WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
DECEMBER 2017

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Brown
Dane
Milwaukee
Ozaukee
Waukesha

FRIDAY, DECEMBER 1, 2017

9:45 a.m.	15AP2019	Tetra Tech EC, Inc. v. Wisconsin Department of Revenue
10:45 a.m.	16AP1365	Wisconsin DWD v. Wisconsin LIRC
1:30 p.m.	16AP355	Wisconsin Bell, Inc. v. LIRC

TUESDAY, DECEMBER 5 , 2017

9:45 a.m.	15AP2224	Wis. Assoc. of State Prosecutors v. WERC
10:45 a.m.	16AP2214	Madison Teachers, Inc. v. James R. Scott
1:30 p.m.	15AP2328-CR	State v. Shaun M. Sanders

Note: The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Hannah McClung at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

Wisconsin Supreme Court
Friday, December 1, 2017
9:45 a.m.

2015AP2019 Tetra Tech EC, Inc., v. Wis. Dept. of Revenue

Supreme Court case type: Petition for Review
Court of Appeals: District III
Circuit Court: Brown County, Judge Marc A. Hammer, affirmed
Long caption: Tetra Tech EC, Inc., and Lower Fox River Remediation LLC, Petitioners-Appellants-Petitioners, v. Wisconsin Department of Revenue (DOR), Respondent-Respondent-Respondent.

Issues presented: This case relates to an EPA-ordered cleanup of environmental damage caused by certain paper companies' release of polychlorinated biphenyls (PCBs) into the Fox River. The primary question is whether the services of one of the subcontractors on the clean-up project, Stuyvesant Dredging, Inc. (SDI), constituted "processing" of tangible personal property, such that the services are subject to Wisconsin sales and use tax under § 77.52(2)(a)11.

Some background: The paper companies created a limited liability company, Lower Fox River Remediation, LLC (Fox River Remediation), to oversee and implement the PCB cleanup work. Fox River Remediation hired a contractor, Tetra Tech EC, Inc. (Tetra Tech), which in turn engaged subcontractors to perform certain tasks. One of those subcontractors was SDI, which was tasked with separating the sand from the polluted sediment dredged from the Fox River, and then extracting the water from the remaining polluted sediment. The remaining material, consisting of a dewatered, PCB-polluted sludge, was then disposed of by Tetra Tech.

In 2010, the Wisconsin Department of Revenue (DOR) determined that: (1) Tetra Tech owed sales tax on the portion of its sale of remediation services to Fox River Remediation that represented SDI's activities; and (2) Fox River Remediation owed use tax on the portion of its purchase of remediation services from Tetra Tech that represented SDI's activities.

In 2011, Fox River Remediation and Tetra Tech filed petitions for redetermination with the Department, which the Department denied in pertinent part, again concluding that SDI's activities were taxable.

Fox River Remediation and Tetra Tech petitioned the Tax Appeals Commission (Commission) to review the Department's determinations. The Commission decided that SDI's activities were taxable. Fox River Remediation and Tetra Tech petitioned the trial court to review the Commission's decision. The trial court affirmed the Commission's order.

Fox River Remediation and Tetra Tech appealed unsuccessfully, and then brought the case before this court.

Section 77.52(2)(a)11. imposes sales and use tax on the "processing . . . of tangible personal property for a consideration for consumers who furnish directly or indirectly the materials used in the . . . processing." Among other things, Fox River Remediation and Tetra Tech argued on appeal that SDI did not engage in "processing"; rather, it "separated" the dredged material into its constituent parts, and since § 77.52(2)(a) does not list "separation" as a taxable service, SDI's activities were not taxable.

The Court of Appeals rejected this and other arguments. The Court of Appeals held that, applying great weight deference, the Commission's decision was reasonable and therefore sustainable.

Fox River Remediation and Tetra Tech argue to this court that the Commission relied on an overly broad dictionary definition of "processing." They also argue that the Commission's interpretation of § 77.52(2)(a)11. should not be afforded great weight deference because this is a matter of first impression and the issues are not straightforward.

Note that the court has directed the parties to brief the following additional issue: Does the practice of deferring to agency interpretations of statutes comport with Article VII, Section 2 of the Wisconsin Constitution, which vests the judicial power in the unified court system?

Wisconsin Supreme Court
Friday, December 1, 2017
10:45 a.m.

2016AP1365 Wisconsin DWD v. Wisconsin LIRC

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Ozaukee County, Sandy A. Williams, reversed
Long caption: Wisconsin Department of Workforce Development (DWD), Plaintiff-Respondent-Petitioner, v. Wisconsin Labor and Industry Review Commission (LIRC), Defendant-Appellant-Respondent, Valarie Beres and Mequon Jewish Campus, Inc., Defendants

Issues presented: This case involves a dispute over whether Valarie Beres, a registered nurse, is entitled to unemployment benefits. Beres was fired from an assisted-living center after she missed one day of work during her 90-day probationary period due to an illness, without notifying her employer in advance that she would be absent. The Supreme Court reviews the following issues:

- Did LIRC err in refusing to apply the absence standard specified by the employer solely because that standard is "stricter" than the statutory disqualification standard that applies when the employer has no policy?
- Does the practice of deferring to agency interpretations of statutes comport with Article VII, Section 2 of the Wisconsin Constitution, which vests the judicial power in the unified court system?

Some background: Section 108.04(5) sets forth a general standard for misconduct and sets forth seven specific circumstances that, by definition, qualify as misconduct. The only one of these circumstances relevant here is absenteeism, which is addressed in § 108.04(5)(e).

This standard, which the Legislature enacted in 2013 and which applies to this case, is significantly different from the previous absenteeism standard, which made a discharged employee ineligible for unemployment benefits "if an employee is absent for 5 or more scheduled workdays in the twelve-month period preceding the date of the discharge without providing adequate notice to his or her employer." Wis. Stat. § 108.04(5g)(c) (2011-12).

If an employee was not discharged for misconduct, either under the general standard in Wis. Stat. § 108.04(5) or under one of the seven circumstances specified in § 108.04(5)(a) through (g), the employee still may be ineligible for unemployment benefits if the employee was discharged for "substantial fault" under Wis. Stat. § 108.04(5g).

Beres was within her 90-day probationary period when she did not call or show up for her scheduled shift on Feb. 23, 2015, due to illness. Beres had signed her employer's written attendance policy, which provided that employees in their probationary period may have their employment terminated for one instance of "no call no show."

The employer's policy required that an employee "call in 2 hours ahead of time" if they are unable to work. Beres was terminated because she did not comply with this policy on the day she took ill.

Beres filed for unemployment benefits. DWD denied benefits due to Beres's "misconduct" in violating her employer's "no call no show" attendance policy.

Beres appealed to LIRC, which concluded that: (1) the "more than 2 absences in 120 days" standard is the default standard; and (2) while employers may have a more generous standard (i.e., utilize the previous statutory standard of five or more absences without notice in a 12-month period), an employer may not be more restrictive than the "more than 2 absences in 120 days" standard.

LIRC concluded, therefore, that Beres's single absence without notice was not a form of misconduct under Wis. Stat. § 108.04(5)(e).

DWD appealed LIRC's decision to the trial court, which reversed LIRC's decision.

LIRC appealed to the Court of Appeals, which affirmed LIRC's decision after holding that, under a due weight deference standard, LIRC correctly applied § 108.04(5)(e) and allowed benefits.

Judge Mark D. Gundrum dissented, writing that: (1) in his view, the court owed no deference to LIRC's interpretation of Wis. Stat. § 108.04(5)(e) because the applicable statutory language is new and the issue at hand is one of first impression; and (2) LIRC misread the statute.

DWD challenges the Court of Appeals' decision on a variety of fronts, including a challenge to whether any deference should have been given to LIRC's interpretation of Wis. Stat. § 108.04(5)(e).

Wisconsin Supreme Court
December 1, 2017
1:30 p.m.

2016AP355 Wisconsin Bell, Inc. v. LIRC

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge Richard J. Sankovitz, reversed and cause remanded with instructions
Long caption: Wisconsin Bell, Inc., Petitioner-Appellant, v. Labor and Industry Review Commission (LIRC) and Charles E. Carlson, Respondents-Respondents

Issues presented: This employment case examines the "inference method" of causation as it relates to the Wisconsin Fair Employment Act (WFEA). More specifically here, whether the evidence of record was sufficient to support the LIRC's findings and decision about the firing of an employee with a disability. The Court of Appeals concluded it was.

The Supreme Court reviews the following issues as presented by Wisconsin Bell, Inc.:

- Is LIRC's "inference method" of proof, as grounds for liability under the "because of disability" prong of the WFEA, based on a reasonable interpretation of the statute and consistent with public policy underlying the statute?
- If the "inference method" of proof is a valid means of proving intentional discrimination, what evidence of causation between the employee's conduct and the employee's disability is required, and should the employer have knowledge of that evidence?
- Was there sufficient evidence of causation and employer knowledge in this case and was it reasonable for Wisconsin Bell not to excuse Carlson's conduct?
- Does the practice of deferring to agency interpretations of statutes comport with Article VII, Section 2 of the Wisconsin Constitution, which vests the judicial power in the unified court system?

Some background: Charles Carlson was a long-time Wisconsin Bell employee, hired in 1986. He worked in a number of different areas of the company, most recently as a customer service representative in a call center. He provided technical support to Wisconsin Bell's customers and technicians for AT&T U-verse services by answering incoming phone calls and responding to electronic messages.

In 1997 Carlson began treatment for what was eventually diagnosed as bipolar I disorder. This illness is characterized by having at least one episode of mania, combined with episodes of depression. These extreme mood swings can come on quickly, and a relatively minor frustration can trigger an episode. Carlson's condition is treated by medication and therapy.

In 2006, before moving to the call center involved here, Carlson disclosed his condition to his supervisor at the time. The supervisor had the discretion to allow temporary accommodations for limited periods of time when Carlson's symptoms arose at work. When Carlson could not get his symptoms under control and had to leave work, he sometimes requested that the time off be covered under the Family and Medical Leave Act (FMLA).

Carlson took medical leaves from Wisconsin Bell, using FMLA, on several occasions in 2008 and 2009. These requests were made to a separate entity, the AT&T Integrated Disability

Service Center (IDSC). Any health information received by the IDSC about employees remains confidential.

Carlson informed his next supervisor about his condition, but she had already been informed by his previous supervisor. When Carlson moved to his most recent position in 2007, he did not inform his new supervisor about his condition because he thought this information had been passed on by management.

In 2010, Carlson was issued a suspension pending termination after he was observed violating company policy by disconnecting eight consecutive calls over a period of nine minutes, without explanation.

At a review board hearing, Carlson presented letters from his psychiatrist and psychotherapist describing his illness and symptoms. The supervisor at the time of the suspension had not been informed about Carlson's condition before this time, but found that the letters from Carlson's treatment providers had no impact on the proceeding because the conduct for which Carlson was being disciplined would never be allowed under any circumstances.

Wisconsin Bell imposed a 50-day suspension and required Carlson to enter into a "Back to Work Agreement." The agreement which permits an employee to return to work with the understanding that at any time during a one-year time period, Wisconsin Bell would have just cause to terminate the employee for infractions relating to customer care, or for a breach of integrity.

Ten days before the expiration of the Back to Work Agreement, on April 20, 2011, Carlson left work just before lunch due to illness. Around 11 a.m. he had activated a "health code" which takes the employee temporarily offline and keeps him from receiving any incoming customer calls.

When asked about the comparatively lengthy 38-minute duration of health code by an operations manager through a computer screen messaging system, Carlson apparently sent a personal message intended for someone else in the call center to the manager. The manager became suspicious that Carlson was chatting about personal matters during a health code.

On April 21, 2011, Carlson received a notice of suspension pending termination. The hearing on this incident was held on May 26, 2011. Carlson obtained another letter from his psychiatrist about his bipolar disorder, which noted that Carlson's medication had been increased recently as a result of an increase in his depression.

In a June 7, 2011 letter, Wisconsin Bell described what it determined were breaches of the provisions of the Back to Work Agreement, namely mistreatment of customers by chatting with other employees while having activated a health code for an excessive amount of time and also a breach of integrity in leaving work early because Wisconsin Bell did not believe that Carlson was really ill.

Carlson filed two complaints with the Wisconsin Department of Workforce Development – Equal Rights Division (ERD), the first in June 2010 when he received the 50-day suspension, and the second in February 2012, after his termination.

In an April 24, 2014 decision, the Administrative Law Judge (ALJ) concluded that Carlson's conduct was caused by his condition, and thus actions taken by Wisconsin Bell against Carlson were "because of" Carlson's disability. The ALJ concluded Wisconsin Bell violated the WFEA with regard to both the suspension and termination. The ALJ ruled that Carlson was to be reinstated at Wisconsin Bell, with back pay, and with Wisconsin Bell making reasonable accommodations for his disability. The ALJ also held that Wisconsin Bell was to pay Carlson's attorney's fees and costs.

Wisconsin Bell appealed to the Labor Industry Review Council (LIRC).

On February 19, 2015, LIRC reversed the ALJ's ruling regarding the suspension. It found that although Carlson's conduct in February 2010 was caused by his bipolar disorder, his supervisor and managers at the time did not have knowledge of his disability. LIRC affirmed the ALJ's conclusion that Wisconsin Bell had terminated Carlson because of his disability. It found Carlson's conduct in April 2011 was caused by his bipolar disorder, and it found that at that time Carlson's supervisor and managers had been informed of the condition and the types of symptoms which could arise at work. LIRC found that Wisconsin Bell had violated the WFEA and affirmed the ALJ's conclusion that Carlson should be reinstated with back pay and that Wisconsin Bell should pay his attorney's fees and costs.

Wisconsin Bell petitioned for judicial review by the Milwaukee County Circuit Court. The circuit court found that the "inference theory" of causation used by LIRC in finding Wisconsin Bell liable was reasonable. However, the circuit court remanded the matter to LIRC, finding LIRC's analysis of the issues and facts to be incomplete, especially with regard to LIRC's findings relating to whether Wisconsin Bell had known that Carlson's conduct was caused by his condition at the time of his termination.

Wisconsin Bell appealed, arguing that the inference method of establishing causation was not a reasonable interpretation of the WFEA. The Court of Appeals concluded that the "inference method" of causation utilized by LIRC was a reasonable interpretation of the Wisconsin Fair Employment Act (WFEA) and that the evidence of record was sufficient to support LIRC's findings and decision.

The Court of Appeals said the appeal focused on whether LIRC's interpretation of the WFEA was reasonable, specifically with regard to the language in § 111.322(1), Stats., with respect to whether the termination was "because of" Carlson's disability. The Court of Appeals concluded that Wisconsin Bell failed to show that LIRC's interpretation was unreasonable. It said the theory behind the inference method of causation was a reasonable interpretation of the WFEA as a means of imposing liability on an employer.

The Court of Appeals said Wisconsin Bell simply chose not to believe Carlson, without giving any consideration to the information from his health care providers and without obtaining an expert of its own to provide a basis to contradict Carlson's experts. The Court of Appeals concluded Wisconsin Bell failed to act in good faith in terminating Carlson under those circumstances.

Wisconsin Bell argues that the Court of Appeals' decision "was not only incorrect, but exemplifies LIRC's inconsistent interpretation and application of the 'because of disability' standard." Wisconsin Bell argues that LIRC's inference method of causation is not based on a reasonable interpretation of the WFEA and conflicts with the WFEA's reasonable accommodation scheme.

Wisconsin Supreme Court
Tuesday, December 5, 2017
9:45 a.m.

2015AP2224 Wis. Assoc. of State Prosecutors v. Wis. Employment Relations Comm.

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge John J. DiMotto, affirmed
Long caption: Wisconsin Association of State Prosecutors and Service Employees International Union, Local 150, plaintiffs-respondents, v. Wisconsin Employment Relations Commission, James R. Scott, and Rodney G. Pasch, defendants-appellants-petitioners

Issues presented: This case examines the recertification requirements for collective bargaining units under provisions of Wisconsin 2011 Act 10. The Supreme Court reviews whether rules promulgated by the Wisconsin Employment Relations Commission (Commission) relating to filing deadlines for petitions to seek recertification exceeded the commission's authority as established by the Legislature.

Some background: Wis. Admin. Code § ERC 80 and § ERC 70 require that labor unions representing state employees or municipal school employees annually file a recertification petition by the end of business hours on Sept. 15, if they wish to appear on the next annual election's ballot.

The Wisconsin Association of State Prosecutors (WIASP) is a labor organization, as defined by Wis. Stat. § 111.81(12), representing a bargaining unit consisting of all assistant district attorneys in Wisconsin as set forth in Wis. Stat. § 111.825(2)(d). Local 150 is the exclusive collective bargaining agent for building helpers and food service workers employed by Milwaukee Public Schools and custodians employed by the Saint Francis School District.

Here is a brief timeline of some of the significant events in this case:

- On Sept. 15, 2014, both WIASP and Local 150 filed petitions for certification with the Commission, but about an hour or so after the 4:30 p.m. close of business hours. WIASP and Local 150 submitted their filing fees the following day, on Sept. 16, 2014.
- On Sept. 16, 2014, the Commission notified both WIASP and Local 150 that their petitions were untimely because: (1) they were not filed prior to 4:30 p.m. on Sept. 15, 2014; and (2) the filing fees had not been received by that date.
- On Oct. 14, 2014, the Commission advised WIASP and Local 150 that the petitions were not timely filed, that the election petitions would not be processed, and that no recertification elections would be held.
- On Nov. 11, 2014, WIASP filed an action for a declaratory judgment and writ of prohibition seeking to invalidate the provision in Wis. Admin. Code § ERC 80 requiring an existing exclusive representative to file an election petition and seeking relief in the form of a recertification election. On Nov. 13, 2014, Local 150 filed a similar lawsuit concerning Wis. Admin. Code § ERC 70.
- On Nov. 14, 2014, the Commission issued formal decisions with respect to the petitions of WIASP and Local 150, concluding in part, that a timely petition must be filed as "prerequisite to our conducting a certification election."

- Following the Commission's decision to dismiss the petitions, WIASP and Local 150 requested a rehearing pursuant to Wis. Stat. § 227.49; these requests were denied.
- On Jan. 15, 2015, WIASP and Local 150 filed petitions for judicial review.
- On March 18, 2015, WIASP and Local 150 filed a motion for summary judgment seeking its requested declaratory judgment, writ of prohibition, and orders setting aside the Commission's decision dismissing the plaintiffs' petitions for recertification elections.
- On July 31, 2015, the trial court issued a written order declaring those provisions of Wis. Admin. Code §§ ERC 70 and 80 requiring an existing exclusive representative to file a petition in order to qualify for a recertification election invalid. The trial court's order also reversed the Commission's decision denying the plaintiffs' recertification elections under Wis. Stat. §§ 111.83(3)(b) and 111.70(4)(d)3.b., and directed the Commission to hold such elections.

Following the circuit court's July 31, 2015 order, annual recertification elections were conducted in the fall of 2015 for both the WIASP and Local 150.

The Commission appealed the circuit court's order, unsuccessfully. It argued that the provisions of Wis. Admin. Code §§ ERC 70 and 80 at issue are presumptively valid and reasonable, and that they do not exceed the Commission's statutory authority. The Court of Appeals noted that when a statute and an administrative rule conflict, the statute prevails. *See* DeBeck v. DNR, 172 Wis. 2d 382, 388, 493 N.W.2d 234 (Ct. App. 1992). The Court of Appeals ruled that, because the Legislature instructed that the Commission "shall" conduct an election to certify the representative of a collective bargaining unit that contains a general employee, the Commission failed to do something that was obligatory.

The Commission argued that without requiring the filing of an election petition, the Commission would have no way of knowing whether the incumbent labor organization maintains an "interest" in representing the general employees. The Commission further argued that holding elections without requiring the filing of a petition would lead to the absurd result of holding an election without any names on the ballot.

The Court of Appeals ruled that under plain language of the statute, an incumbent labor organization remains the representative of the bargaining unit until it is decertified by the Commission after the votes are tallied.

The Commission contends that its enactment of Wis. Admin. Code §§ ERC 70 and 80 fell within its legislatively delegated authority to promulgate reasonable rules. The Commission also argues that the "shall conduct an election" language in §§ 111.83(3)(b) and 111.70(4)(d)3.b. does not impose a bar on requiring the filing of an election petition.

WIASP and Local 150 argue that if the statutes were intended to require an election petition as a prerequisite for holding a recertification election, the Legislature would not have used the mandatory term "shall" in directing the Commission to hold a recertification election. But the Legislature chose to use the word "shall," and the statute trumps the Commission's rules.

Wisconsin Supreme Court
Tuesday, December 5, 2017
10:45 a.m.

2016AP2214 Madison Teachers, Inc. v. Scott

Supreme Court case type: Bypass
Court of Appeals: District IV
Circuit Court: Dane County, Judge Peter C. Anderson
Long caption: Madison Teachers, Inc. (MTI), Plaintiff-Respondent, v. James R. Scott, Chairman and Records Custodian, Wisconsin Employment Relations Commission (WERC), Defendant-Appellant.

Issues presented: The central issue in this public records case is whether the public policy against voter intimidation in union certification elections is sufficient to outweigh the public policy and presumption in favor of disclosing public records. The Supreme Court reviews:

- whether WERC Chair and records custodian James R. Scott properly relied on a policy against voter intimidation or coercion under these facts to deny public records requests by MTI that sought records disclosing which employees had voted up to certain times during annual union certification elections;
- if Scott violated the Public Records Act, whether MTI is entitled to recover its attorneys' fees and costs because MTI's mandamus action was reasonably necessary to obtain the requested records and MTI's action was the substantial reason Scott ultimately released the requested records.

Some background: Scott petitioned for bypass of the Court of Appeals following the circuit court's judgment granting statutory damages, attorneys' fees, and costs to MTI for Scott's alleged violation of the Wisconsin Public Records Act.

Under 2011 Wisconsin Act 10, in order for a public sector union to retain its position as the exclusive collective bargaining representative for a bargaining unit, the union must receive 51 percent of the total votes in the bargaining unit in annual certification elections. Scott says these elections are to be conducted by "secret ballot" and that "a non-vote is the same as a 'no' vote in these elections."

WERC contracted with the American Arbitration Association (AAA) to provide the technological services necessary to run the fall 2015 certification elections. Voting could occur via telephone and via the internet. The AAA provided a secure automated telephone voting system that used an interactive voice response system and a database to record, process, and tabulate votes.

Annual certification elections for five bargaining units that had been represented by MTI were scheduled to occur from Nov. 4 to Nov. 24, 2015. On Oct. 26, 2015, then MTI Executive Director John Matthews sent a letter to Scott advising him that MTI would be submitting three public record requests during the 20-day election period, which would seek production of a list of the employees who had voted prior to a specified time. The letter also stated that if WERC did not maintain such a list of employees in each bargaining unit, MTI would request the ability to inspect and copy each ballot that had been received by the specified time. MTI's letter also stated that it did not intend to engage in voter coercion or any other illegal election practice.

On Nov. 10, 2015, MTI hand-delivered its first public record request during the election. It requested records showing the names of employees who had voted in the election up to that point, by bargaining unit. It sought production of the records as soon as possible, but no later than 5:00 p.m. on Nov. 16, 2015.

Scott denied the request via letter dated Nov. 16, 2015. He gave three reasons for the denial, including that the balancing test under the Public Records Act weighed in favor of not disclosing the requested information due to the "potential for voter coercion while the ballot is ongoing."

MTI delivered a second request letter to Scott on Nov. 17, 2015. Scott did not produce any records in response to the MTI's second request nor did he provide a written response by MTI's requested deadline.

The election ended at noon on Nov. 24, 2015. At 3:26 p.m. on that day, MTI delivered a third request to Scott. This request sought records containing a list of all employees in each bargaining unit who had voted in the election. The following day WERC staff provided to MTI spreadsheets containing the information requested in MTI's third request.

On Nov. 30, 2015, Scott formally denied MTI's second (Nov. 17, 2015) request.

On that same day, MTI filed a mandamus action in the Dane County circuit court. In addition to an order compelling Scott to turn over the records requested in its first two requests, MTI also sought an award of punitive damages and payment of its attorneys' fees and costs.

During the course of discovery Scott did turn over documents showing the information sought in MTI's first two requests (specifically, the names of employees, by bargaining unit, who had voted in the elections as of Nov. 10 and Nov. 17, 2015).

Both parties moved for summary judgment. Ultimately, the circuit court granted MTI's motion for summary judgment. It stated that it was granting a declaratory judgment that Scott had violated the open records law by not producing the documents in response to MTI's request. After another hearing on remedies, the court denied MTI's request for punitive damages, but it awarded MTI statutory damages of $100, as well as its attorneys' fees and costs.

MTI then filed a motion for contempt and supplemental relief based on the fact Scott had denied new MTI requests that were similar to the requests litigated in this action. Ultimately, after issuing a series of orders, the court denied MTI's motion and stated that its prior order that specified the relief granted to MTI would be the final order for purposes of appeal.

Scott filed an appeal. Following the submission of Scott's opening brief and MTI's response brief, Scott filed the petition for bypass.

Scott contends denial of a public records request is proper when the policy of disclosure is outweighed by another public policy. He says each public records balancing test is a fact intensive process performed on a case-by-case basis. Here, Scott believed that employees who had not voted could be intimidated into voting against their will if their names were disclosed, and determined that this outweighed the policy of disclosure while the certification elections were ongoing.

MTI argues that Scott and WERC were required to produce the requested records while the elections were ongoing, as it requested. It disputes Scott's reliance on a policy against voter intimidation or coercion, especially given the presumption in favor of disclosure of public records.

Wisconsin Supreme Court
Tuesday, December 5, 2017
1:30 p.m.

2015AP2328-CR State v. Sanders

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Waukesha County, Judge Lee S. Dreyfus, Jr. and Judge Jennifer R. Dorow, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent-Respondent, v. Shaun M. Sanders, Defendant-Appellant-Petitioner

Issue presented: Can a person be criminally responsible for acts allegedly committed before the age of original juvenile court jurisdiction (which, as germane to this case, was 10 years of age)?

Some background: Shaun M. Sanders was charged with four felony counts related to sexual activity he allegedly engaged in over a number of years with a girl who was several years younger. Count one charged him with committing repeated sexual assaults between 2003 and 2006, when the girl was seven to nine years old and Sanders was nine to 12 years old. The other three counts charged Sanders with committing repeated sexual assault, incest, and child enticement between 2008 and 2012, when the girl was 12 to 15 years old and Sanders was 14 to 18 years old.

A jury found Sanders not guilty on count one, involving the sexual activity that allegedly occurred when he was nine to 12 years old. It found him guilty of the other three counts. Sanders filed a post-conviction motion, arguing that his trial counsel performed deficiently. The circuit court denied the motion. The Court of Appeals affirmed.

On appeal, Sanders argued he was improperly prosecuted on count one (the count on which he was acquitted) because that count included time during which he was under 10 years old. He argued the circuit court lacked subject matter jurisdiction and the competency to exercise that jurisdiction to prosecute him for acts committed prior to age 10.

In addition, he argued his trial counsel was deficient in failing to challenge count one on those grounds before trial. Even though the jury acquitted Sanders on that count, he argued that because the count was not dismissed prior to trial, evidence was admitted at trial specifically related to that count which prejudiced him with regard to the other counts.

The Court of Appeals noted that challenges to the circuit court's competency are forfeited if they are not raised in the circuit court. The court said because Sanders did not raise the issue in the circuit court, it must be addressed on appeal in the context of an ineffective assistance of counsel claim.

The Court of Appeals said by the time Sanders allegedly committed the acts charged in count one, the Legislature had reduced the age at which a person could be treated as a delinquent from 12 years old to 10 years old. The appellate court said it is a defendant's age on the date legal action is initiated, not his age on the date he committed the wrongful acts, that controls. Because the alleged acts did not come to the attention of authorities until Sanders was an adult, the Court of Appeals said they were properly addressed in adult criminal court.

Sanders asks the Supreme Court to determine whether there is a minimum age for criminal prosecution in Wisconsin. He says Wisconsin effectively has no minimum age for criminal responsibility and a person can later be prosecuted for crimes allegedly dating as far back as infancy.

The state says it is well established in Wisconsin that courts' competency to adjudicate a criminal count is based on the offender's age at the time charges are brought, not at the time the offense allegedly occurred. The state says the question of whether there should be a bright line minimum age for criminal culpability is a policy decision that should be left to the Legislature.