benefits.

The circuit court's departure from established constitutional analysis of collective bargaining limitations ignores the reality of what legislatures do. Policy decisions like those made in enacting Act 10 are made by legislatures on a daily basis – legislatures are in the business of drawing lines regarding classes of persons to whom a privilege or penalty applies. Unless the distinctions involve a fundamental right or otherwise illegally discriminate, such distinctions are subject to rational basis review and must be upheld.

The circuit court's analysis goes too far and is precisely why the Seventh Circuit found that Act 10 did not impact fundamental rights and employed a

rational basis analysis to uphold the classifications that Act 10 creates. The circuit court should have followed suit and its decision must be reversed.

CONCLUSION

Based upon the foregoing, the *amici* respectfully request that the Court reverse the circuit court's decision and uphold Act 10 in its entirety.

Respectfully submitted this 12th day of February, 2013.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(b) and (c), for a brief produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 2,973 words. This Certification is made in reliance on the word count feature of the word processing system used to prepare this brief.

I further certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12), and that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certification has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

I further certify that the required number of copies of the brief and appendix correctly addressed have been submitted for delivery to the Court of Appeals on February 12, 2013.

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CERTIFICATE OF MAILING

Stacie Eric herein certifies that she is employed by Phillips Borowksi, S.C., which is located at 10140 N. Port Washington Road, Mequon, WI 53092, assigned to the duties of Administrative Assistant; that on the 12th day of February, 2013, she caused to be filed ten copies of the Brief of *Amici Curiae* Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation, in the above-entitled case which the Clerk of the Wisconsin Court of Appeals, P.O. Box 1688, 110 East Main Street, Suite 205, Madison, WI 53701-1688; and deposited in the U.S. mail, three copies of the above-referenced brief, securely enclosed, the postage prepaid and addressed to:

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