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Prima Facie Tort--A Judicial Reaction to Public Employee Strikes in Missouri

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PRIMA FACIE TORT—A JUDICIAL REACTION TO PUBLIC EMPLOYEE STRIKES IN MISSOURI

State v. Kansas City Firefighters Local 42[1]

Despite the fact that strikes by public sector employees have been outlawed in Missouri and the majority of other states,[2] there has been a gradual increase in the number of such strikes in recent years.[3] States have utilized a number of different sanctions to combat these illegal strikes and maintain uninterrupted public services.[4] These measures, however, have been ineffective in deterring public employee strikes.

In *State v. Kansas City Firefighters, Local 42*, the Missouri Court of Appeals for the Western District sought to provide a solution to illegal public employee strikes in the vital area of police and firefighter services. This decision is legally significant in two respects. First, *Kansas City Firefighters* is the first Missouri case to allow a public employer to maintain a civil damage action against a public employee union for losses resulting from an unlawful strike.[5] Second, while other jurisdictions have allowed civil redress for illegal public employee strikes, Missouri has become the first jurisdiction to allow a party injured by an illegal strike to recover under a prima facie tort theory.[6]

This note will analyze the *Kansas City Firefighters* decision and its impact and consider generally whether any civil remedy is appropriate for public employee strikes. More specifically, this note will consider the effects of the court's expansion of prima facie tort into the public labor context. To accomplish this, the note will discuss first the history of the statutory and common law in Missouri regarding public employee strikes. In addition, the note will address whether the court is justified in denying all public employees the right

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1. 672 S.W.2d 99 (Mo. App., W.D. 1984).

2. *See* Note, *Damage Liability of Public Employee Unions for Illegal Strikes*, 23 B.C.L. REV. 1087 (1982). This comment lists thirty states that expressly prohibit strikes by all public employees or all classes of public employees covered by the statutes.

3. The number of public employee strikes since 1965 has increased from 42 in 1965 to 593 in 1979. 71 GOV'T EMPL. REL REP. (BNA) 1014 (1981).

4. The traditional sanctions in this area include injunctions, penalties directed against employees (dismissal, loss of pay, and imprisonment), and sanctions directed against the union (decertification, loss of privileges, and fines). *See* Note, *Private Damage Actions Against Public Sector Unions for Illegal Strikes*, 91 HARV. L. REV. 1309, 1312 (1978).

5. 672 S.W.2d at 110.

6. *Id.* at 116.

to strike. While the court's conclusion in *Kansas City Firefighters* may be supported by existing Missouri statutory law, the current statute is an inadequate guide for judicial handling of public sector labor disputes.

In *Kansas City Firefighters*, the Missouri Attorney General brought a defendant class action suit against the firefighters and their union, Kansas City Firefighters Local 42, AFL-CIO. The state's suit claimed losses to the state general revenue fund as a result of a four-day firefighter's strike. This strike was precipitated by a dispute between the city and the union regarding parity of pay between the city firefighters and policemen.[7] When an impasse in negotiations resulted, the union employees, based on the executive board's recommendations, voted to strike.

On Friday morning, October 3, 1975, the firefighters failed to report for work, did not respond to fire alarms, and refused to maintain fire equipment. On the same day, the city reported a state of emergency to the governor, who ordered the national guard into emergency duty to replace the firefighters. The guardsmen were withdrawn from the city on October 7, when the union and the city agreed to arbitrate the matter.[8]

The class action was a sequel to an earlier action brought by the state on a quasi-contract theory.[9] In the earlier action, the court of appeals reversed a trial court decision which granted recovery to the state.[10] The court of appeals, however, remanded the case to allow the state to amend its petition to plead a tort cause of action.[11] On remand, the trial court found for the state and entered a judgment against the union and the firefighters for damages.[12] From this judgment, the union appealed.[13]

On appeal, the court was faced with an issue of first impression in Missouri—whether a civil remedy, in addition to traditional remedies of injunction, contempt, and other sanctions, would be granted to a public employer for damages resulting from an illegal public employee strike. The state presented two bases for its recovery. First, it argued that the strike by the firefighters

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7. *Id.* at 104.

8. *Id.*

9. State *ex rel.* Danforth v. Kansas City Firefighters Local 42, 585 S.W.2d 94 (Mo. App., W.D. 1979).

10. The appellate court concluded that under the theory of quasi-contract pleaded by the state, "*negotiorum gestro*," the state was required to prove not only that the state expected the firefighters union to pay for the services rendered, but also that the union knew that the services were being rendered with that expectation. *Id.* at 97. The court based its conclusion on several facts. First, the governor's proclamation ordering the guards into duty specifically provided that the cost of the service would be paid by the state. Second, the statutory authorization did not indicate that the state expected to recover the cost from union members. *Id.*

11. The court noted that the facts as pleaded might entitle the state to a possible recovery under per se tort theory. *Id.* at 98.

12. 672 S.W.2d at 103. The award was for $128,782.72 in compensatory and $25,000 in punitive damages. *Id.*

13. *Id.*

was unlawful, both at common law and by statute.[14] Second, it argued that both the traditional forms of action under the *common law* prohibition and an implied right of action from the *statutory* violation entitled it to tort recovery. The union argued that the judgment was based neither on any developed principles of common law nor on statutory right. It claimed that sound public policy required the courts to "remain neutral in the delicate balance of public sector disputes." The union further argued that since the statute granted no civil remedy, the exclusive remedy must reside in the court's equity powers.[15]

The court of appeals affirmed[16] the trial court's award, holding that the firefighters' strike constituted an intentional violation of the Public Sector Labor Law,[17] thereby giving rise to a cause of action in prima facie tort. The court concluded that the Public Sector Labor Law, like the common law, made strikes by all public employees illegal.[18] Violation of the statute, the court reasoned, gave the state an implied right of action against the union. The court, however, carefully distinguished the state's claim that the statutory violation itself was the basis of liability. Rather, it reasoned that the intent to cause harm to the "public body" was controlling in allowing recovery in prima facie tort.[19]

Currently, public sector labor relations are governed by statute in Missouri.[20] Prior to 1965, Missouri, like many other states, lacked any comprehensive statutory scheme for public sector labor relations. Thus, courts developed the laws and policies that have influenced and guided public sector labor relations in the state. The tone of these relations was set by the Missouri Supreme Court in 1947 when it decided the landmark case of *City of Springfield v. Clouse*.[21]

In *Clouse*, the city of Springfield sought a declaratory judgment to determine its legal power to enter into collective bargaining agreements with city labor unions. The trial court ruled that the city had no such power.[22] In addressing this issue, the supreme court interpreted article I, section 29 of the Missouri Constitution which provides that, "employees shall have the right to organize and bargain collectively through representatives of their own choosing." On its face, this language made no distinction between private and public employees, and, arguably, could have been interpreted as granting both

14. *Id.* at 105.
15. *Id.* at 104.
16. The court, however, reversed the award of damages against the individual firefighters since it was not shown which firefighters voted for the strike. The award of compensatory damages against the union officers was affirmed. However, the case was remanded for reconsideration in light of the reversal of the award against the firefighters. *Id.* at 125-26.
17. MO. REV. STAT. §§ 105.500-.530 (1969).
18. *Id.* at 105.
19. *Id.* at 110.
20. MO. REV. STAT. §§ 105.500 - .530 (1978).
21. 356 Mo. 1239, 206 S.W.2d 539 (1947) (en banc).
22. *Id.* at 1241, 206 S.W.2d at 545.

groups the right to organize and to bargain. The supreme court, however, refused to give a literal reading to this language. Rather, it held that the right to bargain does not extend to public sector employees and that the city could not lawfully enter into any bargaining contracts with such employees.[23] The court reasoned that since wages and hours of public employees are fixed by statute or ordinance, such terms and conditions of employment could not be the subject of bargaining. The court concluded that such bargaining would be a usurpation of legislative powers by executive officers, and, therefore, held that article I, section 29 could not reasonably be construed as giving public employees a right to bargain collectively.[24]

Missouri's first experience with a comprehensive public labor law came in 1965 with the passage of Senate Bill 112.[25] The Public Sector Labor Law gave public employees, with a few exceptions, the right to organize and petition their employers regarding wages and other conditions of employment.[26] It provided for negotiations between the public employer and the union, the results of which would be reduced to writing and submitted to the "public body" for appropriate action.[27] The Act also provided that, "nothing [in this act] shall be construed as granting a right to public . . . employees to strike."[28]

The Act, however, was the subject of much criticism. First, some suggested that the Act was not comprehensive enough and gave public employees no more rights than they had already under the constitution.[29] Others argued that the language of the statute indicated that the authority of the public body to negotiate was discretionary rather than mandatory,[30] thereby implying that

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23. *Id.* at 1244, 206 S.W.2d at 545. The court, however, held that public employees do have a right to organize. It noted that such rights were granted long before the passage of article I, § 9 by the first amendment of the United States Constitution and by the Missouri Constitution of 1945 (which allowed citizens to organize for any proper purpose). *Id.* at 1246, 206 S.W.2d at 542.

24. *Id.* at 1248, 206 S.W.2d at 543.

25. 1965 Mo. Laws 232, codified as MO. REV. STAT. §§ 105.500-.530 (Supp. 1965) (repealed in 1967).

26. MO. REV. STAT. § 105.510 provided:

> Employees except police, deputy sheriff, Missouri State Highway Patrol, Missouri National Guard, all teachers of all Missouri schools, colleges and universities, of any public body, shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through representatives of their own choosing.

The failure on the legislature's part to grant teachers the right to form unions was a major criticism of this statute. As noted by one commentator, while there may be some justification for preventing law enforcement officers and the National Guard from bargaining collectively, "there seems to be no precedent, either in Missouri or anywhere in the country, upon which the legislature could base its denial of basic constitutional rights to teachers." Loevi, *The Development and Current Application of Missouri Public Sector Labor Law*, 36 MO. L. REV. 167, 174 (1971).

27. *See* MO. REV. STAT. § 105.520 (Supp. 1965).

28. *Id.* § 105.530.

29. *See* Loevi, *supra* note 26, at 173.

30. MO. REV. STAT. § 105.520 ("[a]ny public body *may* engage in negotia-

a public employer could refuse to negotiate with public employee unions. Finally, critics contended that the Act created no enforcement agency and, therefore, the courts remained the only means of resolving labor disputes.[31] These concerns led to the Act's repeal in 1967.[32]

House Bill 166 replaced this act in 1967.[33] Except for one minor amendment,[34] this 1967 Act remains the law on public sector labor relations in Missouri. The new Act effectuated a number of important changes, including the introduction of the State Board of Mediation[35] to resolve issues concerning unit determinations and majority representation.[36] Another significant change involved the amendment to section 105.520 which made it mandatory for the public employer to "meet, confer and discuss" with public employees.[37] In addition, the new Act more clearly outlined the procedure for securing legislative approval of agreed-to terms.[38]

Despite these changes in the Public Sector Labor Law, the Act continues to be the subject of criticism and legislative debate. For instance, although the Act introduced the State Board of Mediation to handle unit determinations and majority representation, critics point out that the Act provided no administrative machinery to deal with violations of the statute by public employers and employees.[39] Another criticism is that the Act declares no public policy

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tions") (emphasis added).

31. Loevi, *supra* note 26, at 174.

32. *Id.*

33. *See* MO. REV. STAT. §§ 105.500-.530 (1969).

34. In 1969, Senate Bill No. 36 amended § 105.510 as it related to excluded employees. This change gave excepted employees the right to form "benevolent, social and fraternal organizations," but not labor unions. MO. REV. STAT. § 105.510 (1969).

35. *See* MO. REV. STAT. § 105.520 (1969) (currently § 105.525). This five-member board was established in 1947 by MO. REV. STAT. §§ 295.010-.210, which govern public utility labor disputes. For a more thorough discussion of the Board's functions and its procedures for unit determinations, see Comment, *Bargaining Units for State and Local Employees*, 39 MO. L. REV. 187 (1974).

36. Changes resulted from pressure by non-professional public employee unions in the state and by the State Labor Council. These groups realized that there could be no success in public employee bargaining without some method for resolving unit determinations and majority representation questions. One commentator noted that the introduction of the Board was the only real gain to public employees in the act. *See* Loevi, *supra* note 26, at 177.

37. The statutory language was changed from "may engage in negotiations" to "shall engage in negotiations." Although this change made it mandatory for public employers to enter into discussions with public employee representatives, the Missouri Supreme Court, in Missey v. City of Cabool, 441 S.W.2d 35 (Mo. 1969), held that "the public employer is not required to agree, only to 'meet, confer and discuss.' " *Id.* at 41; *see also* Loevi, *supra* note 26, at 179.

38. MO. REV. STAT. § 105.520 reads, "Upon completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative, legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection."

39. Even the current machinery has been criticized as inadequate and ineffective because of underfunding and lack of administrative manpower for the State Board

nor imposes any sanctions for violations.[40] Therefore, the judiciary is responsible for determining, on a case-by-case basis, what sanctions or remedies will be available to an aggrieved party. Critics argue that allowing the courts to decide delicate labor matters on an ad hoc basis, without clear legislative guidance, is an ineffective means of promoting collective bargaining or effectively resolving labor disputes.[41] Finally, the statute is short-sighted and lags behind modern developments in other jurisdictions. For example, while a sizable majority of states allow public employers and employees to enter into binding collective bargaining agreements,[42] Missouri continues to deny this basic right to public employees.[43]

In recent years, there have been numerous, unsuccessful legislative attempts to modify or repeal the Public Sector Labor Law in Missouri.[44] The most recent attempt was the introduction of Senate Bill 442 and House Bill 1581.[45] Senate Bill 442 would have effectuated a number of important changes. For example, the bill would have provided collective bargaining for public employees and would have given certain classes of public employees the right to strike. In addition, the bill would have established the Public Employees Relations Board to handle all disputes between public employers and employees.[46] House Bill 1581 was introduced,[47] but was later substituted with a proposal identical to a recently passed Illinois law.[48] Both of the bills died at

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of Mediation. These problems led to a backlog and very slow resolution of these representation disputes. Consequently, labor leaders are very skeptical about the board's ability to function adequately. *See* Loevi, *supra* note 26, at 185-87. As noted by one union attorney, the need for prompt resolution of these representation issues is crucial. "If there is a delay, then there can be an erosion in the support for the union." Clyde Craig, speaking at the University of Missouri-Columbia School of Law, October 27, 1984.

40. 672 S.W.2d at 105.

41. *See, e.g.*, Note, *Public Sector Strikes: Will the Illinois Legislature Answer the Challenge?*, 1980 U. ILL. L.F. 869, 871 (1980).

42. Thirty-nine states recognize or authorize a right of collective bargaining for many lower level public employees. Forty-one states, like Missouri, have statutes which expressly grant public employees the right to organize. *See* Note, *supra* note 4, at 1309-10.

43. *See Missey*, 441 S.W.2d at 41.

44. Since 1969, 56 bills have been introducted in the Missouri General Assembly relating to collective bargaining. LEGISLATION, June 29, 1983, at 2 (published by the Missouri Chamber of Commerce).

45. S.B. 442, 82d Gen. Assembly, 2d Reg. Sess. (1984); LEGISLATION, Feb. 2, 1984, at 2 (published by the Missouri Chamber of Commerce).

46. *Id.*

47. House Bill 1581 would also have given public employees the right to enter into binding collective bargaining agreements. *Id.*

48. LEGISLATION, Feb. 16, 1984, at 1 (published by the Missouri Chamber of Commerce); *see* The Illinois Public Labor Relations Act, ILL. REV. STAT. ch. 47, §§ 1601-27 (Supp. 1983). This act was made effective on July 1, 1984. Prior to its passage, Illinois had no statute regulating public sector employees, and the courts adhered to the no-strike rule for all public sector employees. The new statute, however, effectuated some substantial changes. Section 1602 gives public employees the right to organ-

the end of the regular legislative session without debate by either the full house or senate.[49]

Therefore, while the Missouri legislature continues to grapple with the problems involving public sector labor relations, the courts retain the power to administer and interpret the Public Sector Labor Law. It is doubtful that the Missouri courts will, in the near future, overturn its 1947 *Clouse* decision and grant public employees the right to enter into binding collective bargaining agreements with public employers.[50] Thus, any additional grant of collective bargaining rights to public employees will have to come from the legislature.

Before determining if a civil remedy would be granted to the state, the court in *Kansas City Firefighters* first had to determine whether the strike by the firefighters was prohibited by the Public Sector Labor Law.[51] The controlling language in section 105.530 states "Nothing contained in [this act] shall be construed as granting a right to employees covered in [this act] to strike." The Missouri courts have interpreted this language to mean that the legislature intended this section to reinforce the common law rule that public employees have no right to strike.[52]

However, a careful reading of the statute reveals that the language is subject to two possible interpretations. One can conclude, as the court did, that the language was intended to prohibit strikes in the public sector. The language, however, could also be construed to mean that "while the right to strike has not been granted, neither has it been enjoined."[53] The court chose to follow its earlier precedent which has interpreted the language as a codification of the common law prohibition.[54] This interpretation is in accord with the

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ize and to bargain collectively for the purpose of negotiating conditions of employment. Section 1619 gives all public employees, with the exception of security employees, state peace officers, and firefighters, the right to strike if they follow specified procedures. For those employees denied the right to strike, the statute provides an "expeditious, equitable and effective procedure" for resolution of disputes, which includes submitting the dispute to an impartial arbitrator within 30 days. *Id.* at § 1602. The act also created the Illinois Labor Relations Board, which is granted exclusive jurisdiction over public sector labor disputes. *Id.* at § 1605.

49. Critics of the proposal cited the cost of implementation as one of the biggest problems with the legislation. For example, the estimated cost to the state for implementing Senate Bill 442 was within the range of $370,000 to $14.8 million. LEGISLATION, April 28, 1983, at 2 (published by Missouri Chamber of Commerce).

50. *See, e.g.*, Sumpter v. City of Moberly, 645 S.W.2d 359, 363 (Mo. 1982) (en banc) ("The result [of a proposal] will be an administrative rule, an ordinance, a resolution or something else . . . but it will not be a binding collective bargaining contract.").

51. Since the civil cause of action has to be implied from a violation of the Public Sector Labor Law, the prima facie tort theory of recovery would only be available to the state if the strikes by the public employees are prohibited by statute or common law. *See* Note, *supra* note 2, at 1092.

52. *See* St. Louis Teachers' Ass'n v. Board of Educ., 544 S.W.2d 573, 575 (Mo. 1976) (en banc).

53. *See* Loevi, *supra* note 26, at 176.

54. *Kansas City Firefighters*, 672 S.W.2d 99, at 105.

majority of jurisdictions[55] and federal legislation.[56] A more difficult question, one which the court did not directly address, is the rationale behind a blanket prohibition of all public employee strikes.

In determining whether public employees should be given the right to strike, states have adopted several rationales for either granting or denying this right.[57] The persuasiveness of these arguments vary depending on the statutory language and the underlying policies behind the prohibition. Clearly, the public has a right to continuous and uninterrupted services without being held captive by union bargaining demands. On the other hand, public employees, arguably, should have the same right as private employees to have some means of influence in determining their terms and conditions of employment.

Two major rationales for prohibiting public employee strikes are the sovereignty doctrine and the essentiality doctrine. Under the sovereignty doctrine, public employee strikes must be prohibited because they "constitute a denial of and challenge to the authority and sovereignty of the government."[58] Such strikes, therefore, deny the government authority to set policy and constitute a rebellion against the government.[59] The essentiality rationale states that public employee strikes should be prohibited because they interrupt services that are vital to public health, safety, and welfare.[60] Thus, because of the public's dependence on essential services, interruption would cause great harm and inconvenience to the public and give public employees unfair bargaining strength.[61]

In *Kansas City Firefighters*, the court focuses primarily on whether a strike by firefighters is grounds for implying a civil damage remedy in light of statutory prohibition. In this regard, the court noted that the major policy behind the Public Sector Labor Law is to ensure that vital services are maintained, since an interruption could impair the public health and safety.[62] From the language of the opinion, it appears that the court implicitly adopted the essentiality rationale as a basis for prohibiting public employee strikes. However, this reasoning presents a problem. Although the argument of essentiality

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55. *See supra* note 2. Ten states currently permit a limited right to strike by statute: Alaska, Hawaii, Illinois, Idaho, Minnesota, Ohio, Oregon, Pensylvania, Vermont and Wisconsin. *Id.* at 1087 n.6.

56. *See* 29 U.S.C. § 152 (1982). At common law, strikes by employees in the public and private sector were prohibited. *See* R. GORMAN, BASIC TEXT ON LABOR LAW 1-2 (1976). The common law was superseded as to private employees by § 7 of the National Labor Relations Act of 1935, 29 U.S.C. § 157 (1982), which guaranteed the right to strike to private sector employees, but not to those in the public sector.

57. *See* infra notes 59-62.

58. *See* Note, *supra* note 4, at 1314.

59. *See* Cleveland v. Amalgamated Ass'n of St. Employees, 41 Ohio Op. 236, 90 N.E.2d 711 (1949).

60. *See* Note, *supra* note 4, at 1316.

61. *See* Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260 (1969).

62. 672 S.W.2d at 109.

might justify prohibiting strikes by firefighters,[63] this rationale is insufficient justification for an outright prohibition of all public employee strikes.[64] Consequently, the court's failure to distinguish between essential and non-essential services weakens its justification in continuing a blanket prohibition of public employee strikes on the basis of "essentiality."[65]

Therefore, while the court in *Kansas City Firefighters* clearly continues to uphold a blanket prohibition of public employee strikes, the rationale behind the ban is unclear. Strong support for a no-strike rule for essential employees like firemen and policemen is easy to find. However, a rigidly applied no-strike rule for all public employees draws very little support in light of modern day collective bargaining principles.

Having decided that the firefighters had no lawful right to strike, the court in *Kansas City Firefighters* next determined whether the statutory violation gave the state a civil remedy. The court first noted that the Public Sector Labor Law does not expressly enumerate sanctions or remedies for its violation.[66] This legislative silence, it concluded, gave the court authority, not only to impose sanctions, but also to fashion an appropriate remedy for aggrieved parties.[67]

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63. One commentator had criticized the essentiality rationale because it does not reflect the true nature of most government services. He argues that no government service is totally indispensible, noting that in 1978, there were 36 strikes nationally by police and firemen. *See* Note, *supra* note 40, at 886.

64. "Where collective bargaining procedures [had] been exhausted and public health, safety or welfare is not endangered, it is inequitable and unwise to prohibit strikes . . . the collective bargaining process will be strengthened if this qualified right to strike is recognized." GOVERNOR'S COMM'N TO REVISE THE PUBLIC EMPLOYEE LAW OF PA., REPORT AND RECOMMENDATIONS, GOV'T EMPL. REL. REP. 251 (July 1, 1968).

65. The Missouri Supreme Court's language in *Clouse* could provide another possible justification for prohibition in non-essential areas. In that opinion, the court's reasoning for denying collective bargaining agreements is couched in language indicating support for the sovereignty doctrine, which would support a blanket prohibition of all public employee strikes. *Clouse*, 356 Mo. at 1257, 206 S.W.2d at 545. This doctrine, however, has found little judicial support. *See* Note, *supra* note 40, at 883 ("[t]he rubric of sovereign immunity leaves collective bargaining a hollow right"); *see, e.g.*, Anderson Fed'n of Teachers v. City of Anderson, 242 Ind. 558, 569, 251 N.E.2d 15, 20 (1969) ("The conflict of real social forces cannot be solved by invocation of magical phrases like 'sovereignty.' ").

66. 672 S.W.2d at 108. The court noted that unfair labor practice disputes traditionally have been administered by the courts rather than an administrative agency. The court further reasoned that from the authority to administer comes the power to impose sanctions and other remedies which effectuate the policies underlying the Public Sector Labor Law. *Id. See* Missey v. City of Cabool, 441 S.W.2d 35, 41 (Mo. 1969); City of Webster Groves v. Institutional Employees Union, 524 S.W.2d 162, 165 (Mo. App., E.D. 1975).

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> [T]hat the legislature relinquished to the courts authority to declare policy, administer the law and give remedies for breach implies rather an intent also that the courts fashion a private cause of action to give full effect to the policy of the enactment—especially where the judicial sanctions available do not

The court relied on the doctrine of implied right[68] to conclude that the unlawful fighters' strike gave rise to a civil remedy. Under this doctrine, a court may imply a civil cause of action from the violation of a statute which does not expressly specify a remedy.[69] In determining whether to imply a civil cause of action, a court must determine if such an action was intended, either expressly or impliedly, by the legislature.[70] The court must also conclude that the statute was intended to benefit the particular plaintiff and that a civil remedy furthers the policies and enforcement of the statute.[71]

In *Kansas City Firefighters*, the court noted that the statute declares no public policy.[72] However, it reasoned that one policy implicit in the statute is to ensure the continuity of services that are vital to the public health and safety.[73] The court concluded that, since the firefighters strike posed an immediate threat to the public, a civil remedy against the fire fighters and its union would serve two important functions. First, it would serve to ensure that essential firefighter services are protected. Second, the remedy would deter fire fighters from striking—an act which would almost certainly cause harm to persons and property.[74] However, before concluding that such a remedy was available to the state, the court considered whether the state was one of the class for whose benefit the Public Sector Labor Law was enacted.[75]

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suffice for that purpose.
672 S.W.2d at 109.

68. The state argued that in order to give full effect to the statute, a civil cause of action is implied from a violation of the statute. *Id.* at 107. It claimed that one policy implicit in the statute is to provide a tort remedy to any party damaged as a result of the firefighters strike. The private cause of action, it argued, arises per se because of the statutory prohibition. The state relied on the per se tort theory of recovery used by the California courts. *See* Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 100, 111, 140 Cal. Rptr. 41, 48 (1977) (liability on a civil cause of action arises per se from a violation of the statute without considering the policy or intent of the statute).

69.

> When a legislative provision protects a class of persons by prohibiting or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in the furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord an injured member of the class a right of action using a suitable existing tort action or a new cause of action analogous to an existing tort action.

RESTATEMENT (SECOND) OF TORTS § 874A (1977); *see also* Christy v. Petrus, 365 Mo. 1187, 1192, 295 S.W.2d 122, 126 (Mo. 1956) (en banc).

70. *See, e.g.*, *Christy*, 365 Mo. at 1192, 295 S.W.2d at 126; Teal v. Sears Roebuck & Co., 66 Ill. 2d 1, 2, 359 N.E.2d 473, 474 (1976).

71. RESTATEMENT (SECOND) OF TORTS § 874A (1977); *see* Note, *supra* note 4, at 1313-14; Note, *supra* note 2, at 1092-93.

72. 672 S.W.2d at 108.

73. *Id.* at 109.

74. *Id.* at 110.

75. *Id.* There are three ways that a court can determine if the legislature intended to benefit a particular person, class, or entity. First, a court can look to the

The court analyzed the statutory language and concluded that the public employer was an intended beneficiary. As noted by the court, "the text of the [statute] discloses that the prohibition against strikes by public employees was enacted for the benefit of the public body—that is, the public employer."[76] The problem with the court's analysis here is that the statutory language relied upon merely defines the "public body." A close examination does not indicate whether the public employer was an intended beneficiary of the statute for the purposes of implying a civil remedy.[77]

However, having decided that the statute was enacted to benefit the public employer, thereby entitling it to a civil cause of action, the court then had to determine if such a cause of action accrued to the state. Under the court's reasoning, the state "stands in the stead of the municipal public employer, not as a third party,[78] but as a surrogate to any cause of action under the statute."[79] Thus, since the state provided services that the city would have had to provide, this factor entitles the state to sue in the city's place.[80]

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legislative history of the statute. Note, *supra* note 4, at 1313; Note, *supra* note 2, at 1095. The court in *Kansas City Firefighters* did not have much legislative history to rely on to determine for whose benefit the statute was enacted. Thus, the court foregoes any historical analysis.

Second, a court can examine the rationale behind the statute to determine who the legislature intended to benefit and what goals the legislature hoped to achieve in enacting the statute. Note *supra* at note 4, at 1314; Note, *supra* note 2, at 1094. For example, under one rationale, the intended beneficiary is the member of the public who would be subject to harm or inconvenience. This rationale suggests, as the state claimed, that any third party injured as a result of the strike would have a private right of action. Note, *supra* note 2, at 1094.

A court can also interpret the language of the statute to determine who the legislature intended to benefit. Note, *supra* note 2, at 1093. An examination of the statutory scheme could reveal that the legislature had more than one objective. Thus, it is possible to conclude that the statute was enacted to benefit both the public and the public employer. *See, e.g.*, Caso v. District Council 37, 43 A.D.2d 159, 350 N.Y.S.2d 173, 178 (1973) (court recognized that the purpose of a statute prohibiting public employee strikes is, *inter alia*, to protect the public by assuring uninterrupted government operations).

76. 672 S.W.2d at 110.

77. MO. REV. STAT. § 105.500 provides: "Unless the context otherwise requires, the following words and phrases mean . . . (3) "Public Body" means the state of Missouri, or any officer, agency, department, bureau, division, board or commission of or within the state."

78. The court noted that the few states and decisions dealing with the issue of whether to extend civil liability, limit that cause of action to public employers and exclude third parties. 672 S.W.2d at 111; *see also* Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977); Fulenwider v. Firefighters Ass'n Local 1784, 649 S.W.2d 268 (Tenn. 1982).

79. 672 S.W.2d at 110.

80. The court apparently reasoned that municipalities are mere political subdivisions of the state. Therefore, the state can sue in the place of the city since such a cause of action would have entitled the city, as public employer, to sue for damages. *See* City of Mountlake Terrace v. Wilson, 15 Wash. App. 392, 549 P.2d 497 (1976) (city is a mere political subdivision of the state and cannot challenge state retirement

In reaching the conclusion that an implied civil action arose from the illegal firefighters strikes, the court emphasized that the traditional injunctions, fines, and contempt remedies had not deterred firefighters from striking.[81] Therefore, the court held that a civil damage action should be granted to the state to effectuate the policy and intent of the Public Sector Labor Law.[82]

By granting the state a civil remedy for the firefighters' illegal strike, the court has achieved at least two purposes. First, the court has broadened its enforcement powers where traditional sanctions and remedies may be ineffective in providing adequate protection for vital public services. For example, the traditional remedy of injunction may be inadequate, especially where the strike lasts only a few days, but causes considerable damage.[83] Also, an injunction, usually imposed just prior to or during the strike, may actually serve to increase union militancy.[84] In addition, contempt remedies for violation of the injunction may be impractical.[85] Even mandatory fines may be useless because the financial gains which the union hopes to achieve by striking may outweigh the cost of the fine.[86] Therefore, where traditional sanctions and remedies have been insufficient in effectuating statutory policy, the imposition of a civil damage remedy could provide additional judicial muscle.[87]

Second, the imposition of a civil damage remedy might deter public employees from striking in the future.[88] The fear of large damage suits by the public employer or third parties could help prevent strikes.[89] Thus, a civil remedy, in addition to specified sanctions, could force union officials to think long and hard before authorizing a strike.[90]

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system); Becker v. Adams, 37 N.J. 337, 181 A.2d 349 (1962) (state legislative control over cities is almost unlimited as municipal corporations are merely political subdivisions of the state).

81. 672 S.W.2d at 110.

82. *Id.* at 109. The court in *Kansas City Firefighters*, however, carefully narrowed its holding in two ways. First, the court did not address whether the Public Sector Labor Law benefited any third party other than the public employer. Second, the court declined to decide whether every public employee strike in violation of the Public Sector Labor Law automatically gives the public employer a civil cause of action. Rather, the court emphasized that, "we confine our analysis to the public employee function in suit—firefighters." *Id.* at 111.

83. *See, e.g.*, Burke & Thomas, Inc. v. International Org. of Masters, 92 Wash. 2d 762, 763-65, 600 P.2d 1282, 1283-84 (1979) (a two day Labor Day weekend strike by public ferry workers, although it ended before an injunction could be issued, caused over a million dollars in damages to local businesses).

84. *See* Note, *supra* note 4, at 1319.

85. *See id.*

86. *See* Comment, *supra* note 4, at 268.

87. "Indeed a major justification for the implication doctrine is its utility in providing a supplementary enforcement mechanism in light of experience as to the efficacy of the explicit statutory enforcement procedures." Note, *supra* note 4, at 1318.

88. *See* Note, *supra* note 2, at 1096.

89. *See* Note, *supra* note 4, at 1319.

90. *See* Burns, Jackson, Miller, Summit & Spitzer v. Lindner, 1980-81 Pub. Bargaining Cas. (CCH) 37, 253 (N.Y. Sup. Ct. March 31, 1981). Plaintiff asked for

However, the consequences of imposing a civil damage remedy could be undesirable. For instance, the availability of a civil damage action to employers and third parties could prolong the strike since the union will undoubtedly include a demand for indemnification as a condition for settlement.[91] A civil damage action could also upset the harmonious working relationship between the public employer and its employees. Thus, after a strike, there could be resentment among public employees as they work to pay off long-term judgments.[92] Finally, by imposing a civil damage remedy, a court could cause an imbalance in the bargaining power of public employers and employees.[93]

After concluding that the illegal strike by the fire fighters gave rise to an implied civil remedy, the court in *Kansas City Firefighters* then had to determine which tort recovery it would allow. The possible theories of recovery available were intentional interference with a contract, tortious inducement of breach of contract, nuisance, tort per se, and prima facie tort.

The Missouri Supreme Court's decision in *Clouse* foreclosed any recovery under either tortious interference with a contract or tortious inducement of breach of contract.[94] The court, however, rejected both of these as possible bases of recovery because of *Clouse*, which held that negotiations between a public employer and employees cannot result in a binding contract.[95] This limitation also ruled out other possible contractual remedies such as breach of contract or the use of third party beneficiary theory.[96]

Similarly, the court rejected nuisance as a possible theory of recovery. As

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$50 million per day for the 11 day strike. The union's attorney warned that if the damages were granted "the unions are out of business." *Id.*

91. For example, one of the conditions by the fire fighters union was that the city would not bring suit against the strikers or the union. Kansas City Times, Oct. 7, 1975, at 1, col. 5; *see* Note, *supra* note 4, at 1320.

92. *See* Comment, *Parent Union Liabilities for Strikes in Breach of Contract*, 67 CALIF. L. REV. 1028, 1032 (1979) (post-strike damages could impair industrial harmony).

93. *See* Lamphere Schools v. Lamphere Fed'n of Teachers, 400 Mich. 104, 130, 252 N.W.2d 818, 830 (1977). In *Lamphere*, the court noted that "the ultimate legislative goal is to achieve a prompt, fair resolution of disputes while avoiding disruption . . . to recogize alternative tort remedies would result in a substantial negative impact upon such purposes." *Id.*

94. Tortious interference with a contract occurs when a person intentionally and improperly interfers with the performance of a contract by causing a party not to perform. *See* RESTATEMENT (SECOND) OF TORTS § 766A (1977). Under this theory, the union would be liable since it encouraged the fire fighters to strike, thus making it impossible to fulfill their contractual obligations. In contrast, tortious inducement of breach of contract occurs when a person intentionally and without justification, persuades or induces another party to breach a contractual duty owed to a third party. *See* RESTATEMENT (SECOND) OF TORTS § 766, comment h (1979). Here the inducement by the union to go on strike, resulting in a breach of a contractual obligation would be the basis of recovery.

95. *See* 206 S.W.2d at 545.

96. Note, *supra* note 2, at 1131.

noted by the court, a nuisance can be both public and private.[97] A public nuisance results when there is an unreasonable interference with the exercise of a right common to all members of the public.[98] The court rejected this as a basis of recovery since the invasion of a public right merely constitutes a petty criminal offense, enjoinable by the public employer.[99]

Another possible theory of recovery, one principally relied on by the state, was the doctrine of per se tort. This doctrine was applied for the first time in the public sector labor context in *Pasadena Unified School District v. Pasadena Federation of Teachers, Local 1050*,[100] where the court held that an illegal strike by union employees, which constituted a statutory violation, resulted in damages recoverable by the city.[101] In *Pasadena*, the court reasoned that the unlawful act itself was a tort.[102] The court in *Kansas City Firefighters* declined to accept that court's rationale since, traditionally, Missouri courts have held that not every violation of a statute automatically gives rise to a civil remedy.[103]

Having foreclosed all traditional tort remedies, the court concluded that since the legislature intended some kind of remedy, relief in the form of prima facie tort was available to the state.[104] The major purpose behind the prima facie tort doctrine is to provide an injured party some form of recovery when no traditional tort action permits recovery.[105] Under this doctrine, a defendant may incur liability if he intends to injure the plaintiff even if defendant engages in otherwise lawful conduct.[106]

This theory was recently recognized by the Missouri Court of Appeals for the Western District in *Porter v. Crawford*.[107] In that case, the court chose to adopt the more flexible approach of the Restatement (Second) of Torts rather

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97. 672 S.W.2d at 114.

98. *See* RESTATEMENT (SECOND) OF TORTS § 821B (1977).

99. 672 S.W.2d at 114. Although public nuisance can be grounds for a private damage recovery, the court noted that there was no showing of a particular injury of a kind not shared by the public, a prerequisite to such recovery. *Id.* Rather, the suit by the state was for reimbursement to the state general revenue fund for damages resulting from the illegal strike. *Id.*

100. 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977).

101. *Id.* at 111, 140 Cal. Rptr. at 48.

102. *Id.* at 112, 140 Cal. Rptr. at 48.

103. *See Christy*, 365 Mo. at 1192, 295 S.W.2d at 126.

104. 672 S.W.2d at 115.

105. Note, *The Prima Facie Tort Doctrine in Missouri: Commission of a Lawful Act with Intent to Injure May Result in Liability*, 50 UMKC L. REV. 128 (1981).

106. *Id.*

107. 611 S.W.2d 265 (Mo. App., W.D. 1980). In *Porter*, plaintiff sued defendant insurance company for damage resulting from defendant's stop payment placed on a check issued to plaintiff. The court held that although defendant engaged in an otherwise lawful act, the intent to stop payment led to foreseeable injuries to plaintiff. Thus, the court, relying on RESTATEMENT (SECOND) OF TORTS § 870, ruled that the unjustified conduct constituted a prima facie tort. *See* Note, *Prima Facie Tort Recogized in Missouri*, 47 MO. L. REV. 533, 554 (1980).

than the more restrictive view applied by the New York courts.[108] Under the Restatement view, the plaintiff need only show that the defendant intended to cause him injury, that the injury has in fact resulted, and that the defendant was without excuse or justification.[109]

In *Kansas City Firefighters*, the court found that the union and the firefighters had the requisite intent to justify granting the state recovery in prima facie tort. The court reasoned that the withholding of essential services led to a presumption of harm intended to the "public body."[110] It placed particular emphasis on the fact that the union solicited commitments from area firefighters not to enter into the city and that the firefighters sabotaged fire equipment during the walkout.[111] Thus, by intentionally engaging in an illegal strike, the court concluded that the consequences were indeed an intended result.[112]

The effect of applying the prima facie tort doctrine in the public labor context is unclear since Missouri is the first state to allow prima facie tort recovery and since application of the doctrine is quite unsettled in this state. From the standpoint of public employees and unions in this state, the extension of prima facie tort into this area represents a further tightening of the noose around the neck of public employee bargaining rights. Now, not only do public employee unions have to contend with unenforceable bargaining agreements, legislative reluctance to reform public sector legislation, and prohibition of strikes for both essential and non-essential services, they also must now fear the imposition of huge damage suits for losses resulting from their attempts to influence terms and conditions of employment. One possible effect is that now public employers in Missouri need not worry about reaching a negotiated settlement since any losses resulting from public employee strikes can be recouped under the umbrella of prima facie tort recovery.

On the other hand, the use of a prima facie tort remedy could be a means of protecting needed public services and allowing public employers to recover

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108. Traditionally, the New York federal district courts have placed a number of limitations on their application of the prima facie tort doctrine. For instance, in order to incur liability, defendant must have a sole malicious motive that is unmixed by any other motive. *See, e.g.*, Sadowy v. Sony Corp., 496 F. Supp. 1071, 1077 (S.D.N.Y. 1980). These courts have also denied recovery under the prima facie tort doctrine where injuries were recoverable under traditional tort. *See, e.g.*, Smith v. Fidelity Mut. Life Ins. Co., 444 F. Supp. 594 (S.D.N.Y 1978).

109. RESTATEMENT (SECOND) OF TORTS § 870 (1977); *see* also Note, *Prima Facie Tort*, 11 CUM. L. REV. 113, 120-24 (1980).

110. 672 S.W.2d at 112.

111. *Id.* at 116. The court also emphasized the fact that all of these illegal acts were done after the issuance of an injunction.

112. *Id.* The court relied on two New York decisions as a basis for allowing recovery in prima facie tort. Although these decisions did not actually grant recovery under prima facie tort theory, they recognized it as a possible theory of recovery for unlawful public employee strikes. *See* Burns, Jackson, Miller, Summit & Spitzer v. Linder, 59 N.Y.2d 314, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983); Jamur Prods. Corp. v. Quill, 51 Misc. 2d 501, 273 N.Y.S.2d 348 (Sup. Ct. 1966).

losses to the taxpayers resulting from public employee strike activity. As noted by the court, the prima facie tort remedy is well-suited for public employee strikes.[113] This conclusion might be well-founded, particularly in cases like *Kansas City Firefighters*, where the public employer would not be able to recover under traditional remedies. There is little doubt that the flexibility of the prima facie tort doctrine can be an important means of allowing the public employer to recover losses resulting from an illegal strike and a powerful weapon against public sector strikes which threaten the public health and safety.

However, such remedies are merely short-term solutions to very complicated and delicate labor matters. What is needed more is reform of the current Public Sector Labor Law by the legislature. While a detailed discussion of an ideal statutory model is beyond the scope of this note, at a minimum, there should be included a right for public employee unions to enter into binding collective bargaining agreements.[114] By carefully eliminating the inherent ambiguities and other shortcomings in the statute and by making the law more equitable to public employees, the legislature could protect vital public services, and, at the same time, provide public employees with a realistic and speedy method for addressing serious labor concerns. Such prompt legislative action would eliminate the need to search for new remedies in an area where careful balancing of the competing and equally justified interests of the public, the public employer, and the public employees is essential.

The issues raised in *Kansas City Firefighters* illustrate some of the complex and delicate problems involving public sector labor relations in Missouri. In addition, the case demonstrates the ambiguities and incompleteness of the current Public Sector Labor Law. These statutory problems place an added burden on the courts to fill gaping holes in the statute and to formulate patchwork remedies and rationales on an ad hoc, case-by-case basis. Such an approach can be detrimental to public employer-employee relations and to the resolution of public labor disputes.

The use of a prima facie tort remedy in the public labor context could serve to protect vital public services and deter public employee strikes. However, the way in which the court had to strain to find a remedy in *Kansas City Firefighters* points to the need for clearer, more comprehensive legislation covering public sector labor relations. Meanwhile, public employee unions will be

113. 672 S.W.2d at 115.

114. Such a statutory scheme could be some variation of Senate Bill 442 or the recently passed Illinois Act. *See supra* note 4871. Although there could be some additional costs in implementing changes in the current law, the courts could be aided in their interpretation by clear legislative guidelines. Also, the public employer, employee, and the public also could be benefited since such reform would be more conducive to the expedient resolution of public labor disputes.

skating on thin ice anytime they recommend a strike to resolve an impasse in bargaining negotiations.

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