STATE OF WISCONSIN CIRCUIT COURT VILAS COUNTY

STANLEY G. GRANT, PATRICIA E. GRANT,
ALLEN E. WARDEN, ELISABETH FAGAN,
ARTHUR B. KUMMET, BARBARA RUID,
and PATRICK SWEENEY,

Plaintiffs,

vs. Case No. 87-CV-22

LABOR AND INDUSTRY REVIEW COMMISSION, and
MONTGOMERY WARD & CO., INCORPORATED,

Defendants.

TRANSCRIPT OF FINDINGS & JUDGMENT - 9/1/87

THE COURT: I must say, I have enjoyed the intellectual stimulation. It seems that I don't do perhaps enough of that as I would like.

I would also indicate that normally, in a situation like that, I would take a great deal more time in deciding this issue and would probably provide a written decision. However, because -- and this is again a plea to the assistance of the appellate courts, we need some assistance and when I say we, I mean especially us one-county judges who have to delve into every aspect of our system every day, we need some law clerks and we need some help -- I find it very difficult to have to deal with issues of such magnitude as I see this issue in the realm of dealing with all the other decisions and opinions that I must get out. And for that

reason, I am going to provide a decision here today.

This is a -- an unemployment compensation case that is brought pursuant to Sections 108.09 paren (7) and 102.23 Stats. Venue for this action is the Vilas County Circuit Court pursuant to stipulation of the parties under section 102.23 paren (1), and order of this court.

As indicated, the facts in this case are not disputed or they are relatively undisputed. Each of the plaintiffs work as a catalog sales agent for Montgomery Ward and Company, Inc. under a -- written catalog sales agency agreements. After over a century in the catalog business, in Wisconsin, Ward terminated its catalog sales agency operations. Each of the plaintiffs thereafter made application to the Department of Labor and Industry Review Commission for unemployment compensation benefits. The commission's decisions held that the plaintiffs were ineligible for unemployment benefits based on personal services performed by them as catalog sales agents because such services were not performed as an employee of Wards within the meaning of Section 108.02 paren (12) (e).

Perhaps as stated by plaintiff, Section 108.02(12)(e) as enacted created two separate and distinct classes of contractors; those who do not have employees of their own and who will be considered employees of the principal, and those who do have such employees and who will

be excluded from the coverage of the unemployment compensation Act.

Of course, I am talking about covered. I think it was Attorney Pearson who brought that up in his brief, that we are talking about the covered application of that statute as well. It is this distinction upon which the plaintiffs base their claim that Section 108.02 paren (12)(e) is unconstitutional because it violates the equal protection requirements in Article Fourteen, Section 1 of the Amendments to the United States Constitution and its counterpart in Article 1, Section 1 of the Wisconsin Constitution.

And I would as a footnote obviously indicate, and I think was Justice Abrahamson indicated, that Article 1, Section 1 of the Wisconsin Constitution has consistently been interpreted as providing the protections against unequal treatment by the state guaranteed by the equal protection clause of the United States Constitution. And because of that similarity, the same legal analysis is used, and I use that same legal analysis as well, and I believe that was in Sambs vs. City of Brookfield that Justice Abrahamson made that note that I last read having to do with that similarity.

Both parties well-agreed that the standard that this court should use in reviewing the constitutionality of the statutory classification which is challenged here as

violative of the equal protection is the rational basis test.

McGowan vs. Maryland, -- and that's at 366 U. S. 420, a 1961 case, and I quote, the Fourteenth Amendment permits states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others, and constitutonal safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of State's objective.

State legislatures are presumed to have acted within their constitutional powers despite the fact that, in practice, their laws result in some inequality.

A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. Quote.

In Omernik vs. State, 64 Wis 2nd 6, 1974 case, the Wisconsin Supreme Court described the rational basis standard as follows: Again, it's quoted. A legislative classification is presumed to be valid. The burden of proof is upon the challenging party to establish the invalidity of a statutory classification. Any reasonable basis for the classification will validate the statute. Equal protection of the law is denied only where the legislature has made irrational or arbitrary classification. The basic test is not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the

classification.

Judicial response to a challenged legislative classification requires only that the reviewing court locate some reasonable basis for the classification made. The public policy involved is for the legislature, not the courts, to determine.

The Wisconsin Supreme court has provided, and it was Justice Bablitch in a more recent case, Milwaukee Brewers vs. Department of Health and Social Services, 130 Wis 2nd, indicated it was to be a useful analytical tool, quote and unquote, for reviewing the constitutionality of legislative enactments to measure the reasonableness of the classifications created. That is the useful analytical tool that was referred to by Attorney Nielsen in the Harris case and Omernik case as well. That analytical tool provides the following five measures:

One, all classifications must be based upon substantial distinctions which make one class really different from another.

Two, The classification adopted must be germane to the purpose of the law.

Three, the classification must not be based upon existing circumstances only and must not be so constituted as to preclude addition to the numbers included within a class.

Four, to whatever class a law may apply, it must apply equally to each member thereof.

And five, that the characteristics of each class could be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Having set the stage by indicating the above statutory measures, I am also forced to indicate as well that unfortunately for this court and others as well, there is no well to find formula for assistance.

As decided in Schweiker vs. Wilson, as stated, no bright line divides the merely foolish from the arbitrary law. The rational basis test holds two firmly established principles in tension. One is that the court must not substitute its view of wise or fair legislative policy for that of the duly elected representatives of the people. I will omit a long line of citations. And the other principle in tension, the equal protection requirement does place a substantive limit on legislative power. At a minimum, the legislature cannot arbitrarily discriminate among citizens. Again, I am omitting the citations. Enforcing this prohibition, while avoiding unwarranted incursions on the legislative power presents a very, very difficult task for the court system.

And I might add as well, and I think this was a footnote again by Justice Abrahamson in the County of Portage vs. Steinpreis case, and it also was a -- I think it was a footnote by Justice Brennan of the Supreme Court case. It becomes even more difficult considering that the Wisconsin and the United States Supreme Courts have used numerous formulations for the rational basis test, and have afforded different degrees of deference to the legislature.

And it has to make things extremely difficult given those facts and given the difficulty in which both the Wisconsin and the United States Supreme Court have rendered assistance as they do to us trial courts in determining the appropriate formula for a rational basis test.

Nonetheless, this court is obliged to attempt to set forth what it views as the legislative objective and, as Attorney Hart has suggested, the legislative means to reach this objective so that it might review whether the objective is legitimate and whether there is a rational relation between the objective and the means. And that's how Justice Abrahamson has again stated the issue in her dissent in the Milwaukee Brewer case.

The legislative intent behind Section 108.02(12)(e) is clear. The rationale for creating a statutory scheme is not. As such, quote, it is the Court's

obligation to locate or to construct, if possible, a rationale that might have influenced the legislature and that reasonably upholds the legislative determination. The rationale that the court locates or constructs is not likely to be indisputable. But it is not our task to determine the wisdom of the rationale or the legislation. The legislature assays the data available and decides the course to follow. Sambs -- S-a-m-b-s -- vs. City of Brookfield.

The Wisconsin Supreme Court, as counsel have indicated, has had the opportunity to review in detail the case law and legislative history surrounding Section 108.02(3) in the case of Robert Hansen Trucking vs. LRIC 126 Wis 2d 323, 377 NW 2nd 151, 1985 case, and reached the following conclusions concerning the legislative intent. On review of the Price County and Sears cases, the Pearson memorandum, the legislative reference bill drafting file, and the language of Section 108.02(3), we conclude that the legislature intended the amendments to change that part of the court's Sears decision that a contractor who was a covered employer could also be an employee of the principal. The legislature did not intend to change that part of the Price County and Sears decisions that the employee status of the individuals hired by the contractor depended on whether the contractor was a covered employer. The legislature repealed the second sentence of paragraph (a) because the

Court had derived a rule that a contractor could be a covered employer and also an employee of the principal from that language. That is the Price County case and Sears case. The legislature created paragraph (e) to provide expressly that contractors who are covered employers are not to be considered employees of the principal. In excepting contractors who are covered employers from being considered employees, paragraph (e) contemplates that these contractors will be liable for the unemployment compensation of the individuals they hire. Unquote.

Thus it is clear the 1980 amendments to Section 108.02(3) were brought about as indicated in that case through the efforts of the Sears lobbyist, Chris Tachett. The rationale as presented to the legislature was to change the Supreme Court's decision in the Price County and Sears case. The legislature unfortunately did not set forth its rationale for imposing the classification.

And as indicated, I think it is appropriate to indicate, as the court did in its footnote, that this legislation was drafted by Attorney Pearson here before the Court today, and was presented in an unusual form not to indicate that the legislation was not legal, but simply as an indication of how this legislation developed and how in fact it was passed.

While I recognize the presumption of

constitutionality in the rather easily accomodated rational basis test I cannot blindly rubber stamp this legislation as well. The rational basis standard is not, quote, a toothless one, unquote. Schweiker vs. Wilson.

it is important to note, and I am going to take the time to read the policy declared by the by the legislature when it enacted the Wisconsin Compensation Act, because I do think it is important, and although Attorney Pearson indicated it may not in a given case provide any purposeful meaning to the court, I think in this case it is appropriate to indicate what the policy was when the legislature enacted the unemployment compensation act.

One. Unemployment in Wisconsin is recognized as an urgent public problem, gravely affecting the health, morals and welfare of the people of this state. The burdens resulting from irregular employment and reduced annual earnings fall directly on the unemployed worker and his family. The decreased and irregular purchasing power of wage earners in turn vitally affect the livelihood of farmers, merchants and manufacturers, results in a decreased demand for their products, and thus tends partially to paralyze the economic life of the entire state. In good times and in bad times unemployment is a heavy social cost, directly affecting many thousands of wage earners. Each employing unit is -- in Wisconsin should play at least a part of this social

cost, connected with its own irregular operations, by financing compensation for its own unemployed workers. Unquote.

That is, as also stated, the purpose of the Unemployment Compensation Act is to avoid the risk or hazards that will befall those who, because of their employment, are dependent upon others for their livelihood. Princess House, Inc. vs. DIHLR, 111 Wis 2nd 46.

The Unemployment Compensation Act is remedial in nature and should be liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage earning status.

It is interesting to note, as Attorney Nielsen has brought up this afternoon, one looks at 108.02, either before or after the amendment, you will note as Attorney Pearson had indicated, we are talking about in (a) and (b), an Employee, and we are talking about independent contractors, and if you look at the rationale behind 108.02 and how it was originally drafted, it was obviously as Attorney Nielsen has indicated, to exclude from coverage those persons who were unlikely to be dependent upon others even though they may have performed services for others because they had their own separately established business. This was a legislative statement in respect to a class of

persons who are not dependent on another employing unit. It obviously served a purpose that was consistent with the general policy of the unemployment compensation law.

As stated in Princess, and I quote, because persons of the class envisioned in the exception are not dependent on an employer, the risk of their unemployment must be borne by themselves and not another.

The very rationale as found by the court in Princess and other courts was not followed when the amendment was drafted. It wasn't followed when 108.02(12)(e) was placed in that section. We have, as I see it, a basic change in purpose and in policy, not reflected by any legislative history. This court's inability to fanthom any reason for the differentiation between the two groups here proves fatal to the constitutionality of Section 108.02(12)(e). I cannot hypothesize any reasonable -- and I would underline reasonable -- basis for the legislation in question.

The plaintiffs in this case stand in precisely the same relationship with Ward as did their counterparts who had no employees and received benefits. Each was as dependent upon Ward for their livelihood as were their counterparts who had no employees. As plaintiffs accurately stated, quote, each suffered the same economic loss and the same pain and burdens of dislocation and disruption in their lives which the Unemployment Compensation Act was designed to

ameliorate.

To use that useful analytical tool, as Justice Bablitch has now phrased it, I am satisfied beyond a reasonable doubt that no substantial -- and I underline substantial -- distinction exists which makes one class really different from another. The hearing testimony in this action revealed the principal reason for employing assistants was simply a matter of personal convenience. The only difference between classes created was that one hired assistants and the other did not.

Given the purpose of the unemployment compensation act and the nature of the relationship between employer and employee, which is the same in this case, does not justify this legislation. I am satisfied beyond a reasonable doubt that Section 108.02 paren (12) paren (e) is not germane to the purpose of the Unemployment Compensation Act or to the purpose behind 108.02. As I indicated, it certainly isn't germane to the Unemployment Compensation Act, and it certainly isn't germane to a termination as to employee or independent contractor as was indicated by the legislature and its purpose indicated in the Princess case which was certainly reasonable and constitutional.

This was special interest legislation relieving Wards, Sears, of liability for contributions to the unemployment compensation reserves. And I would indicate in

the public purpose section of the statute, that was one of the declarations of the legislature at that time was to make sure that the parties paid their fair share into the reserves. And what this did is it took them out of doing exactly that. Whether one had assistants or not, does not make them any less dependent upon Wards.

As stated, the legislature has indicated its purpose and concern in dealing with independent contractors under 108.02(12)(a)(b). The legislature then included another subsection not relating to independent contractors without providing any written purpose.

Now, defendants have postulated a number of reasons for this legislative action. This court receives with some skepticism this post hoc hypothesis about legislative purpose unsupported by legislative history. That's State ex rel Grand Bazaar vs. Milwaukee, 105 Wisconsin 2nd 203. As footnote 6 of Grand Bazaar says, citing Schweiker vs. Wilson, Powell dissenting, indicates, and I quote, when a legitimate purpose for a statute appears in the legislative history or is implicit in the statutory scheme itself, a court has some assurance that the legislature has made a conscious policy choice. Our democratic system requires that legislation intended to serve a discernible purpose receive the most respectful deference. Again, omitting citations.

If this court had seen any legislative

history that could provide this court any reasonable or any substantial basis, I would give the legislature that deference. The court could find none. None was provided this court. And the court cannot hypothecate any to substantiate this legislation.

The question of whether a statutory classification discriminates arbitrarily cannot be divorced from whether it was enacted to serve an identifiable purpose. And I again am quoting from footnote 6. When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a review in court may be presented, not so much with a legislative policy choice, as its absence.

This concern for a policy choice is reflected here. And this court has some very strong concerns. If I had the concern that the legislature made a deliberate choice, a considered choice, that would be one thing. I did not see that. The way the legislation was enacted -- and that's the only reason I bring that up, it was not initiated originally through the normal statutory channels under Section 108.14(5). As I read the footnote, the counsel did not even take this -- although there was an indication there was no objection.

This concern that I am broaching is reflected in another case, and let me quote from that case as

well. That's United States Retirement Board vs. Fritz, 449 U. S. 166, 101 Supreme Court 453, 1980 case. And it's Brennan dissenting opinion, and I quote: From these cases and others it is clear that this court will no longer sustain a challenged classification under the rational basis test merely because government attorneys can suggest a, quote, conceivable basis upon which it may be thought rational. The standard we have applied is properly deferential to the Legislative Branch: where Congress has articulated a legitimate governmental objective, and the challenged classification rationally furthers that objective, we must sustain the provision.

In other cases, however, the courts must probe mere deeply. Where Congress has expressly stated the purpose of a piece of legislation, but where the challenged classification is either irrelevant to or counter to that purpose, we must view any post hoc justifications proffered by Government attorneys with skepticism. A challenged classification may be sustained only if it is rationally related to achievement of an actual governmental purpose.

As Justice Bablitch recently stated, in the Milwaukee Brewers case, If the concept of equal protection is to be meaningful, equal protection cannot be interpreted so as to allow the legislature to exercise its will on a minority of citizens anytime it desires so long as there is

any rationale to do so, regardless of how remote, fanciful, or speculative the rationale may be. To be rational for the purpose of equal protection analysis, the legislative rationale must be reasonable. Put another way, in application to policies, projects or acts, rational implies satisfactory to the reason or chiefly actuated by reason. Webster's Third New International Dictionary (1961).

Defendants' proffered rationale for support of this legislation consisted of the following, and Attorney Nielsen indicated what they were, administrative convenience, less perceived need, fund integrity or economic benefit to the principal. The court views all of those proffered rationale as being, quote, conceivable, unquote, as Justice Brennan has indicated.

I think in dealing with this issue, any legislation having to do with the Unemployment Compensation Act in which denial of benefits was likely to happen, a justification, conceivably, could be fund integrity. It's easy, as Attorney Nielsen has indicated. The Court doesn't find that, however, reasonable, given the facts of this case, nor substantial. The Court doesn't believe to differentiate between two classes as we have here, simply because of the fact that one employees assistants and one does not, is arbitrary, is irrational, and wrong.

Economic benefit to the principal, given the

policy of the Unemployment Compensation Act, it's remedial in nature, as it's stated, to make sure that parties pay into that system when appropriate. And that people are entitled to benefits when it's appropriate. I don't see that as a reasonable or a substantial reason for that classification. Less perceived need. We have two groups of individuals as indicated that stood in the same position with Wards. Whether they hired assistants or they did not. When I queried Attorney Hart about that issue of perceived need or that they were entrepreneurs or they're less in need or they're independent contractors, I can't say that. And that's why I asked that question. I don't see that as obvious, obviously, as defense does. I don't see that distinction as making a difference. I don't see in fact that either one of those classes of individuals are in any less or more need than the other. And certainly by hiring assistants, I don't think makes that difference. Administrative convenience. Again, as with the other three proposed and offered rationales, they are all conceivable. All rational. They were presented to the Court, but that's not the issue.

I think the issue is stated by Bablitch and Abrahamson and even Brennan, Powell, in their dissents. The issue is whether they are reasonable or they are substantial. And under the Omernik test as I indicated, I am satisfied beyond a reasonable doubt that at least three of the tests of

that analytical tool are not met.

This legislation in this court's opinion is very wide of any reasonable mark. Any rationale suggested by the defendants as far as this court is concerned, is too thinly a basis for this legislative action.

For those reasons, the Court does find, holds that 108.02 paren (12) paren (e) is unconstitutional, is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 1 of the Wisconsin Constitution.

I am going to enter judgment for the plaintiff upon their complaint, reverse the decisions of the Labor and Industry Review Commission, and remand this matter to the Labor and Industry Review Board for calculation and payment of unemployment compensation benefits.

I am doing that assuming that is the appropriate avenue to proceed upon the finding of the court. Although, I don't know if that in fact is the case. I don't know if there has to be further determination administratively or not, but in any event, the court is going to remand for those purposes.

And perhaps for the file, Mr. Nielsen, you can provide an order for the court's signature along the lines as indicated in my opinion.

. . .

THE COURT: As I was going to say, us trial judges, we take the little we have and we do the best we can. And we leave the rest for the quiet faith of man, or God, or the Appellate Court, whichever, in this case, someone would like to rest their arguments on. But in any event, you can be off to the other courts and see what they have to say about the issues

MR. NIELSEN: Thank you, Judge.

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STATE OF WISCONSIN)
)SS.
COUNTY OF VILAS)

I, MARY L. KUNAU, Official Shorthand Reporter, said county, do hereby certify the foregoing is a true and correct transcript of the proceedings had in the above-entitled matter as compared with my original stenographic notes taken at said time and place.

Dated this 28th day of September, 1987.

MARY L. KUNAU, Reporter