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DISTRICT IV

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You are hereby notified that the Court has entered the following order:

2012AP2067 Madison Teachers, Inc. v. Scott Walker

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

Appellants Scott Walker, James Scott, Judith Neumann, and Rodney Pasch (collectively, the state officials) move to stay a circuit court order that declared unconstitutional on their face certain portions of the Municipal Employment Relations Act ("MERA," located at WIS. STAT. § 111.70 to 111.77) while an appeal from that order is pending. Respondents Madison Teachers, Inc., Peggy Coyne, Public Employees Local 61, AFL-CIO, and John Weigman (collectively, the unions) oppose a stay. Upon reviewing the materials submitted by the parties, the court has concluded that additional briefing would be useful on issues relating to the alleged statewide effect of the underlying decision of the circuit court.

In explaining the potential harm that they believe would result in the absence of a stay, the state officials argue at various points throughout their memorandum that there is confusion among municipal employers and others about the proper interpretation of the circuit court's order and about who is currently bound by it. At the same time, the state officials seemingly argue that under settled law, such as ***Raasch v. City of Milwaukee***, 2008 WI App 54, ¶8, 310 Wis. 2d 230, 750 N.W.2d 492, the order striking down portions of MERA constrains only the parties to this action. The state actors apparently took the same position in the circuit court and the circuit court pointed out that, if this is true, it may undermine the state officials' assertion of statewide confusion.

In contrast, all of the unions' arguments about the potential harm that would result if a stay were imposed appear to be premised on the proposition that the circuit court's decision does have statewide effect. The unions first point out that circuit courts of this state have the authority to declare statutes unconstitutional, which is certainly true. WIS. STAT. § 806.04(2); ***Just v. Marienette***

County, 56 Wis. 2d 7, 26, 201 N.W.2d 761 (1972). They next point to cases stating that when a statute has been declared unconstitutional on its face, it is to be treated as null and void from its inception. ***State v. Wood***, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63 (2010). But none of the cases brought to our attention involve the question whether this proposition means that a decision of a *circuit court* has binding effect on non-parties or, for that matter, on a party with respect to other controversies. In sum, none of the authorities cited by the unions for these two propositions directly address the questions of *which if any non-parties are bound,* and *to what extent parties are bound in other controversies,* by a circuit court decision declaring a statute void ab initio on the grounds that it is facially unconstitutional.

Regarding the effect on parties to this action, the unions argue that the circuit court's order will have statewide effect because the state officials who they assert are charged with the responsibility of administering MERA—namely, members of the Wisconsin Employment Relations Committee (WERC)—are parties to this action, and are therefore bound by it. For this proposition, the unions cite ***Lister v. Board of Regents***, 72 Wis. 2d 282, 302-03, 240 N.W.2d 610 (1974). Again, however, that case did not directly address who is bound by a *circuit court* decision holding a statute facially unconstitutional, but instead focused on the legal fiction that allows controversies regarding the constitutionality or proper construction of statutory provisions to be brought against an officer or agency charged with administering a statute without violating principles of sovereign immunity. Moreover, though none of the parties focus on this fact, we note that the mandate portion of the circuit court order at issue here declaring MERA void in part does not appear to contain language enjoining WERC from taking any particular actions.

We observe that circuit-court-ordered injunctions against a state agency or official often have statewide effect because the injunction directs the agency or official to take action or refrain from

taking action and, in doing so, may direct action or prohibits action statewide. It is not immediately apparent, however, why an agency like WERC is necessarily bound to apply a non-precedential circuit court decision declaring a statute unconstitutional to parties other than those involved in the case in which the decision arose. For example, suppose an agency takes the position that a statute it is charged with enforcing is constitutional and the agency is simultaneously litigating that issue in multiple circuit courts involving different parties. In the absence of injunctive relief, would the first circuit court to rule bind the other circuit courts? As we understand the logic of the unions' position, the unions would answer yes to this question. But the unions have provided no direct authority or legal reasoning showing why this would be true.

We acknowledge that the unions raise the prospect that WERC might be bound to apply the circuit court's ruling in other cases based on the principles of issue preclusion. However, we question the applicability of this doctrine where, as here, the resolution of the issue has not been finalized. "Under the doctrine of issue preclusion, a *final judgment* bars the relitigation of a factual or legal issue that actually was litigated and decided in [an] earlier action." ***State v. Parrish***, 2002 WI App 263, ¶14, 258 Wis.2d 521, 654 N.W.2d 273 (emphasis added and citation omitted). The unions do not address whether or under what circumstances an opinion which is under appellate review should be considered "final" for the purpose of considering its preclusive effect in a separate lawsuit.

With that brief background, we request supplemental memoranda from the parties addressing the following questions:

(1) Taking into account the potential difference between declaring portions of a law unconstitutional and granting particular injunctive relief, did the circuit court indicate, either orally or

in writing, that it was enjoining WERC in any respect? If yes, identify with specificity the court's language.

(2) Sometimes the arguments of parties before a circuit court assist us in understanding the meaning of a ruling. Regardless of the answer to (1), could the inclusion of injunctive relief be deemed implicit in the circuit court's order based upon any arguments or discussions before the circuit court about the remedy being sought? If yes, then direct this court's attention to anything in the record or submitted materials that bears upon this question.

(3) Is it possible, based on the record, to conclude that the circuit court's ruling in this case would be binding on non-party unions or non-party municipal employers under the doctrine of issue preclusion?

(4) Assume for purposes of this question that only the parties here are bound by the order on appeal. If a stay is not issued, what effect, if any, would the participation of WERC employees in this lawsuit have on the challenged order's impact on future potential or actual contract negotiations between municipal employers and unions who are not parties to this action?

(5) Is it possible, based on the record, to conclude that the circuit court's ruling in this case would be binding on non-party unions or non-party municipal employers under a theory other than issue preclusion?

(6) Assume for purposes of this question that the order on appeal has statewide effect in the sense that it would bind all circuit courts in actions involving unions and employers. Under this scenario:

(a) If a stay is ordered, and the circuit court's order is eventually upheld on appeal, is there any *legal* reason why unions statewide could not bargain to obtain benefits and wages through retroactive application of the law, absent the unconstitutional provisions, for time periods during which the unconstitutional provisions were in force?

(b) If a stay is not ordered, and if municipalities and unions statewide enter into agreements that provide benefits and wages to employees that exceed those permitted under portions of MERA that the circuit court has declared unconstitutional, and the circuit court's order is eventually reversed on appeal, is there any *legal* reason why municipalities could not hold employees liable for such benefits and wages and recoup them?

Accordingly,

IT IS ORDERED that the appellants shall file a supplemental memorandum, not exceeding 4,500 words, addressing the above questions within 10 business days of this order, and the respondents shall have 10 business days after the appellants' memoranda is filed to submit their own supplemental memorandum, not exceeding 4,500 words. The appellants may then either advise this court that they will not reply or file a reply memorandum, not exceeding 3,000 words, within 5 business days. We further direct the parties to provide this court with copies of any materials from the record that are relevant to these issues, if they have not been attached to previous submissions.

Diane M. Fremgen
Clerk of Court of Appeals