Appeal No. 03-1850 **Cir. Ct. No. 02CV000021**

WISCONSIN COURT OF APPEALS
DISTRICT III

JOAN SOLIE AND ANN BAXTER,

PLAINTIFFS-RESPONDENTS,

V.

EMPLOYEE TRUST FUNDS BOARD AND THE DEPARTMENT OF EMPLOYEE TRUST FUNDS,

DEFENDANTS-APPELLANTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Cane, C.J., Hoover, P.J., and Peterson, J.

We certify this appeal to the Wisconsin Supreme Court to clarify whether its decision in ***Schmidt v. Wisconsin Employe Trust Funds Board***, 153 Wis. 2d 35, 449 N.W.2d 268 (1990), should be construed to provide continued membership in the "Combined Group" to teachers who withdrew their deposits in the State Teachers' Retirement System (STRS) and then returned to teaching after creation of the "Formula Group."

In 1957, the legislature adopted a "Combined Group" retirement option for teachers. All teachers who entered the system after July 1, 1957, automatically became participants in the Combined Group plan. The benefits provided under the plan were a function of the amount of funds deposited by the member and by the State. No concept of creditable service existed. When STRS

Combined Group members exited the system early and withdrew their funds, they received their own money deposited in their accounts and lost the right to the State's contribution. Commencing September 11, 1965, the legislature created a "Formula Group," and members of the Combined Group were allowed to elect whether to join the Formula Group. Formula Group members' benefits were a function of the number of years of creditable service they provided. In 1973, all STRS members were required to join the Formula Group.

In ***Schmidt***, the teacher left teaching in 1963 and withdrew his deposits in the STRS. He returned to teaching in 1964 and was again made a member of the Combined Group by paying into the account. The court considered whether the waiver he signed pursuant to WIS. STAT. § 42.242(5)[1] when he withdrew his deposits resulted in forfeiture of his years of service when he eventually joined the Formula Group. The court held that a Combined Group member who signed the Combined Group waiver only lost the money that was deposited in the retirement deposit fund and did not lose credit for the years of service that would later be applied if he joined the Formula Group.

The plaintiffs in this action, Joan Solie and Ann Baxter, are similarly situated except that they returned to teaching after the Formula Group was created. The Department of Employee Trust Funds automatically enrolled them in the Formula Group, deeming them "new members." They subsequently again took separation benefits and signed a waiver of benefits as Formula Group members.

[1] All references to the Wisconsin Statutes are to the 1965 version.

The trial court held that Solie and Baxter were inappropriately placed in the Formula Group when they returned to teaching and that the board erred by denying them credit for their earlier years of service merely because they took separation benefits and signed a waiver. The trial court concluded that WIS. STAT. § 42.245(1)(a), as interpreted by ***Schmidt***, grants creditable service for years of teaching in Wisconsin regardless of whether a separation benefit was taken for those years. The trial court reasoned that the waivers Solie and Baxter signed when they initially withdrew funds from the Combined Group only concerned money and not years of creditable service. Therefore, they remained members of the Combined Group and were inappropriately forced into the Formula Group. As "members," they had the right to elect whether they would remain in the combined group. *See* WIS. STAT. § 42.244(1). Since they did not elect to become Formula Group members, the trial court reasoned that they remained Combined Group members and, under ***Schmidt***, retained their right to credit for years of teaching service.

The board contends that the only thing included in the retirement deposit fund is money. Solie and Baxter were no longer "members" of the Combined Group as defined in WIS. STAT. § 42.20(6r)(a)[2] because they withdrew all of their deposits from the fund. Therefore, they were properly placed in the Formula Group when they returned to teaching. The waivers they signed when

[2] WISCONSIN STAT. § 42.20(6r)(a) provides:

> "Member" means a person who, as the result of having been engaged in Wisconsin teaching, has a credit in the retirement deposit fund or a reserve in the annuity reserve fund, or who is or may be entitled to a present or future benefit under the teachers' insurance and retirement law as provided by s. 42.51.

they took separation benefits from the Formula Group included all credits obtained as Combined Group members. The board construes ***Schmidt*** as holding that the years of teaching service remained in their records, but was not a "credit" and did not fulfill the definitions of "member" in § 42.20(6r)(a). It argues that ***Schmidt*** did not expand the statutory definition of "member."

The trial court ruled that the term "credit" in WIS. STAT. § 42.20(6r)(a) is more broad than the term "deposits" in § 42.242(5).[3] Therefore, withdrawal of the accumulated deposits did not terminate all of a member's interest in the Combined Group because a credit for years of service remained. It held that the board applied an unduly restrictive definition of "member" when it concluded that Solie and Baxter did not meet the definition in § 42.20(6r)(a). The trial court concluded that removal of deposits did not remove all "credits" from their accounts, therefore they were still "members" of the Combined Group. The court also noted that the definitions of types of members found in § 42.20(6r)(b) suggest a broader definition of "member" than the board recognizes.

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[3] WISCONSIN STAT. § 42.242(5) provides:

> Any member who has ceased to be employed as a teacher in the public schools, state colleges or university in this state, and is not on leave of absence from a teaching position in the public schools, state colleges or university in this state, may be paid the accumulation from the member's deposits made while a member of the combined group based on teaching service performed after June 30, 1957, on filing with the board before the 50th birthday anniversary of such member a written request therefore and a full and complete discharge and release of all right, interest or claim on the part of such member to state deposit accumulations based on teaching service performed after June 30, 1957. Withdrawal of accumulations from member's deposits made before said member became a member of the combined group shall be governed by s. 42.49.

A critical issue in this appeal is whether a teacher who withdrew all of the money from the Combined Group fund nonetheless retained membership in the Combined Group. In ***Schmidt***, the teacher's membership in the Combined Group was not at issue because Schmidt returned to teaching before creation of the Formula Group. Therefore, he had deposits in his account. The opinion in ***Schmidt***, however, does not focus on that factor. It merely holds that the Combined Group waiver only waived Schmidt's "right to money which accumulated in his retirement fund through State deposits, nothing else. His years of service remained on his record …." This language could be construed to suggest that Schmidt also retained his membership in the Combined Group after withdrawing his money because he retained "credit" for his years of teaching.

We conclude that a decision by the Wisconsin Supreme Court is appropriate for two reasons: First, it is in the best position to determine whether Schmidt's membership in the Combined Group because he returned to teaching before creation of the Formula Group was a significant factor in the court's decision. The Supreme Court can clarify whether retained years of service not extinguished by the Combined Group waiver constitutes sufficient credit to support continued membership in the Combined Group. Second, the board notes that similar cases are being held in abeyance pending final determination in this case and there will likely be other cases involving these same issues. The scope of the ***Schmidt*** holding is a common issue in these cases, and immediate clarification would promote judicial and administrative efficiency.