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injuries). To hold otherwise would be to approve a second suit which may ultimately prove to be completely fruitless or at least redundant in important respects.[68]

The effect of *Drake* is to clarify two options open to a plaintiff injured by the negligence of an uninsured motorist: (1) Based on *Collicott,* an immediate suit may be brought against his own insurer under the uninsured motorist coverage even if other potentially liable sources are available for suit; or (2) An action may be commenced against the uninsured motorist and other potentially liable parties and proceed to judgment, after which it can be determined whether a recovery has been yielded in excess of the uninsured motorist policy coverage, thus precluding any recovery against the plaintiff's own insurer.

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LABOR

I. FAIR EMPLOYMENT

A. Right to Discrimination Hearing

In *Watkins v. Department of Industry, Labor and Human Relations,*[1] the supreme court held that the Fair Employment Act[2] requires the Department of Industry, Labor and Human Relations (DILHR) to make a discrimination determination if demanded by the complainant even though the employer or union has rectified the alleged discrimination after the filing of the complaint. No determination, however, is required if the parties later enter into a bilateral conciliation agreement.

The complainant in *Watkins* was a black woman employed by the Milwaukee County social services department. She alleged in her complaint that the employer had discriminated against her because of her race in refusing her a requested job transfer. Before the department made its initial determination as required by Wisconsin Statutes section 111.36(3)(a),[3] she

68. 70 Wis. 2d at 982-83, 236 N.W.2d at 207.

1. 69 Wis. 2d 782, 233 N.W.2d 360 (1975).
2. WIS. STAT. § 111.31 *et seq.* (1973).
3. WIS. STAT. § 111.36(3)(a) (1973).

received the transfer. A conciliation conference was held pursuant to section 111.36(3)(9),[4] but the complainant refused to enter into a conciliation agreement and demanded a hearing.

Following the hearing, the department entered an order dismissing the complaint on the grounds that the transfer had eliminated any discrimination. No determination was made whether there had been discrimination prior to the transfer. On review, the circuit court reversed the order and remanded for determination of the question whether the employer had discriminated against the complainant before the transfer. The supreme court affirmed the circuit court ruling.

In support of its position, DILHR argued that the transfer amounted to a conciliation, thus precluding a discrimination determination.[5] The court rejected the argument, holding that a conciliation must be agreed upon by both parties: "Conciliation requires the assent of both disputing parties to the proposition that the dispute has ended. Unilateral offers by the employer and union, when they are threatened with a finding of discrimination, do not in and of themselves constitute conciliation."[6] It also noted that publicity of discrimination findings was one of the means available to the department to encourage fair employment.[7] The broad interpretation of conciliation urged by DILHR, it held, would avoid legitimate discrimination findings and "reduce the situations in which exposure and publicity would serve as a deterrent to future discrimination."[8]

The primary argument advanced by the department was that the discrimination issue was moot at the hearing stage because at that time the complainant had been transferred. The court, however, ruled that the issue was not moot because there would be a practical legal effect to resolving the discrimination question, even though there was no issue of back pay,[9] in that (1) the department could order the employer to con-

4. *Id.*

5. *See* Murphy v. Industrial Comm'n, 37 Wis. 2d 704, 711, 155 N.W.2d 545, 157 N.W.2d 568 (1968).

6. 69 Wis. 2d at 791, 233 N.W.2d at 364.

7. WIS. STAT. § 111.36(1) (1973).

8. 69 Wis. 2d at 793, 233 N.W.2d at 365.

9. WIS. STAT. § 111.36(3)(b) (1973) authorizes the department to order back pay, which often makes a discrimination determination necessary although the employer has granted the relief sought prior to the hearing. The transfer sought by the complainant in *Watkins* carried the same rate of pay as her original position.

sider the complainant for future transfers without regard to her race, and (2) that the complainant was entitled to know whether she had been discriminated against because of the "deep personal frustration"[10] she suffered before being transferred. The court seemed to be searching hard to justify its ruling since a resolution of personal frustration seems like little more than a personal vindication of one's position, and any order to the employer to avoid discrimination in the future would be superfluous, as the Fair Employment Act prohibits such discrimination.

The court also stated as an additional reason for its decision on the mootness issue that to prohibit a hearing on the grounds of mootness would encourage employers to resist compliance with the Act until the filing of a complaint and then to quickly comply and move for dismissal. Evidently the court assumed that the inconvenience and adverse publicity of the hearing process and discrimination finding would serve as an effective deterrent.

B. Sex Discrimination

In a second decision under the Fair Employment Act, *Ray-O-Vac v. Department of Industry, Labor and Human Relations,*[11] the supreme court squarely faced the question whether it is sex discrimination for an employer to provide different disability benefits for a pregnancy-related disability than for other types of disabilities. The court had touched on this issue last term in *Wisconsin Telephone Co. v. Department of Industry, Labor and Human Relations,*[12] but did not reach the merits of the case because procedural defects necessitated a rehearing. The court in dicta in *Wisconsin Telephone,* however, did state that there is sex discrimination under section 111.32(5)(g)[13]: "if [the employer] is found to have treated temporary disability due to pregnancy differently from other temporary disabilities with respect to leave time, benefits, seniority, re-employment rights, etc., without what the department might consider an adequate business justification."[14]

This rule was applied in *Ray-O-Vac.* The complainant

10. 69 Wis. 2d at 794, 233 N.W.2d at 366.
11. 70 Wis. 2d 919, 236 N.W.2d 209 (1975).
12. 68 Wis. 2d 345, 228 N.W.2d 649 (1975).
13. WIS. STAT. § 111.32(5)(g) (1973).
14. 68 Wis. 2d at 366, 228 N.W.2d at 661.

charged, and the Department of Industry, Labor and Human Relations found, that the employer's disability insurance plan was discriminatory because (1) it provided a shorter maximum benefit period for pregnancy-related disability than for other disabilities, and (2) pregnancy-related disability benefits were payable only if the employee was actively employed at the commencement of both pregnancy and disability, whereas benefits were payable for other disabilities if the disability alone began during active employment. The court ruled that either of these practices was grounds for a finding of sex discrimination.

The employer, relying on *Geduldig v. Aiello*,[15] which the United States Supreme Court decided on the basis of the fourteenth amendment,[16] argued that the plan was not discriminatory because the same benefits were provided to all pregnant employees. The Wisconsin court had indicated in *Wisconsin Telephone* that it would not accept this argument, since the Wisconsin Fair Employment Act standard was broader than the fourteenth amendment test.[17] It reiterated this reasoning in *Ray-O-Vac*, emphasizing the practical effect of the disparate benefit policy:

> The relevant question here is whether, in light of its purpose, the effect of the benefits program is to provide disparate treatment for men and women employees. The undeniable thrust of Ray-O-Vac's "Group Insurance Plan" is to provide financial assistance to its employees who are temporarily disabled. In this context, the matter to be determined is whether, as to eligibility for and amount of benefits, men and women are treated alike under the plan.[18]

The employer also contended that providing pregnancy disability benefits on the same basis as benefits for other disabilities would greatly increase costs and that this would qualify as an adequate business necessity excusing the discriminatory practice. The court found no evidence in the record to support the allegation that Ray-O-Vac's costs would be substantially increased. It did state, however, that "greatly increased costs

15. 417 U.S. 484 (1974).
16. U.S. CONST. amend. XIV.
17. 68 Wis. 2d at 367, 228 N.W.2d at 661.
18. 70 Wis. 2d at 930-31, 236 N.W.2d at 214 (footnote omitted).

should be considered a factor excusing a discriminatory practice."[19]

II. WORKER'S COMPENSATION

A. *"Contractor Under" Interpretation*

The court this term overruled a long line of cases narrowly interpreting the "contractor under" portion of the Worker's Compensation Act[20] and restored an early broad construction of the statute. In *Green Bay Packaging, Inc. v. Department of Industry, Labor and Human Relations,*[21] the court held that the test for liability under section 102.06 is whether the principal employer is liable for injury to employees of a contractor or subcontractor where he would have been liable for compensation if the employee had been working directly for him. In contrast to the former rule, it is now irrelevant whether the work done by the contractor or subcontractor is of the type usually done by the principal employer.

Tracing the judicial construction of section 102.06, the court noted that the early case *Great Atlantic & Pacific Tea Co. v. Industrial Commission*[22] gave a similar interpretation to the statute emphasizing the question of whether the employer would have been liable had the injured employee been working directly for him. Shortly after the *A. & P.* decision, however, the court in *Madison Entertainment Corp. v. Industrial Commission*[23] altered the test to make the principal employer liable only if the contractor or subcontractor was carrying on the usual business of the principal employer or performing contractual duties which the principal contractor owed to a third party. The basis of this restricted interpretation was a determination that section 102.06 was in essence an antifraud statute designed to prevent employers from avoiding liability by sub-

19. 70 Wis. 2d at 934, 236 N.W.2d at 216.

20. WIS. STAT. ch. 102 (1973). Section 102.06 provides in pertinent part:

> An employer shall be liable for compensation to an employe of a contractor or subcontractor under the employer who is not subject to this chapter, or who has not complied with the conditions of s. 102.28(2) in any case where such employer would have been liable if such employe had been working directly for the employer, including also work in the erection, alteration, repair or demolition of improvements or of fixtures upon premises of such employer which are used or to be used in the operations of such employer . . . .

21. 72 Wis. 2d 26, 240 N.W.2d 422 (1976).

22. 205 Wis. 7, 236 N.W. 575 (1931).

23. 211 Wis. 459, 248 N.W. 415 (1933).

letting their work to independent contractors. *Madison Entertainment* was followed in numerous cases.[24]

In *Green Bay Packaging*, the court concluded that *Madison Entertainment* and subsequent cases had incorrectly interpreted section 102.06. It based this conclusion on both the express language of the statute and on the purpose of section 102.06, which is designed to protect employees of contractors who are not covered by the Worker's Compensation Act or are not in compliance with its mandatory insurance requirements. The *Green Bay Packaging* test focuses on whether the circumstances were such that the principal employer would be liable if the injured employee had been working directly for him.

The court cautioned, however, that this broader construction would not make employers liable for injuries to employees of all persons with whom they contract:

> [W]e do not mean to impose liability upon principal employers for the employees of all persons with whom they have contractual relations, however slight. . . . By a contractor under we mean to refer to one who regularly furnished to a principal employer materials or services which are integrally related to the furnished product or service provided by that principal employer.[25]

B. Nontraumatically Caused Mental Injury

Two years ago, in *School District No. 1 v. Department of Industry, Labor and Human Relations*,[26] the supreme court announced the rule that nontraumatically caused mental injury may be compensable under the Worker's Compensation Act,[27] although it did not find a compensable injury in that case. The rule was stated as follows:

> [M]ental injury nontraumatically caused must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience. Only if the "fortuitous event unexpected and unforeseen" can be said to be so out of the ordinary from

24. Britton v. Industrial Comm'n, 248 Wis. 549, 22 N.W.2d 525 (1946); Marinette County Fair Ass'n v. Industrial Comm'n, 242 Wis. 552, 8 N.W.2d 268 (1943); City of Hudson v. Industrial Comm'n, 241 Wis. 476, 6 N.W.2d 217 (1942); Heineman Lumber Co. v. Industrial Comm'n, 226 Wis. 373, 276 N.W. 343 (1937); Employers Mut. Liab. Ins. Co. v. Industrial Comm'n, 224 Wis. 527, 272 N.W. 481 (1937).

25. 72 Wis. 2d at 36, 240 N.W.2d at 428.

26. 62 Wis. 2d 370, 215 N.W.2d 373 (1974).

27. WIS. STAT. ch. 102 (1973).

> the countless emotional strains and differences that employees encounter daily without serious mental injury will liability under ch. 102, Stats., be found.[28]

As with any rule allowing recovery for mental injury, this standard is necessarily imprecise and takes definite shape only through a case-by-case application to specific fact situations. The court's decision this term in *Swiss Colony, Inc. v. Department of Industry, Labor and Human Relations*[29] further defines the kind of injury compensable under the *School District* rule.

The claimant in *Swiss Colony* was diagnosed as schizophrenic, with a twenty-five percent permanent disability because she was unable to resume her former job, although she returned to full-time work in a lower position. Before the injury, she had been the purchasing agent for Swiss Colony, a mail order cheese company. The facts that (1) the company's business was heavily seasonal, and (2) in ten years it had expanded from two million dollars of gross sales to thirteen million dollars were found to be sufficient to establish that the job was unusually nerve-wracking and created greater pressures than the average employee would face.

In addition, about a year before the claimant became disabled she was placed under a superior whom the court characterized as "negative, brusque, and belittling."[30] The supervisor regularly challenged and criticized her decisions and required the claimant to do excessive amounts of work. She regularly worked over fifty hours a week, took work home, and was compelled to cancel two planned vacations due to her workload. The employer did not seriously dispute that work pressures caused her breakdown and subsequent permanent disability.

The court held that the combination of factors shown in *Swiss Colony* easily met the *School District* rule that nontraumatically caused mental injury, to be compensable, must result from emotional strains and tensions greater than those normally faced by all employees.

C. Dependents' Benefits Under Section 102.49

In *Schwartz v. Department of Industry, Labor and Human*

28. 62 Wis. 2d at 377, 215 N.W.2d at 377.
29. 72 Wis. 2d 46, 240 N.W.2d 128 (1976).
30. *Id.* at 52, 240 N.W.2d at 131.

Relations,[31] the court was asked to decide the relationship between sections 102.57[32] and 102.49.[33] Section 102.57 provides that when a compensable injury is caused by an employer's violation of a statute or a lawful department order, compensation and death benefits are to be increased fifteen percent. Section 102.49 creates a state fund to pay death benefits to dependent children of a person receiving spouse's death benefits provided under section 102.46.[34] Affirming the decisions of the department and the circuit court, the Wisconsin court held that section 102.57 does not require the employer to pay increased benefits to surviving dependent children under section 102.49.

The court gave only a minimal explanation of its reasoning. The principal ground for the decision was that the legislative intent in creating the state fund for dependent children of fatally injured employees was to spread the burden of their support equally among all employers. This would avoid possible discrimination in employment of workers with large families. Requiring an employer to pay a percentage increase of the fund payment would run counter to this policy.

The court was also heavily influenced by the fact that the department has consistently ruled since the section's enactment more than fifty years ago that section 102.49 benefits are not subject to the percentage increase.[35]

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31. 72 Wis. 2d 217, 240 N.W.2d 173 (1976).

32. WIS. STAT. § 102.57 (1973):

Where injury is caused by the failure of the employer to comply with any statute or any lawful order of the department, compensation and death benefits as provided in this chapter shall be increased 15% but not more than a total increase of $7,500. Failure of an employer reasonably to enforce compliance by employes with such statute or order of the department shall constitute failure by the employer to comply with such statute or order.

33. WIS. STAT. § 102.49 (1973). Subsection (1) provides in pertinent part:

(1) Where the beneficiary under s. 102.46 or s. 102.47(1) is the wife or husband of the deceased employe and is wholly dependent for support, an additional death benefit shall be paid from the funds provided by sub. (5) for each child by their marriage living at the time of the death of the employe, and who is likewise dependent upon him for support.

34. WIS. STAT. § 102.46 (1973):

Where death proximately results from the injury and the deceased leaves a person wholly dependent upon him for support, the death benefit shall equal four times his average annual earnings, but when added to the disability indemnity paid and due at the time of death, shall not exceed seventy per cent of weekly wage for the number of weeks set out in paragraphs (a) and (b) of subsection (3) of section 102.44, based on the age of the deceased at the time of his injury.

35. 1923 Wis. Laws, ch. 328.

D. Compromise Agreements

Section 102.16[36] of the Worker's Compensation Act permits settlement of disputed claims by a compromise agreement between employer and employee, subject to DIHLR approval. In *LaCrosse Lutheran Hospital v. Oldenburg*,[37] the employee and employer had entered into such an agreement. The agreement provided that the employer would pay the employee a single lump sum payment with no provision for payment of hospital or medical bills. Included in the agreement was a disclaimer of liability by the employer. The plaintiff hospital commenced an action against the employer to recover the value of expenses incurred by the employee for treatment of the allegedly compensable injury. The hospital claimed that the employer was liable for the expenses and that the compromise agreement did not preclude a third-party claim against the employer.

The trial court overruled the employer's demurrer. The supreme court reversed, holding that the employer was not liable to the hospital under the facts alleged. The court ruled that when the employer denies liability in a compromise agreement approved by the department, any payment under the agreement fully discharges the employer's liability. It was explained that since public policy favors the compromise of disputed claims, a third party should not be permitted to force a case to litigation in order to determine the employer's liability if the employer and employee are willing to settle.

III. Unemployment Compensation

In *McGraw-Edison Co. v. Department of Industry, Labor and Human Relations*,[38] the supreme court held that a lump sum retirement benefit, elected by an employee, offset unemployment compensation benefits provided throughout the period of the employee's entitlement to the unemployment benefits. At issue was the construction of section 102.04(15),[39] which states the circumstances under which retirement benefits offset unemployment compensation benefits. That statute requires an offset if "the employee is receiving or has claimed and will receive, or has been retired at such employer's compul-

36. Wis. Stat. § 102.16 (1973).
37. 73 Wis. 2d 71, 241 N.W.2d 875 (1976).
38. 72 Wis. 2d 99, 240 N.W.2d 148 (1976).
39. Wis. Stat. § 108.04(15) (1973).

sory retirement age and could claim and receive, retirement payments, *as to any week covered by his benefit claim* under a group retirement system to whose financing any employing unit has substantially contributed."[40]

Two employees of McGraw-Edison had elected to take their retirement benefits, to which the employer had made most of the contributions, in single lump sum payments. The alternate payment methods available were a lifetime monthly annuity or installment payments over a set period. The employees also claimed unemployment compensation benefits on the theory that under the language of section 102.04(15) the lump sum payment would only offset unemployment benefits during the week in which the payment was actually made.

The department, giving the statute a very literal construction, upheld this theory, ruling that the lump sum retirement benefit should not offset unemployment benefits in any subsequent week. The supreme court, however, decided that for purposes of computing unemployment benefits a lump sum retirement benefit was to be allocated on a weekly basis over a period of time, with the amount of each weekly allocation offsetting unemployment compensation for that week. The formula for determining the weekly allocation, the court held, was the "weekly value of a lifetime annuity that could be purchased with the amount of the lump-sum payment."[41]

The court added in dicta that the same weekly allocation principle would apply to an annuity or installment payment method. It said that the weekly value of a lifetime annuity retirement benefit would be the amount of each payment divided by the number of weeks between payments. The court, however, refused to consider the more difficult problem of determining an allocation formula for the installment payment option, which might extend beyond the employee's life expectancy.

In arriving at its decision, the court relied heavily on the fact that the legislative intent of the unemployment statute was to avoid multiple and windfall benefits. It also noted the policy consideration that refusing an offset of unemployment compensation benefits would have the detrimental effect of

40. *Id.* (emphasis added).

41. 72 Wis. 2d at 108, 240 N.W.2d at 153.

discouraging employers from offering the lump sum option to their retiring employees.

IV. MUNICIPAL EMPLOYMENT

A. *Collective Bargaining*

Collective bargaining between school boards and teachers' associations often presents problems in that many factors affecting wages, hours and conditions of employment are also closely involved with educational policy decisions. In *Beloit Education Association v. Wisconsin Employment Relations Commission,*[42] the court set a test for determining which areas are mandatory collective bargaining subjects in school board-teachers' association bargaining.

The case came before the court on the school board's petition for a declaratory ruling[43] on the question of whether proposals submitted by the association were mandatory bargaining subjects under section 111.70(1)(d). This section states that municipal employers must collectively bargain with employees in regard to wages, hours and conditions of employment.[44]

The Wisconsin Employment Relations Commission (WERC) had adopted the rule that areas primarily related to wages, hours or conditions of employment are mandatory subjects of bargaining. The court upheld the WERC, stating, "The commission construed the statute to require mandatory bargaining as to (1) matters which are *primarily* related to 'wages, hours and conditions of employment,' and (2) the impact of the 'establishment of educational policy' affecting the 'wages, hours and conditions of employment.' We agree with that construction."[45] It declined to formulate more specific guidelines for applying the "primarily related" test, preferring a case-by-case application of the basic rule.

In determining the standard for review of WERC decisions under the "primarily related" test for mandatory bargaining, the supreme court reserved substantial review power. It refused to adopt the usual standard that an administrative agency's interpretation of a statute that the agency is required to admin-

42. 73 Wis. 2d 43, 242 N.W.2d 231 (1976).
43. Declaratory rulings are authorized by WIS. STAT. § 111.70(4)(b) (1973).
44. WIS. STAT. § 111.70(1)(d) (1973).
45. 73 Wis. 2d at 54, 242 N.W.2d at 236 (emphasis in original).

ister is entitled to great weight.[46] The court decided that this rule applies only if the administrative interpretation is of long standing and has not encountered legislative or judicial challenge. Instead, the court adopted what it called the "great bearing" or "due weight" standard, stated in *City of Milwaukee v. Wisconsin Employment Relations Commission*,[47] that the reviewing court "is not bound by the interpretation given to a statute by an administrative agency. Nevertheless, that interpretation has great bearing on the determination as to what the appropriate construction should be."[48]

Applying the "primarily related" test to the bargaining proposals made by the association, the court held the following areas were subject to mandatory collective bargaining: teacher evaluation procedures; teacher access to personnel files insofar as the files contain material relative to evaluation or continued employment; mandatory notice and hearing procedures in disciplinary actions, including contract nonrenewal; procedures followed in teacher layoffs, so long as the board's right to determine curriculum is not thereby impaired; procedures for dealing with student misbehavior that presents a physical threat to the teacher's safety; aspects of the school calendar that are primarily related to wages, hours, and conditions of employment;[49] in-service training; and the impact of class size as it bears on wages, hours and conditions of employment.

B. Definition of "Managerial Employee"

The Wisconsin Municipal Employment Relations Act[50] was amended in 1971 to cover "any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employee."[51] The supreme court this term, in *City of Milwaukee v. Wiscon-*

46. Libby, McNeill & Libby v. Wisconsin Employment Relations Comm'n, 48 Wis. 2d 272, 179 N.W.2d 805 (1970).

47. 71 Wis. 2d 709, 239 N.W.2d 63 (1976).

48. 73 Wis. 2d at 68, 242 N.W.2d at 243, *quoting* 71 Wis. 2d at 714, 239 N.W.2d at 66.

49. The association had not submitted any specific calendar proposals. The court held that while the school calendar is generally a subject for management determination, there are aspects of calendaring that are closely related to wages, hours and conditions of employment, such as scheduling educational conventions and in-service training. 73 Wis. 2d at 61-62, 242 N.W.2d at 239-40.

50. WIS. STAT. § 111.70 *et seq.* (1973).

51. WIS. STAT. § 111.70(1)(b), *amended* by 1971 Wis. Laws, ch. 124.

sin Employment Relations Commission,[52] construed "managerial employee" under this section.

At issue was whether the Milwaukee assistant city attorneys were excluded from forming a collective bargaining unit as "managerial employees." The WERC held that they were not excluded, as did the circuit court on appeal. The supreme court affirmed, adopting the WERC definition of managerial employee, stated by the court as "those who participate in the formulation, determination and implementation of management policy or possess effective authority to commit the employer's resources."[53]

The city had urged adoption of the broader definition used by the National Labor Relations Board (NLRB) in interpreting the National Labor Relations Act, "those who formulate and effectuate management policies by expressing and making operative decisions of their employer."[54] The court, however, considered only whether the WERC definition was reasonable and consistent with the purpose of the statute. Concluding that it was, the court looked especially to the fact that the Act expressly provides for coverage of professional employees[55] and that the comparable act covering state employees[56] specifically includes state-employed attorneys.[57]

The parties agreed that under the WERC definition the assistant city attorneys were not managerial employees under the act, so the court did not discuss the application of this definition to the facts of the case.

C. *Municipal Employee Strikes*

In *Joint School District v. Wisconsin Rapids Education Association,*[58] the court addressed several issues relating to municipal employee strikes. The case arose out of a 1974 strike by teachers in the Wisconsin Rapids area. When the teachers went on strike, the board of education began an action in its own name demanding an injunction forcing the strikers back to work.

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52. 71 Wis. 2d 709, 239 N.W.2d 63 (1976).

53. 71 Wis. 2d at 716, 239 N.W.2d at 67.

54. NLRB v. Bell Aerospace Co. Div'n of Textron, Inc., 416 U.S. 267, 286 (1974), *quoted in* 71 Wis. 2d at 716, 239 N.W.2d at 67.

55. WIS. STAT. § 111.70(1)(*l*) (1973).

56. WIS. STAT. § 111.80 *et seq.* (1973).

57. WIS. STAT. § 111.81(3)(a)6.c. (1973).

58. 70 Wis. 2d 292, 234 N.W.2d 289 (1975).

In response to the association's argument that the board lacked capacity to sue, the court, expanding its recent holding in *Flood v. Board of Education,*[59] held that in seeking an injunction against a teachers' strike, a board of education has interests identical to those of the school district and is therefore a proper party. The *Flood* decision was based on an estoppel theory. In *Joint School District*, however, the court examined the functions of the board, placing particular emphasis on the fact that the board was responsible for contract negotiations with the teachers and for managing school operations. The court concluded that for purposes of this action, the interests of the board were indistinguishable from those of the district.

The association also argued that sections 103.56(1)[60] and 103.63,[61] the Wisconsin Little Norris-LaGuardia Act, restricted the power of the circuit court to issue an injunction. The Wisconsin court, following rulings in jurisdictions with similar statutes,[62] held that the Little Norris-LaGuardia Act did not control actions brought by states or political subdivisions seeking injunctive relief against striking government employees. The decision was also based on the principle that statutory restrictions on injunctive power should be strictly limited to the terms of the statute and on the fact that Wisconsin has other statutory provisions expressly controlling municipal labor relations.[63]

Arguing in the alternative, the association contended that the general rules on injunctions[64] required the school board to show irreparable harm before an injunction could be granted. The board countered with the argument that there was no need to show actual harm if the strike was illegal, as was a strike by municipal employees.[65] The court acknowledged that such a rule has been followed in some jurisdictions, and that Wisconsin has recognized the rule in situations where there has been a legislative or judicial determination that the activity per se causes irreparable harm.[66]

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59. 69 Wis. 2d 184, 230 N.W.2d 711 (1975).

60. WIS. STAT. § 103.56(1) (1973).

61. WIS. STAT. § 103.62 (1973).

62. *See* 48 AM. JUR. 2d, *Labor and Labor Relations* § 1471 (1970) for a discussion of these cases.

63. *See* WIS. STAT. § 111.70 *et seq.* (1973).

64. WIS. STAT. § 813.02(1) (1973).

65. WIS. STAT. § 111.70(4)(*l*) (1973).

66. Vogt, Inc. v. Teamsters Local 695, 270 Wis. 315, 71 N.W.2d 359, 74 N.W.2d 749,

The court held, however, that there is no such legislative or judicial determination in the case of municipal employee strikes and that, on the contrary, section 111.70(6)[67] declares a policy encouraging voluntary settlement of municipal labor disputes by the parties. For these reasons, the court held that there must be an actual showing of irreparable harm before an injunction would issue.

Municipal employee strikes received further consideration in *Kenosha Unified School District v. Kenosha Education Association,*[68] wherein the court ruled on the power of a state court to impose fines for contempt on the grounds of violation of an injunction.

The trial court in *Kenosha Unified* issued an injunction ordering striking teachers to return to work. When the injunction was ignored, the court found both the individual teachers and the association in contempt and imposed a fine of ten dollars per day on the individual teachers and a total fine of three thousand dollars on the association. The association argued that under section 111.70(7),[69] the court had power to fine only the individual teachers in contempt.

The supreme court agreed that section 111.70(7) authorizes imposition of fines only upon individual strikers. Its reasoning was based on the language of the statute that "whoever" violates section 111.70(4)(1) shall be fined, with the fine to be paid by means of a salary deduction. The court reasoned that these references clearly show a legislative intent that only individual persons be covered under the section. The court, however, went on to rule that since a labor organization has the capacity to sue and be sued on behalf of its members,[70] it necessarily can be held in contempt of court under the Wisconsin civil contempt statutes.[71]

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aff'd, 354 U.S. 284 (1956).

67. WIS. STAT. § 111.70(6) (1973).

68. 70 Wis. 2d 325, 234 N.W.2d 311 (1975).

69. WIS. STAT. § 111.70(7) (1973):

> Whoever violates sub. (4)(*l*) after an injunction against such a strike has been issued shall be fined $10. After the injunction has been issued, any employe who is absent from work because of purported illness shall be presumed to be on strike unless the illness is verified by a written report from a physician to the employer. Each day of continued violation constitutes a separate offense. The court shall order that any fine imposed under this subsection be paid by means of a salary deduction at a rate to be determined by the court.

70. Fray v. Meat Cutters Local 248, 9 Wis. 2d 631, 101 N.W.2d 782 (1960).

71. WIS. STAT. ch. 295 (1973).

The court next considered the amount of the fine that may be imposed on an unincorporated association. Looking to the civil contempt statutes, it held that section 295.14[72] required the fine in this case to be limited to two hundred fifty dollars plus costs and expenses, since there was no showing of actual damages. The court, however, opened the door to the possibility that in an appropriate case, the dollar limit set by section 295.14 could be found to be an invalid restriction on the inherent power of a court to punish for contempt. It was stated that the legislature may regulate the power to punish for contempt but "may not diminish it so as to render it ineffectual."[73] The court ruled that to exceed the statutory maximum, there must be a specific trial court finding that the contempt power would be rendered ineffectual. Since there was no such finding in *Kenosha Unified,* the statutory limit precluded imposition of a greater fine.

MARY F. WYANT

MISCELLANEOUS

1. OPEN MEETING LAW

In *State ex rel. Lynch v. Conta,*[1] the Wisconsin Supreme Court upheld the applicability of Wisconsin's open meeting law[2] to closed sessions of a state legislative committee where it was questionable whether those members in attendance, all of whom were from a single political party, acted in the capacity of a political caucus or a legislative body. This case was an original action for declaratory relief[3] challenging the legality of

72. WIS. STAT. § 295.14 (1973):
If an actual loss or injury has been produced to any party by the misconduct alleged, the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him and to satisfy his costs and expenses, instead of imposing a fine upon such defendant; and in such case the payment and acceptance of such sum shall be an absolute bar to any action by such aggrieved party to recover damages for such injury or loss. Where no such actual loss or injury has been produced the fine shall not exceed two hundred and fifty dollars over and above the costs and expenses of the proceedings.
73. 70 Wis. 2d at 335, 234 N.W.2d at 316.

1. 71 Wis. 2d 662, 239 N.W.2d 313 (1976).
2. WIS. STAT. § 66.77 (1973).
3. The court discussed at some length the propriety of rendering a declaratory