Appeal No. 2010AP2705 **Cir. Ct. No. 2009CV1813**

WISCONSIN COURT OF APPEALS
DISTRICT II

KATHLEEN DEBRUIN,

PLAINTIFF-APPELLANT,

V.

ST. PATRICK CONGREGATION,

DEFENDANT-RESPONDENT.

FILED

AUG 17, 2011

A. John Voelker
Acting Clerk of
Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

In light of the Wisconsin Supreme Court's decision in ***Coulee Catholic Schools v. LIRC***, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868, are religious organizations immune from common law breach of contract lawsuits brought by ministerial employees?

FACTS

On July 1, 2009, Kathleen DeBruin signed a one-year contract to serve as the "director of faith formation" for St. Patrick Congregation, a Catholic

parish that is part of the Archdiocese of Milwaukee. The contract stated that DeBruin "shall not be discharged during the term of this contract, without good and sufficient cause, which shall be determined by [St. Patrick]." St. Patrick fired DeBruin on October 5, 2009, for allegedly failing to do a background check.

DeBruin subsequently filed suit against St. Patrick for breach of contract. St. Patrick responded by filing a motion to dismiss, arguing that its decision to fire DeBruin was protected by ***Coulee***, the Free Exercise Clause of the First Amendment of the U.S. Constitution, and the Freedom of Conscience Clauses in Article I, Section 18 of the Wisconsin Constitution. The circuit court granted St. Patrick's motion and dismissed the case. DeBruin appealed, arguing that ***Coulee*** does not prohibit common law breach of contract claims.

DISCUSSION

In ***Coulee***, the Wisconsin Supreme Court held that the Free Exercise Clause of the U.S. Constitution and the Freedom of Conscience Clauses in the Wisconsin Constitution protect religious organizations from employment discrimination lawsuits when the employee's position is important and closely linked with the religious mission of the organization. ***Coulee***, 320 Wis. 2d 275, ¶¶67, 88. This is known as the "ministerial exception." *See* ***id.***, ¶¶39, 67. As the "director of faith formation" for a Catholic parish, DeBruin unquestionably is a ministerial employee. *See* ***id.***, ¶67. What is not clear, is whether St. Patrick is immunized from DeBruin's common law breach of contract lawsuit by virtue of DeBruin's status as a ministerial employee.

The court in ***Coulee*** cautioned that "[w]e do not mean to suggest that anything interfering with a religious organization is totally prohibited." ***Id.***, ¶65. While the Wisconsin Supreme Court made clear that a state law could not interfere

with a religious organization's ability to hire or fire ministerial employees, DeBruin is not seeking to apply a state law. Rather, she is asking for a court to exercise jurisdiction over her common law breach of contract claim. In ***Rayburn v. General Conference of Seventh-Day Adventists***, 772 F. 2d 1164, 1171 (4th Cir. 1985)—a case relied upon heavily by the Wisconsin Supreme Court in ***Coulee***—the Fourth Circuit Court of Appeals stated that "[o]f course churches are not—and should not be—above the law. Like any person or organization, they may be held liable for their torts and upon their valid contracts." Several state and federal cases have supported this viewpoint.

In ***Minker v. Baltimore Annual Conference of United Methodist Church***, 894 F.2d 1354, 1355 (D.C. Cir. 1990), a Methodist minister sued the United Methodist Church for allegedly denying him a promotion because of his age. In addition to an age discrimination claim—which was dismissed on free exercise grounds—Minker brought two breach of contract claims. ***Id.*** One of the contract claims was based on an alleged promise to find the minister a more appropriate congregation and to provide him with a raise, while the other contract claim was based on passages from the Methodist Book of Discipline concerning the assignment of pastorships. ***Id.*** The court dismissed the breach of contract claim based on the Book of Discipline, holding that the court lacked jurisdiction to interpret a religious text. ***Id.*** at 1358-59. The court, however, allowed the breach of an oral contract claim to go forward, as "[a] church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court." ***Id.*** at 1359. Furthermore, "courts may always resolve contracts governing 'the manner in which churches own property, hire employees, or purchase goods.'" ***Id.*** (quoting ***Jones v. Wolf***, 443 U.S. 595, 606 (1979)). While the minister's breach of an oral contract claim could potentially affect the church's

free exercise rights, the D.C. Circuit held that the minister had alleged enough to survive a motion to dismiss and that the trial court should be permitted "to control the case so as to protect against any impermissible [church and state] entanglements." ***Minker***, 894 F.2d at 1360.

Many appellate courts have held that a trial court may adjudicate a breach of contract claim against religious organizations so long as the basis of the claim is secular and not religious. The Third Circuit has held that a chaplain at a Catholic university was permitted to bring a fraudulent misrepresentation claim and a breach of contract claim against the university because those claims would not impinge on the university's free exercise rights. ***Petruska v. Gannon University***, 462 F.3d 294, 310 (3d Cir. 2006). The court stated that "contractual obligations are entirely voluntary," and that "[e]nforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights." ***Id.***

The New Jersey Supreme Court has said that the threshold question that a court must determine is whether the underlying dispute is secular or "ecclesiastical." ***McKelvey v. Pierce***, 800 A.2d 840, 851 (N.J. 2002). As the court stated:

> If … the dispute *is* truly of a *religious nature*, rather than theoretically and tangentially touching upon religion, [then] the claim is barred from secular court review. If, however, the dispute can be resolved by the application of purely neutral principles of law and without impermissible government intrusion (e.g., where the church offers no religious-based justification for its actions and points to no internal governance rights that would actually be affected), there is no First Amendment shield to litigation.

Id. at 856 (emphasis in original). In reinstating a former Catholic seminarian's contract and tort claims against a Catholic Diocese and a number of priests, the

New Jersey Supreme Court noted that "[d]eclining to impose neutral and otherwise applicable tort or contract obligations on religious institutions and ministers may actually support the establishment of religion, because to do so effectively creates an *exception* for, and may thereby help *promote*, religion." ***Id.*** at 844, 857 (emphasis in original).

Some courts, however, have been less willing to adjudicate contract claims against religious organizations when the claim involves a clergy member. As one court has stated, "religious organizations must be allowed to select their own clergy, free from government interference." ***Bourne v. Center on Children, Inc.***, 838 A.2d 371, 378 (Md. Ct. Spec. App. 2003). If a clergy member's primary duties are religious, some courts will refuse to examine his or her employment contract. *See* ***id.*** at 380. Similarly, many courts have held that they will not review a fired clergy member's breach of contract claim when the firing was based on theological grounds. *See* ***Lewis v. Seventh Day Adventists Lake Region Conference***, 978 F.2d 940, 942-43 (6th Cir. 1992); ***Nevius v. Africa Inland Mission Int'l***, 511 F. Supp. 2d 114, 120 (D.D.C. 2007); ***Leavy v. Congregation Beth Shalom***, 490 F. Supp. 2d 1011, 1027 (N.D. Iowa 2007); ***El-Farra v. Sayyed***, 226 S.W.3d 792, 795-96 (Ark. 2006); ***Black v. Snyder***, 471 N.W.2d 715, 720 (Minn. Ct. App. 1991). One court, however, stated that had the discharged rabbi "brought a claim for breach of contract based on [the congregation's] refusal to provide the agreed-upon insurance coverage or failure to make the annual compensation adjustment, it may well be that the Court could adjudicate those claims by factual determinations that do not involve the court in internal, ecclesiastical matters." ***Leavy***, 490 F. Supp. 2d at 1027. Another court, while holding that it had no jurisdiction over a breach of contract claim related to the firing of a priest, nonetheless held that a trial court could decide the issues in the

priest's complaint related to unpaid salary, benefits, and missing property. ***Dobrota v. Free Serbian Orthodox Church St. Nicholas***, 952 P.2d 1190, 1194-95 (Ariz. Ct. App. 1998). The fact that the trial court might have to examine church documents related to the priest's compensation did not matter because "[a] court may 'interpret provisions of religious documents involving property rights and other nondoctrinal matters as long as the analysis can be done in purely secular terms.'" ***Id.*** at 1196 (citations omitted). *See also* ***Favalora v. Sidaway***, 995 So. 2d 1133, 1135 (Fla. Dist. Ct. App. 2008) (per curiam) ("[C]ourts are not forbidden from examining a religious organization's internal laws or structure, especially where the inquiry is relevant to a third party's purely secular tort or contract claims.").

While DeBruin is a "ministerial employee," it is not clear whether she is a "member of the clergy." Wisconsin's marriage statute defines a member of the clergy as a "spiritual advisor of any religion, whether the advisor is termed priest, rabbi, minister of the gospel, pastor, reverend or any other official designation." WIS. STAT. § 765.002(1). For purposes of the clergy-penitent privilege, a clergy member "is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual." WIS. STAT. § 905.06(1)(a). A broad definition of clergy member that encompasses a "director of faith formation" would provide St. Patrick with a stronger argument that it cannot be subjected to a breach of contract lawsuit for firing DeBruin. This argument is undermined, however, by the fact that St. Patrick's decision was based not on ecclesiastical grounds, but rather on DeBruin's alleged failure to do a background check.

While the federal and state case law that we have cited seems to indicate that religious organizations are not immune from common law breach of

contract claims from ministerial employees, the Wisconsin Supreme Court has stated that the Wisconsin Constitution provides broader religious liberty protections than the First Amendment of the U.S. Constitution. *See* ***Coulee***, 320 Wis. 2d 275, ¶66. As the Wisconsin Supreme Court is the primary lawmaking court in this state, we believe it should have the opportunity to flesh out the ***Coulee*** standard. We therefore respectfully ask the Wisconsin Supreme Court to accept this certification and resolve the question of whether the religious liberty protections found in the Wisconsin Constitution are so broad as to shield religious organizations from common law breach of contract lawsuits brought by ministerial employees.