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## **ANALYSIS OF RULINGS OF THE WISCONSIN SUPREME COURT JUSTICE DAVID PROSSER**

The Hon. David T. Prosser of the Wisconsin Supreme Court is currently running for reelection for a new 10-year term as an associate justice on the court. He received over 52 percent of the vote in the primary election, and will face Assistant Attorney General Joanne Kloppenburg in the general election on April 5, 2011. This paper summarizes Justice Prosser’s rulings on labor issues for purposes of the pending election.

### **I. Brief Overview**

Justice Prosser’s decisions are reliably anti-union and anti-employee. In the few cases where he has authored or signed on to a pro-employee or pro-union decision, the wrongs perpetrated on the prevailing employee or union were egregious and the court’s decision was unanimous. Thus, in future cases – particularly in close cases –he will probably tend to rule against workers and unions.

### **II. Justice Prosser’s Anti-Labor and Anti-Employee Decisions**

In his decisions, Justice Prosser has taken positions in opposition to employee privacy, due process, workers’ compensation, retirement benefits, and family medical leave. This section will briefly describe his anti-labor or anti-employee decisions.

One of Justice Prosser’s earliest opinions involved the issue of employee privacy. In *Milwaukee Teachers’ Educ. Ass’n v. Milwaukee Bd. of School Directors*, 596 N.W.2d 403, 417 (Wis. 1999) (Prosser, J., dissenting), one of our own affiliates sued the Milwaukee school board, seeking declaratory and injunctive relief to prevent the release of personnel information to a local newspaper, which had made a request under Wisconsin’s open records law. *Id.* at 405. The school board had expressed a clear intention to grant the newspaper’s request. *Id.* The court found that the employees were entitled to *de novo* review to determine whether their interest in privacy outweighed any public interest that would be served by releasing the information. *Id.* at 412 Justice

Prosser entered a dissent in the case. However, he provided no reasoning for his opinion; it was limited to just two words: “I dissent.” *Id.* at 417 (Prosser, J., dissenting).

Justice Prosser later joined the dissent in a case where the majority held that circuit courts were not the exclusive forums for county law-enforcement employees to challenge dismissals. *Eau Claire County v. General Teamsters Union Local No. 662*, 611 N.W.2d 744, 753 (Wis. 2000) (Sykes, J., dissenting). Rather, the employees could choose to proceed either with an appeal to the circuit court or with the grievance procedures provided in the applicable collective bargaining agreement. *Id.* In so holding, the majority distinguished an earlier decision, *City of Janesville v. Wisconsin Employment Relations Com'n*, 535 N.W.2d 34 (Wis. Ct. App. 1995), which held that a very similar statute to the one at issue in *Eau Claire* provided for appeal to the circuit court as the exclusive method for obtaining review of municipal police and fire personnel disciplinary decisions. Justice Prosser joined the dissent, which reasoned that, since the two similar statutes were enacted together and had similar wording, they should be interpreted as having the same meaning. *Id.* at 753 (Sykes, J., dissenting).

Justice Prosser also dissented in a case where the majority ruled that a county sheriff could not summarily fire a group of unionized county food service employees who prepared meals for the jail and replace them with a private food service provider. *Kocken v. Wisconsin Council 40*, 732 N.W.2d 828 (Wis. 2007) (Roggensack, J., dissenting). The union in the case, AFSCME, demanded that the county bargain over the proposed changes. *Id.* at 833. The county refused, and the sheriff filed suit to enjoin the union from pursuing charges with the Wisconsin Employment Relations Commission (WERC). *Id.* The injunction was granted, preventing the union from pursuing any type of action before the WERC or seeking injunctive relief to prevent the sheriff from hiring Aramark as a food service provider at the jail, and requiring AFSCME to withdraw its prohibited practice complaint with the WERC. *Id.* at 831. The union appealed. *Id.* When the case reached the Wisconsin Supreme Court, the majority held that the sheriff's actions were not within his constitutional powers. *Id.* at 846. The hiring and firing of personnel to provide food service fell within the “mundane and commonplace” “internal management and administrative duties” not protected by the constitution, and was subject to legislative regulation, including collective bargaining. *Id.* at 845. Justice Prosser joined in a dissenting opinion by Justice Roggensack. *Id.* at 847. The dissent's reasoning was that the sheriff's actions fell within his constitutional powers, rights, and duties because the Wisconsin Constitution gives the sheriff the responsibility of “caring for” prisoners, and that choosing the group of employees that prepares food in the county jail was the sheriff's way of going about his constitutionally-appointed duties. *Id.* at 853-54.

Justice Prosser sided with the county in a case where a police officer who was promoted on a probationary basis was fired without cause, *Kraus v. City of Waukesha Police and Fire Com'n*, 662 N.W.2d 294 (Wis. 2003), and in a case where teachers who withdrew their deposits in the state teachers' retirement system and then returned to teaching were not given credit for their pre-withdrawal years of teaching. *Solie v. Employee Trust Funds Bd.*, 695 N.W.2d 463, 484 (Wis. 2005) (Wilcox, J., dissenting). He dissented in a case where the majority held that an injured worker was entitled to

compensation per surgery rather than per injury. *DaimlerChrysler v. Labor and Industry Review Com'n*, 727 N.W.2d 311 (Wis. 2007) (Roggensack, J., dissenting). And he wrote the majority opinion in a case where the court held that an employee bringing actions against an employer for violations of the Wisconsin Family or Medical Leave Act had neither a statutory right nor a state constitutional right to a jury trial. *Harvot v. Solo Cup Co.*, 768 N.W.2d 176 (Wis. 2009).

### III. Justice Prosser's Pro-Labor and Pro-Employee Decisions

The catalogue of pro-union or pro-employee Wisconsin Supreme Court decisions where Justice Prosser authored or joined the majority is short. Of the published decisions located in this research, all were unanimous and involved employer violations of the law that ranged from relatively clear-cut to blatant and egregious.

In *Milwaukee Dist. Council 48 v. Milwaukee County*, 627 N.W.2d 866 (Wis. 2001), a public employee labor union brought an action for declaratory judgment against a county, alleging that it was wrongly denying pensions to eligible employees who were terminated for fault or delinquency. The Supreme Court unanimously held that the county could not deny pensions to such employees without first affording them the procedural due process of a hearing. *Id.*

In *Strozinsky v. School Dist. of Brown Deer*, 614 N.W.2d 443 (Wis. 2000), a former payroll clerk and the Brown Deer school district brought an action for wrongful and constructive discharge in violation of public policy. Strozinsky alleged that she was forced to resign because she refused to comply with an order not to withhold taxes from the district superintendent's bonus check. *Id.* at 449. The court held that Strozinsky had a claim for wrongful discharge because she identified a fundamental and well-defined public policy in her complaint. *Id.* at 457. The court further held that the doctrine of constructive discharge could satisfy the "wrongful discharge" element the public policy claim, and that the question of whether Strozinsky's resignation was voluntary was a question for a jury. *Id.* at 465.

Finally, in *Salveson v. Douglas County*, 630 N.W.2d 182 (Wis. 2001), Justice Prosser authored the court's unanimous decision in a case concerning damages in a Title VII employment discrimination and sexual harassment action against a county and its insurer. The facts of the case evidenced a particularly egregious harassment situation. After fourteen years of demeaning sexual advances from her supervisor, which Salveson rebuffed, she was severely injured when the supervisor ordered her to work on his personal tractor during company work hours. *Id.* at 187. He told her that he had secured the tractor, but released the vehicle during the procedure and it rolled onto Salveson, injuring her. *Id.* The Wisconsin Supreme Court ruled that the circuit court properly exercised its discretion in awarding employee back pay and front pay, that the employee's damage awards should not have been offset by duty disability payments she received, that the award of front pay was excluded from statutory cap on damages, and that the number of persons employed by an employer for purposes of the damages cap was properly determined at the time the discriminatory act occurred. *Id.* at 201.

#### **IV. *Wisconsin Professional Police Ass'n, Inc. v. Lightbourn* Decision**

One case written during Justice Prosser's term that concerned labor rights, *Wisconsin Professional Police Ass'n, Inc. v. Lightbourn*, 627 N.W.2d 807 (Wis. 2001), was not strictly pro- or anti-union. In *Lightbourn*, Justice Prosser, writing for a 4-3 majority, gave judicial sanction to important changes to the Wisconsin Retirement System (WRS). The legislation in question was known as "1999 Wisconsin Act 11." *Id.* The Wisconsin Professional Police Association and the State Engineering Association objected to provisions in the act that 1) directed a \$4 billion distribution from the transaction amortization account (TAA) to fund present or future retirement benefits; 2) directed that \$200 million of the estimated \$1.236 billion sent to employer reserve be used as employer contribution credits against unfunded liability; 3) amended the statutory "assumed rate," meaning the probable average effective rate expected to be earned for the fixed annuity division on a long-term basis; and 4) raised the 65% benefit cap by five percent for all employees except protective occupation employees. *Id.*

In a lengthy opinion by Justice Prosser, the court held that all of the challenged provisions were constitutional. *Id.* The court said that the act did not take property without just compensation, did not impair the obligations of their contract with the State of Wisconsin, and did not violate trust principles. *Id.* at 862.

Unions were on both the prevailing and the losing side of this case; therefore, the decision cannot be called truly "pro-union" or "anti-union." While the case was originally brought by the WPPA, the Wisconsin Education Association Council intervened as a respondent because it believed that the Act was generally beneficial to its members. *Id.* at 830. For example, the Act raised the "benefit cap" – the maximum amount of initial retirement annuity guaranteed by the state – for non-protective service employees, including teachers, to 70 percent from 65 percent. *Id.* at 827. Protective service employees covered by social security remained at 65 percent, and protective service employees not covered by social security remained at 85 percent. *Id.* The Police Association argued that this aspect of the legislation amounted to a denial of equal protection. *Id.* at 831.

#### **V. Conclusion**

As detailed above, Justice Prosser has a record of ruling against unions and employees. In the few instances where he has rendered a decision in favor of employees or unions, the cases were clear-cut and the court's decisions were unanimous.