STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 29

ARCHDIOCESE OF MILWAUKEE
and ST. ALBERT SCHOOL,

Petitioners,

vs. Case No. 007-640

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Respondent. Decision No. 24781-B

MEMORANDUM DECISION & ORDER

The plaintiffs, Archdiocese of Milwaukee and St. Albert School, have moved this court pursuant to Sec. 731.02 Wis. Stats. for a preliminary injunction to prohibit the defendant, Wisconsin Employment Relations Commission (WERC), from conducting any further proceedings in the case of Cynthia Labucki vs. Archdiocese of Milwaukee and St. Albert's School Case 4, No. 38745, c-2061, until this court determines whether a permanent injunction should issue.

The plaintiffs' complaint seeks an order from this court forever prohibiting the WERC from asserting jurisdiction in this matter on the ground that neither of the plaintiffs are an "employer" under Sec. 111.02 (7) of the Wisconsin Employment Peace Act (WEPA) and therefore not subject to WERC

jurisdiction.

A hearing was set before the WERC for June 14, 1988 to consider a complaint filed by Teamsters "General" Local Union No. 200 and Cynthia Labucki that Labucki's nonrenewal as a teacher at St. Albert School for the 1987-88 school year was in retaliation for her protected, concerted activities under WEPA The hearing has been adjourned on a day-to-day basis pending this court's decision.

On August 31, 1987, WERC Examiner Lionel L. Crowley granted the plaintiffs' motion to dismiss the complaint on jurisdictional grounds holding that religious schools are an implied exemption to the definition of "employer" as set forth in WEPA.

On March 11, 1988, the WERC reversed Examiner Crowley's decision and ordered in a 2-1 decision that there is no exemption for religious schools under WEPA and that the exercise of WERC jurisdiction would not present "a significant risk that the First Amendment will be infringed".

Evidence relevant to the issues before this court is not in dispute. The affidavits submitted by the plaintiffs establish that the plaintiff Archdiocese of Milwaukee is a canonical unit of the Roman Catholic Church, led by an archbishop and

organized for the purpose of providing religious instruction and sacramental life for Roman Catholics within its jurisdiction. There are 280 parishes within the Archdiocese of Milwaukee and each is a separately organized and operated canonical subdivision of the Archdiocese run by a pastor or an administrator.

St. Albert Parish is a corporation separate and distinct from the Archdiocese. It, like other parishes within the Archdiocese, holds and operates a parish grade school. The management of the parish school is vested in the parish, and the parish is responsible for setting and terms and conditions of the employment of all individuals who work for the school including Labucki.

St. Albert School is dedicated to the total development of each child as a Christian. It is the goal of St. Albert School to provide a meaningful learning experience in a Christian environment, enabling the student to grow as an individual and as a member of the community. All of St. Albert's classroom teachers are required to teach religion, and all teachers must maintain in addition to their State Teacher's Certification a religious education certification. Religious education certification is

based upon 40 clock hours in religious education which must be completed within the teacher's first five years of employment followed by 15 clock hours of religious education every three years thereafter. Religion classes are a regular part of everyone's curriculum and are taught every day. The school staff and entire student body must attend Mass every Friday as a part of the school's curriculum. In addition, each class and its teacher attend Mass once every other week. The WERC does not contest the fact that St. Albert's School is at least in part a religious educational organization

Labucki had been employed as a teacher at St. Albert School since 1980. In early 1987, the St. Albert School principal, Brenda White, stated in her affidavit that she decided not to renew Labucki's teaching contract for the 1987-88 because Labucki had exhibited disloyalty toward the school administration, had created a morale problem among faculty and divisiveness among parishioners and had prompted a loss of trust in her based primarily on an incident that occurred in 1986 involving a student with special education needs. White also stated in her affidavit that although Labucki was also active in promoting the union as a collective bargaining

representative for teachers at St. Albert School, her views and her actions in that respect played no part in the decision not to renew her contract. The plaintiffs have stipulated that religious reasons played no part in the decision to discharge Labucki.

Labucki was informed of her nonrenewal and the reasons for her nonrenewal and was given a letter confirming her nonrenewal on February 11, 1987. Approximately, three weeks later, Labucki and the union filed a complaint with the WERC alleging that nonrenewal of her teaching contract constituted an unfair labor practice because it was based on her union activity and her open support of the Teamsters Union.

The WERC has asserted that this court should refuse to grant prohibition either as a provisional or as a final remedy in this action because the plaintiffs have an adequate remedy under Chapter 227 Wis. Stats. and have failed to demonstrate any extraordinary hardship.

In Matter of State ex rel Wuench v. County Court, 82 Wis. 2d 454, 460 (1978), it was held that the before prohibition can be granted it must be shown that ordinary remedies by appeal or otherwise are inadequate and that grave or extraordinary

hardship will result if the court does not order prohibition.

The plaintiffs argue that a review under Chatper 227 Wis. Stats. would be inadequate to protect the rights of the plaintiffs since they would be required to prepare and defend their position at the WERC hearing when most likely the WERC has no jurisdiction over the matter. It is further argued that in the interests of justice and judicial economy the court should order the requested relief and make a determination on the legal issues, because if it is determined that the WERC does not have jurisdiction at this time, the parties will not have to endure the hearing process.

I agree with the plaintiffs' position. I am satisfied that pursuant to the reasoning set forth in State ex rel Department of Public Instruction vs. ILHR, 68 Wis. 2d 677 (1975) that if it is determined that the WERC does not have jurisdiction over the plaintiffs in the first instance the provision for judicial review pursuant to Chapter 227 Wis. Stats., a remedy after the entire proceeding had been conducted, would be grossly inadequate and the requisite extraordinary harm is inherent in the situation. The availability of review under Chapter

227 Wis. Stats. does not prevent a Circuit Court from issuing a writ of prohibition. As stated in St. Michael's Church vs. Department of Administration, 137 Wis. 2d 226 at pp. 332-333:

> "We conclude that the debatability of an administrative agency's jurisdiction on undisputed facts does not prevent a Circuit Court from issuing a writ of prohibition directed to the agency. The court should decide whether the agency has jurisdiction even if ... 'difficult and close questions of law' are presented."

I am satisfied that prohibition is the appropriate remedy in the instant case if in fact the WERC does not have jurisdiction over the plaintiffs in this case.

Sec. 111.02 (7) Wis. Stats. defines:

> "The term "employer" means a person who engages the services of an employee ... but shall not include the state or any political subdivision thereof, or any labor organization ... other than when it is acting as an employer in fact."

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..."

Article I, Sec. 18 of the Wisconsin Constitution provides:

> "The right of every person to worship

> almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect, or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishment or modes of worship ... ."

The plaintiffs assert that the WERC does not have jurisdiction over this matter because neither plaintiff is an "employer" under WEPA and because exercise of jurisdiction by the WERC will unconstitutionally infringe upon the plaintiffs' rights to be free from excessive governmental intrusion. In NLRB v. Catholic Bishop of Chicago, 440 U. S. 490 (1979), the Court construed a statute of the National Labor Relations Act (NLRA) which is similar to Sec. 111.02 (7) Wis. Stats. as it contained a broad definition without specifically including or excluding the religious entity at issue. The first question the Court addressed was whether or not Congress intended the National Labor Relations Board (NLRB) to have jurisdiction over teachers in church-operated schools. The Court in a 5-4 decision held an Act of Congress should not be construed to violate the Constitution if any other possible construction remained available and that where

serious constitutional questions are evident, there must be an affirmative intention on the part of Congress to apply the statute to the situation. The Court concluded that because neither the language of the statute nor its legislative history disclosed any affirmative action by Congress that church operated schools be within the NLRB jurisdiction, and, absent a clear expression of Congress' intent to bring teachers of church operated schools within the NLRB's jurisdiction, the Court would not construe the Act in such a way as would call for the resolution of difficult and sensitive questions arising out of the guarantees of the First Amendment Religious Clauses. NLRB v. Catholic Bishop of Chicago, supra, at pp. 504-407.

The NLRA definition of "employer" is similar to the definition of an employer under WEPA. Both acts are similar statutes based on very similar policies, and because they are nearly identical and because the roles played by the NLRB and the WERC in enforcing the laws are nearly identical, Wisconsin courts frequently look to NLRB decisions and federal court decisions in interpreting the WEPA. See e. g. Mahnke v. WERC, 66 Wis. 2d 524 (1975); Libby, McNeill & Libby v. Wisconsin v. Wisconsin

Employment Relations Commission, 48 Wis. 2d 272, 281-283 (1970) and Vogt, Inc. v. International Brotherhood of Teamsters, 270 Wis. 315 (1956) aff'd 354 U. S. 284 (1957).

In State ex rel Department of Public Instruction, supra, at p. 681, the court opined that construction of the NLRA by the United States Supreme Court was not binding on the Wisconsin Supreme Court's construction of Wisconsin laws. However, it has been held in Wisconsin that a statute should be construed so as to avoid constitutional objections to its validity. Milwaukee v. Milwaukee Amusement, Inc., 22 Wis. 2d 240, 251 (1964). In Wipperfurth v. U-Haul Company of Western Wisconsin, 98 Wis. 2d 516, 522. (Ct. App., 1980) aff'd. 101 Wisconsin 2d 586 (1981), the court stated:

> "One of the most fundamental rules of statutory construction requires the court to not only construe a statute to avoid a construction that renders the statute unconstitutional, but also to construe the statute to dispell any serious doubts concerning its constitutionality."

The approach of Wisconsin courts to carefully and cautiously construe statutes where constitutional ramifications are evident is consistent with the approach of the United States Supreme Court.

The case of Wisconsin Employment Relations Board v. Evangelical Deaconess, 242 Wis. 78 (1943) relied upon by the WERC is not applicable to the instant case because no fundamental constitutional guarantees were implicated. The court held that in order to find an implied exception from the term "employer" contained in Sec. 111.02 (7) Wis. Stats. there must be a clear basis for saying the legislature intended such an exception. The Court did not address a situation where, as here, the agency's jurisdiction created significant risks of infringement of constitutional rights.

Therefore, I believe the statutory construction employed by the United States Supreme Court in Catholic Bishop would be adopted by the Wisconsin appellate courts in determining whether or not Sec. 111.02 (7) applies to religious organizations.

Because of the decision in Catholic Bishop, I conclude that there must be an affirmative intention clearly expressed by the Wisconsin Legislature that religious organizations, such as the plaintiffs', be covered under WEPA. Because there has been no showing of an affirmative intention by the Wisconsin Legislature to include church-operated

schools within WEPA definition of "employer" the plaintiffs are exempt from WEPA and, accordingly, the WERC has no jurisdiction in this matter.

The majority in Catholic Bishop was soundly criticized in the dissenting opinion of four of the justices for inappropriately using statutory construction to avoid consideration of difficult constitutional issues. Justice Brennan stated in the dissent at p. 518:

> "I repeat for emphasis, however, that while the resolution of the constitutional question is not without difficulty, it is irresponsible to avoid it by a cavalier exercise in statutory interpretation which succeeds only in defying congressional intent. A statute is not a 'a nose of wax to be changed from that which the plain language imports ... .' (Citation omitted)"

Assuming that the Wisconsin appellate courts would follow the reasoning of the Catholic Bishop dissenters, I am satisfied in any event that the exercise of jurisdiction by the WERC over the plaintiffs would unconstitutionally infringe their rights under the First Amendment to the United States Constitution and Article I, Section 18 of the Wisconsin Constitution.

The WERC has argued that the WEPA may

constitutionally be applied to the plaintiffs because if analysis is limited to the facts surrounding Labucki's complaint, no religious freedoms are infringed because the plaintiffs concede that no religious reasons motivated the nonrenewal of Labucki's teaching contract.

The WERC finally argues that if analysis is extended beyond Labucki's complaint, it may constitutionally oversee any future collective bargaining, may constitutionally determine whether religious based reasons asserted for discharge are pretextual, and may constitutionally fashion appropriate remedial orders where discharge decisions are premised in part on unlawful motivations.

While the United States Supreme Court in Catholic Bishop sidestepped the constitutional issue as to whether or not the NLRB could exercise jurisdiction over religious organizations such as the plaintiffs, the underlying decision by the Seventh Circuit Court of Appeals thoroughly considered the issue. See Catholic Bishop of Chicago v. NLRB, 559 F. 2d 112 (7th Cir., 1977)

In determining that such jurisdiction was unconstitutional, the Seventh Circuit rejected the argument of the NLRB that the fact of constitutional

injury was merely speculative and must be a demonstrable reality. Instead, the court deduced that the issue was not whether NLRB jurisdiction actually intruded into the Catholic Bishops' right to interprete and implement church doctrine. Rather, the issue as stated by the court in Catholic Bishop, 559 F. 2d at 1126, is whether jurisdiction will create a reasonable possibility for excessive governmental intrusion. If this possibility exists, jurisdiction is unconstitutional. The Seventh Circuit explained this test using an analogy to cases involving state aid to schools:

> "The whole tenor of the religion clauses cases involving state aid to schools is that there does not have to be an actual trial run to determine whether the aid can be segregated, received and retained as to secular activities only, but it is sufficient to strike the aid down that a reasonable likelihood or possibility of entanglement exists. Thus, we find the language in ... (Lemon v. Kurtzman, 403 U. S. 602, 619 (1971)) ... concerning a difficulty in the "possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions." (Emphasis added.) "Also in the same case we find, ... the language: 'This kind of state inspection and evaluation of the religious content of a religious organization is fraught with a sort of entanglement that the constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools in hence of churches' ... 'We cannot ignore here the danger that pervasive modern

> governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses (Emphasis Added). NLRB v. Catholic Bishop of Chicago, 559 F. 2d 1112, 1126 (7th Cir., 1978)"

If there is a reasonable possibility of infringement, the court must act and deny jurisdiction before the excessive entanglement is realized, it cannot wait until an actual dispute arises:

> "In the sensitive area of First Amendment religious freedoms, the burden is on the State to show that implementation of a regulatory scheme will not ultimately infringe upon and entangle it in the affairs of religion to an extent which the Constitution will not countenance. In cases of this nature, a court will often be called upon to act in a predictive posture; it may not step aside and await a course of events which promises to raise serious constitutional problems. Surniach v. Pasquera, de Busquets, 604 F. 2d 73, 76 (1st Circuit, 1979)."

In the instant case, even though religious reasons were not a factor in the plaintiffs' decision not to renew Labucki's employment contract, the WERC's assertion of jurisdiction over this matter would create a reasonable possibility that the plaintiffs' constitutional rights would be infringed. I agree with the plaintiffs that, if the WERC were alllowed to assert jurisdiction, employees would be allowed to organize and bargain collectively giving

the WERC the right to judge the legitimacy of the plaintiffs' employment decisions and be subject to WERC orders. Ultimately, the shift of decision-making powers from the plaintiffs to the teachers will burden the plaintiffs' ability to fully control the religious character of the school. WERC could regulate and impede the plaintiffs' ability to take actions that are necessarily related to the religious mission of the school. For example, jurisdiction would affect the plaintiffs' right to close schools, to subcontract teaching positions to religious faculty, and to require teachers to maintain religious certification and to attend Mass. The following passage cited by the Seventh Circuit in plaintiffs' brief set forth the dangers of NLRB jurisdiction over church-operated schools:

> "Once the bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload, workload is then related directly to class size, class size to range of offerings, and range of offerings to cirricular policies. This transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur (quoting from Brown, Collective Bargaining in Higher Education, 67 Mich. Law Review 1067, 1075 (1969). Catholic Bishop, 559 F. 2d at 1123."

These same dangers will be present if the WERC were premitted to assert jurisdiction here.

I agree with the plaintiffs' assertion that the teacher in a church-operated school plays a role that is central to the religious mission of the school and the religious development of each child. This unique role of the teacher in a church-operated school has been recognized by the United States Supreme Court:

> "The key role played by teachers in such a school system has been the predicate for our conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools. Catholic Bishop, 440 U. S. 490, 501 (1979)."

The Supreme Court did acknowledge the serious constitutional problems that would inevitably follow if the NLRB were to assert jurisdiction:

> "The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow." Id. at 504"

I also agree with the plaintiffs' assertion which was recognized by the Seventh Circuit that the NLRB's assertion of jurisdiction would "chill" the

decision-making processes in church-operated schools." Catholic Bishop, 559 F. 2d at 1124. The court recognized that this chilling aspect would ultimately require the school to tailor its conduct and decisions to "steer far wider of the unlawful zone" of impermissible conduct. Id. at 1124, quoting from Speiser v. Randall, 357 U. S. 513, 526 (1958). In the instant case, the same "chilling aspect" would occur if the WERC asserts jurisdiction over the plaintiffs. The plaintiffs would be uncertain over when the WERC would step in to review their employment actions, or when their actions would or would not be constitutionally protected. This uncertainty would undoubtedly lead the school to "steer far wider of the unlawful zone".

I do not agree with the argument of the WERC that in cases where an administrative agency could determine whether an asserted religious-based reason was in fact the reason for a discharge, it could protect First Amendment rights where the discharge was in part based on religion by "accommodation" in fashioning remedial orders which would exclude reinstatement of the employee. See Catholic High School Association v. Culvert, 753 F. 2d. 1161 (2nd Cir., 1985) The Seventh Circuit

rejected this accommodation argument stating:

> "We fail to comprehend the real possibility of accommodation in the present context without someone's constitutional right being violated which in turn would seem to preclude the possibility of accommodation as an answer to the obviation of the religious entanglement problem. Catholic Bishop, 559 F. 2d at 1130."

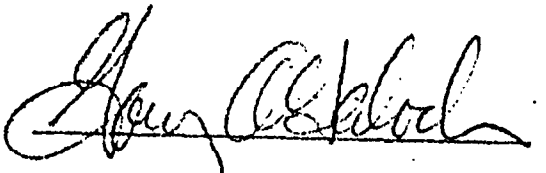
The defendant citing Ohio Civil Rights Commission v. Dayton Schools, 477 U. S. 619 (1986), and Black v. St. Bernadette Congregation, 121 Wis. 2d 560 (Ct. App., 1984), argues that First Amendment rights are not infringed merely by fact finding to determine whether an asserted religious-based reason is in fact the reason for a discharge. Dayton Schools, however, involved a sex discrimination complaint and not an unfair labor practice complaint. I agree with the plaintiffs that the potential for excessive entanglement in the employment discrimination context is far less substantial than in the union-employer context. Further, Black involved a contract action by a principal of a church-operated school, and the court in no way implied that the state has jurisdiction to engage in fact finding to determine the basis of the discharge of a teacher from a church-operated school. The court's statement at

p. 564 that "Wisconsin courts lack jurisdiction to review merits of termination based on ecclesiastical reasons" does not mean that a state agency has authority to review the discharge of a teacher whose employment was terminated for non-religious reasons from a church-operated school.

I am satisfied the plaintiffs' motion for preliminary and permanent relief must be granted. The plaintiffs' motion can be considered and treated as a motion for judgment on the pleadings and in turn as a motion for summary judgment because of the affidavits attached to the motion. Sec. 902.06 (3) Wis. Stats. Because there are no material issues of fact regarding the matters considered by the court, I am satisfied that the plaintiffs are entitled to summary judgment and a writ of prohibition shall issue absolute.

THEREFORE IT IS ORDERED that the request of the plaintiffs, Archdiocese of Milwaukee and St. Albert School, for a writ of prohibition against the defendant, Wisconsin Employment Relations Commission, is herein granted.

BY THE COURT:



Gary A. Gerlach

Dated at Milwaukee, Wisconsin

this 20th day of September, 1988.