

WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES OCTOBER 2023

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

Dane
Milwaukee

MONDAY, OCTOBER 9, 2023

9:45 a.m. 22AP1999-W Antonio S. Davis v. Circuit Court for Dane County

11 a.m. 20AP333 Erik A. Andrade v. Milw. Bd. of Fire and Police Commissioners

Note: The Supreme Court calendar may change between the time you receive it and when a case is 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 type of camera coverage of Supreme Court oral argument, you must contact media coordinator Logan Rude at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT

October 9, 2023

9:45 a.m.

2022AP1999-W State ex rel. Antonio S. Davis v. Circuit Court for Dane County

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison) denying Davis’s petition for supervisory writ, and thereby affirming the Dane County Circuit Court order, Judge Ellen K. Berz presiding, which denied Davis’s motion for judicial substitution.

This is a supervisory writ action. Davis was arrested in Dane County on misdemeanor offenses on August 16, 2022. Davis applied for State Public Defender (SPD) representation the following day, and the SPD office determined he qualified for representation. However, due to the shortage of SPD attorneys and the backlog of cases, Davis was not appointed counsel until November 3, 2022. Davis therefore appeared without an attorney at his initial appearance on August 30, 2022.

On November 9, 2022, six days after counsel was appointed by the SPD, Davis moved for judicial substitution. His appointed counsel submitted an affidavit in support of the motion explaining why the request was filed outside the 20-day deadline to do so required under Dane County Circuit Court Local Rule. The circuit court denied the motion because it was “untimely.”

Davis filed a petition for supervisory writ with the Court of Appeals. He argued that the circuit court had a legal duty to grant his late substitution request because the government-created obstacle of the delayed SPD appointment made it impossible for him to intelligently exercise his right to substitution within the requisite time period set forth in the local rule.

The Court of Appeals denied Davis’s petition reasoning that Davis “failed to establish that the circuit court had a plain duty to grant his substitution request based on existing case law.” The Court of Appeals stated that Davis did not cite to any authority which imposed a duty on the circuit court to recognize the substitution request as timely based on the delay in the appointment counsel.

Davis filed a petition for review with the Supreme Court, and this court granted the petition.

The issues for the Supreme Court to decide are:

1. Whether the SPD’s inability to appoint counsel before the deadline for requesting a substitution of judge expires is a “government created obstacle” that interferes with a defendant’s intelligent exercise of his right of substitution?
2. Alternatively, whether the doctrine of equitable tolling tolls the deadline for filing a request for substitution of judge until the defendant is appointed counsel?

WISCONSIN SUPREME COURT
October 9, 2023
11:00 a.m.

2020AP333 Erik A. Andrade v. City of Milw. Bd. of Fire & Police Commissioners

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed the Milwaukee County Circuit Court order, Judge Jeffrey A. Conen, presiding, upholding the City of Milwaukee Board of Fire and Police Commissioners' decision to discharge Andrade as an officer with the Milwaukee Police Department.

This case involves Andrade's social media postings following the high-profile arrest of Sterling Brown.¹ Officer Andrade answered a call to assist at the scene but was not involved in arresting Brown. Andrade's contact with Brown involved transporting him after arrest.

A few months after this incident, the Milwaukee Police Department (MPD) commenced an investigation into Andrade's social media posts after a city alderperson gave police a screenshot of one of Andrade's Facebook posts. The MPD concluded that none of his publicly available Facebook posts could be deemed inappropriate or in violation of the MPD Code of Conduct.

On June 19, 2018, Brown filed a civil complaint relating to his arrest against several MPD officers, including Andrade. Brown's civil complaint included images of several of Andrade's Facebook posts as evidence of racist behavior by MPD officers.

Three investigative meetings ensued. In the first, Andrade told investigators that he had 1,200 "Facebook friends" with whom he shared posts. His profile picture included a badge with a memorial band on it; he believed that his Facebook friends knew he was an MPD officer. Andrade stated he did not like the portrayal that he was a racist based on his Facebook posts. He deleted his Facebook account on June 19, 2018 (the day Brown filed his suit against MPD).

On August 23, 2018, then-MPD Chief Alfonso Morales charged Andrade with two violations of the MPD Code of Conduct. On September 1, 2018, Morales issued a Personnel Order concluding Andrade was guilty of "[p]osting content to a social media networking site that was disruptive to the mission" of MPD, and imposed a 30-day suspension without pay. Morales also determined Andrade was guilty of failing "to inspire and sustain the confidence of our community" and discharged Andrade from the MPD. Andrade appealed his discharge to the Milwaukee Board of Fire and Police Commissioners.

During the disciplinary hearing before the Board, Morales said the deciding factor turning Andrade's suspension to termination was his conclusion that Andrade would be unable to testify usefully in criminal proceedings because the Facebook posts would be used to impeach his credibility. At the hearing, Andrade's counsel asserted that Andrade had not been given proper notice of MPD's intention to focus on Andrade's future ability to testify. Following the hearing, the Board affirmed Andrade's termination.

¹ In 2018, Sterling Brown, a Milwaukee Bucks player, double parked in a disabled parking spot outside a Walgreens store. The Milwaukee police used force and shocked Brown with a Taser while taking him into custody.

Andrade sought review of the Board's decision with the Milwaukee County Circuit Court. Andrade first asked the circuit court to review the Board's decision to discharge him. He then filed a writ of certiorari challenging the Board's decision. The cases were consolidated. The circuit court issued a written decision upholding the Board's decision. Andrade filed an appeal with the Court of Appeals, and the Court of Appeals affirmed the circuit court's decision.

Andrade filed a petition for review with this court, arguing his due process rights were violated both under Wis. Stat. § 62.50(13) and under Loudermill.² Andrade argues that the Board violated his due process rights by not giving him adequate notice that he was discharged primarily due to his misconduct compromising his ability to testify for the State in future police cases, thereby preventing him from putting forth a full defense to his termination.

The issues for the Supreme Court to decide are:

1. Did Chief Morales deprive Officer Andrade of due process by failing to provide an explanation of his evidence supporting his decision to discharge Officer Andrade?
2. Did Chief Morales deprive Officer Andrade of due process by failing to comply with Wis. Stats. § 62.50(13)?

² Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). In Loudermill, the United States Supreme Court held that a tenured public employee is "entitled to pre-termination process consisting of oral or written notice of the charges against them, an explanation of the employer's evidence and an opportunity to present their side of the story."