Appeal No. 2007AP496 **Cir. Ct. No. 2006CV193**

WISCONSIN COURT OF APPEALS
DISTRICT IV

COULEE CATHOLIC SCHOOLS,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, DEPARTMENT OF WORKFORCE DEVELOPMENT AND WENDY OSTLUND,

RESPONDENTS-RESPONDENTS.

FILED

OCT 18, 2007

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

This appeal arises from an age discrimination complaint filed by an elementary school teacher against Coulee Catholic Schools, which is run by the Roman Catholic Diocese of La Crosse (collectively, the Diocese). The central issue is whether the nature of the teacher's job, combined with First Amendment protections applicable to the Diocese, precludes the State from enforcing its employment discrimination laws against the Diocese. This issue, in turn, involves important sub-issues, such as whether and how the State may assess a religious organization's asserted motivations for taking an employment action and the weight to give a religious organization's asserted view of the importance of various religious tasks.

We certify this case because we conclude that the existing test, adopted by the court of appeals in ***Jocz v. LIRC***, 196 Wis. 2d 273, 538 N.W.2d 588 (Ct. App. 1995), is insufficient to resolve the case, and development of the law requires important policy considerations. How the ***Jocz*** test is altered or developed is a matter of considerable statewide importance because of the potential to either increase State interference with the employment decisions of religious organizations or to insulate those organizations from the normal consequences of discriminatory practices. As we hope will be apparent from this certification, the supreme court, not this court, is best suited to make the balancing decisions and policy choices inherent in this First Amendment realm.

BACKGROUND

The respondent, Wendy Ostlund, has long worked as an elementary school teacher for the Roman Catholic Diocese of La Crosse. Ostlund's job description listed six categories of duties: (1) religious atmosphere; (2) teaching responsibilities; (3) supervising responsibilities; (4) professional responsibilities; (5) grade-level responsibilities; and (6) compliance with the contract and policies of the Diocese.

In 2002, Ostlund was notified that her teaching contract would not be renewed "due to the implementation of a Reduction in Force program." Ostlund, who was 53 at that time, filed an age discrimination complaint with the Department of Workforce Development's Equal Rights Division. The Diocese responded that Ostlund was selected for reduction because she did not have a degree in elementary education or certification as a Grade 1 elementary school teacher. The Equal Rights Division determined that there was no probable violation, and Ostlund sought a review hearing before an ALJ. The Diocese

requested a bifurcated hearing so that it could obtain a separate initial ruling on whether the Equal Rights Division was precluded from acting in the matter on constitutional religious protection grounds. In addressing this threshold issue, the ALJ found facts regarding Ostlund's daily routine and concluded that, under the ***Jocz*** test, the Equal Rights Division was not precluded from acting on First Amendment grounds. The ALJ found that:

> Ms. Ostlund's primary duty was to instruct her students in a core of disciplines, consisting of reading, social studies, science, math, handwriting and religion. Although she taught religion for about one half-hour four times per week, led brief prayers about twice per day, at times made references to religious symbols as aids when teaching core subjects other than religion, occasionally incorporated a religious theme into her social studies classes, prepared her students several times per year to present a liturgy and supervised them during their attendance at weekly liturgies, all these religiously-related activities did not constitute her primary duty.

Applying the ***Jocz*** test, the ALJ concluded that Ostlund's teaching post "was not a *ministerial* position as that term is used for purposes of considering whether a state adjudication interferes with the free exercise of religion" (emphasis added). In a discussion, the ALJ suggested that a full inquiry into the question of whether a particular adjudication would create excessive entanglement with religion ought to involve more than a determination of whether a position is ministerial. Citing a federal court of appeals case, ***Geary v. Visitation of the Blessed Virgin Mary Parish School***, 7 F.3d 324, 327-28 (3d Cir. 1993), the ALJ suggested that the analysis should also take into account: (1) whether the challenged actions of the religious entity are ongoing; and (2) whether there is any actual conflict between the law sought to be enforced and the religious doctrine of the entity against whom enforcement is sought.

LIRC adopted the ALJ's factual findings, including the finding that Ostlund's primary duties consisted of teaching secular "core curriculum" subjects. LIRC affirmed the ALJ's conclusions that the teaching position was non-ministerial and that the Equal Rights Division was therefore not precluded from adjudicating the discrimination complaint. LIRC noted, however, that the ALJ's suggestion that the inquiry into whether preclusion applies should include more than a determination of whether the position itself is ministerial or ecclesiastical might conflict with this court's statement in ***Jocz*** that, "[i]f the agency or court concludes that the position is 'ministerial' or 'ecclesiastical,' further enforcement of the WFEA against the religious association is constitutionally precluded, and the complaint should be dismissed." ***Jocz***, 196 Wis. 2d at 302. Rather than proceed to the underlying merits of Ostlund's discrimination claim, the Diocese was permitted to challenge LIRC's findings and conclusions in the circuit court.[1] The circuit court affirmed LIRC's holding that the Equal Rights Division was not precluded from acting in this matter, and the Diocese appealed.

DISCUSSION

In ***Jocz***, we concluded that this State's employment discrimination laws may not be enforced against a religious association "when the employment position at issue serves a 'ministerial' or 'ecclesiastical' function." ***Id.*** at 301 (citing ***Rayburn v. General Conference Of Seventh-Day Adventists***, 772 F.2d 1164, 1165 (4th Cir. 1985)). In effect, the ***Jocz*** test is whether the position is primarily "ministerial":

[1] On appeal, LIRC does not suggest that there is any procedural problem with the circuit court reviewing only the constitutional issue presented in this certification.

> "'[I]f the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered ["ministerial" or "ecclesiastical"].'"

Jocz, 196 Wis. 2d at 303 (citing ***Rayburn***, 772 F.2d at 1169, but substituting the language "'ministerial' or 'ecclesiastical'" for the term "clergy" that was used in ***Rayburn***).

The ***Jocz*** test is a limited one in several respects. First, it provides limited guidance as to whether a particular position is "ministerial." We are uncertain whether use of the term "primary" means that the agency and the courts should look at the amount of time an employee spends on a task. We note that in ***Rayburn***, immediately following the language we adopted in ***Jocz***, the ***Rayburn*** court further explained: "This approach necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church." ***Rayburn***, 772 F.2d at 1169.

Second, the ***Jocz*** test is limited because we concluded that employment discrimination laws may not be enforced against a religious association when the employment position is ministerial, but we did not hold the converse. That is, we did not address whether state discrimination laws may be enforced whenever the complaining employee serves in a non-ministerial position for a religious organization, regardless of ministerial tasks involved in the position.

Thus, questions remain as to whether the ministerial-position test is dispositive of the State's ability to enforce its discrimination laws against a religious organization, or whether the test might instead be only the first step of a multi-part analysis. If the latter proposition is true, ***Jocz*** provides no direction as

to what other factors might preclude enforcement of discrimination laws in regard to an employment decision by a religious organization. We question the following: (1) whether the "primary duties" guideline of the ministerial test adopted in ***Jocz*** focuses on the relative amounts of *time* an employee spends on secular versus religious tasks, as opposed to the *importance* of any religious tasks performed to the spiritual or pastoral mission of the religious organization; (2) whether deference should be accorded to the religious organization's own assertion that a particular position is ministerial in nature; and (3) whether the ministerial test adopted in ***Jocz*** also permits consideration of the asserted reason for a religious organization's employment action in deciding whether review of that action is precluded.

With regard to the first issue, LIRC's conclusion that Ostlund's position was not ministerial rested upon the determination that her primary duty involved teaching core subjects that would also be taught in any secular classroom. The Diocese does not challenge LIRC's findings as to the amount of time Ostlund spent on various tasks. It maintains, however, that LIRC erred in determining that Ostlund's other tasks, such as teaching religion and fostering a Catholic atmosphere throughout the day, were not her "primary" duties, given the deposition testimony of a number of church authorities to that effect. For example, one of the Diocese officials stated that the "primary function of a first grade teacher in the Catholic school is to lay the foundation for the Catholic faith," and the Director of Catholic Schools for the Diocese of La Crosse stated that the "primary mission … of a teacher in a Catholic school system is Catholicity, teaching the Catholic faith" and that the very reason Catholic schools exist is to teach Catholic values. The Diocese contends that the court should have placed more weight on these and similar assertions in order to determine whether the

teaching position at issue was "important to the spiritual and pastoral mission of the church" as discussed in ***Rayburn***, rather than focusing on the actual amount of time Ostlund spent on ecclesiastical tasks. On the other hand, our analysis that the position at issue in ***Jocz*** "implicated several of the primary duties" identified in the adopted guideline could suggest that we were, in fact, comparing the amount of time spent on those duties as opposed to lay tasks.

The parties' competing interpretations of the "primary duties" test are thus intricately related to the deference issue. That is, if the focus of the primary duties test is on the *importance* of particular tasks to the mission of a religious organization, it would logically seem that the religious organization itself would be in the best position to define its mission and the importance of various tasks to that mission, as the Diocese argues. Conversely, if a religious organization's designation of a position as ministerial is not entitled to deference, it would make more sense to look at more objective factors, such as time spent on various tasks, as opposed to the importance of a particular task to the organization's mission. ***Jocz*** stated that a religious association's designation of an employment position as ministerial does not necessarily control the issue. ***Jocz***, 196 Wis. 2d at 302-03. ***Jocz*** did not, however, discuss whether some level of deference might still be appropriate and, if so, in what manner such deference would be applied.

Finally, there appears to be a split among federal circuits as to whether it is permissible to also look at the asserted motivation for an employment action in deciding whether state discrimination laws may be enforced. As LIRC noted, in addition to the ***Geary*** case cited by the ALJ from the federal Third Circuit, the Ninth Circuit has suggested that it is appropriate to take the asserted motivation for the employment action into account in at least some circumstances.

See ***Bollard v. California Province of the Society of Jesus***, 196 F.3d 940, 948 (9th Cir. 1999) ("Where the church provides no doctrinal nor protected-choice based rationale for its alleged actions, and indeed expressly disapproves of the alleged actions, a balancing of interests strongly favors application of [Title VII].").

In contrast, the Seventh Circuit has taken the position that: "The [ministerial] exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause protects the act of a decision rather than a motivation behind it." ***Alicea-Hernandez v. Catholic Bishop of Chicago***, 320 F.3d 698, 703 (7th Cir. 2003) (citations omitted). On its face, at least, this language also seems to be in accord with that from the Fourth Circuit case, ***Rayburn***, which was relied upon in ***Jocz***. *See* ***Rayburn***, 772 F.2d at 1165.

As LIRC also pointed out, however, because ***Rayburn*** discussed the ministerial-position test in the context of the more general excessive-entanglement doctrine, it is not entirely clear whether that case would in fact preclude any examination of the reason proffered by a religious organization for an employment decision. Moreover, even if ***Rayburn***, and by extension ***Jocz***, can reasonably be read to preclude any further inquiry once a position has been determined to be ministerial, is the opposite true? In other words, is the entire preclusion analysis also over once a position is deemed non-ministerial? What if, for instance, an employee in a clearly non-ministerial position, such as a school janitor, engaged in activities that the Diocese deemed to be damaging to its religious mission? Would the State have the authority to adjudicate a termination of employment purported to be on religious grounds?

In sum, there appear to be compelling reasons to take into account the proffered reason for an employment decision by a religious organization when determining whether constitutional religious protections bar adjudication of the decision. It is unclear, however, whether the ministerial-position test adopted in ***Jocz*** permits any such consideration. Assuming that it does not, the question arises whether this State should still follow ***Jocz*** in light of more recent cases from other federal circuits which seem to take a broader approach. Finally, regardless whether the constitutional preclusion inquiry is to be limited solely to whether or not a position is ministerial, additional clarification may be required as to the proper scope and focus of that test, including what if any deference may be due to a religious organization's assertion that a position is ministerial and whether that determination may be made on the basis of the time an employee spends on certain tasks. For all of these reasons, we ask the Wisconsin Supreme Court to accept certification of this case.