

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 30, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0298

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

FRED J. PERRI,

Plaintiff-Appellant,

v.

DIOCESE OF LA CROSSE,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for La Crosse County: PETER G. PAPPAS, Judge. *Affirmed.*

Before Eich, C.J., Sundby and Vergeront, JJ.

VERGERONT, J. Fred Perri, a teacher of religion at Aquinas High School in La Crosse, appeals from a summary judgment dismissing his complaint against the Diocese of La Crosse, which operates the school. The trial court granted the Diocese's motion for summary judgment because it concluded that it lacked jurisdiction. The court held that the First Amendment's free

exercise and establishment clauses,¹ and article I, section 18 of the Wisconsin Constitution,² precluded it from exercising jurisdiction.³ Perri contends that the Diocese was not entitled to summary judgment because there are disputed issues of material fact and because the trial court erred in deciding that it did not have jurisdiction. We conclude that there are no material facts in dispute and that the Diocese was entitled to summary judgment as a matter of law because the position Perri held was "ministerial" or "ecclesiastical." We therefore affirm.

¹ 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."

² Article I, section 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 establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

³ The trial court concluded that the Freedom of Religion Restoration Act, 42 U.S.C. § 2000(bb), also precluded it from exercising jurisdiction. We do not address this statute because of our conclusion that the federal and state constitutional provisions denied the trial court subject matter jurisdiction.

BACKGROUND

Perri's complaint alleges that he had been employed as a teacher by the Diocese from 1972 until 1992, when he was terminated by the Diocese without first being advised that his job performance was unsatisfactory. During his employment, he had successive written one-year contracts with the Diocese. The complaint asserts three causes of action: (1) that the one-year contracts created a legal and moral obligation on the part of the Diocese to either continue to employ him or provide a sufficient severance package, which obligation the Diocese breached; (2) that Perri's years of service created an implied contract to continue to renew the one-year contracts, which the Diocese breached; and (3) that the Diocese interfered with his property right because he is now foreclosed from other employment opportunities.

The Diocese's answer denied all the allegations of the complaint, except that Perri was employed as a teacher from 1972-1992, taught religious study, and had one-year contracts with the Diocese. Among other affirmative defenses, the Diocese asserted that the trial court lacked jurisdiction under the free exercise and establishment clauses of the federal and state constitutions.

The Diocese filed a motion to dismiss and for summary judgment on several grounds, including the lack of jurisdiction. The affidavit of James Vail, the principal of Aquinas High School, accompanied the motion. Vail averred that Aquinas is a Roman Catholic high school operated by the Diocese of La Crosse, a religious corporation. Perri at all material times was employed as a full-time teacher of Roman Catholic religious doctrine. As a full-time teacher of religion, Perri's duties, in addition to teaching religion, included sacramental preparation of students, liturgical participation in the religious ceremonies of the Roman Catholic Church, student faith development, student conscience formation and scriptural exegesis.

A copy of Perri's written employment contract for the term July 1, 1991 through June 30, 1992, was attached to Vail's affidavit and to the complaint. According to this contract, Perri's title was "teacher" and his co-curricular title was "head girl's basketball coach."

Perri submitted his affidavit in opposition to the motion for summary judgment. He averred that he had held various positions with the Diocese between 1972 and 1992, such as instructor of religious studies, women's basketball coach and other miscellaneous duties. He was never advised that his work was unsatisfactory or that parents were dissatisfied, and he felt he was doing an adequate and proper job. Father Robert Altman, the prior principal, had commended him for the job he was doing. It was only when Vail replaced Father Altman that Perri was terminated. Before being terminated, he was given no warning that his performance was unsatisfactory or that his actions violated any Catholic doctrine. His role as a teacher involved preparing students for adulthood and teaching them proper moral standards and behavior, and he was unaware that anything he taught caused discord among faculty, parents or students. The Diocese's claim that it had ecclesiastical reasons for terminating him was a pretext. The allegation in the answer that he taught religious principles contrary to the doctrine of the Roman Catholic Church is untrue. If he is permitted to take the deposition of Vail and Donald Novotny, he will be able to discover what is in his employment file and the basis for the Diocese's action.

A second affidavit submitted by Vail contained the following averments. As a teacher of Roman Catholic religious doctrine at Aquinas, Perri was a member of the religion department. His assigned courses included "New Testament" and "Sacraments," and he was required to use a textbook entitled "Celebrating Sacraments." The table of contents of this book shows that it covers such topics as "Prayer," "Jesus," "The Church," "The Sacraments in History," "Baptism" and "Confirmation." A class observation report of Perri's class, "Junior Morality," shows that in this class Perri led a discussion on the beatitudes from the Bible and then instructed students to make a list of moral issues, which the students then read aloud. Perri's primary duty was to convey to students the major tenets of Catholicism and the relationship of those tenets to various moral, social and personal issues. His entire assigned curriculum was religious in content.

Vail averred in his second affidavit that on March 20, 1992, he informed Perri in a written memorandum which was attached to the affidavit of concerns the school, students and parents had regarding his religious teaching. The memorandum was preceded and followed by verbal discussions with Perri about his failings in teaching the religion courses assigned him. As a result of these criticisms, Perri resigned his position and later attempted to rescind the

resignation. But the school informed him it was not renewing his contract. The reason for the nonrenewal was Perri's failure to properly teach the religion courses and the resulting negative effect it had on the faith development of these students.

Perri submitted a second affidavit in which he disputed that there were any discussions about his failings as a teacher of religion and disputed many of the observations and criticisms in the March 20 memorandum. He considered resigning in order to receive a service bonus, but decided not to. He again stated that he properly taught the religion courses, does not disagree with church doctrine, and was non-renewed for other reasons.

The trial court granted the Diocese's motion for summary judgment because it concluded that the March 20 memorandum clearly showed that the teaching of religious doctrine was involved, and the court could not inquire into the merits of the Diocese's decision without infringing on ecclesiastical authority. It relied on *Black v. St. Bernadette Congregation of Appleton*, 121 Wis.2d 560, 360 N.W.2d 550 (Ct. App. 1984). In *Black*, we held that Wisconsin courts lack jurisdiction to review the merits of a termination based on ecclesiastical reasons. *Id.* at 564, 360 N.W.2d at 552. We granted summary judgment to the diocese and the bishop in *Black*, concluding that the motivating reason for the discharge of the school principal--to avoid discord in the parish--was an ecclesiastical reason. *Id.* at 565, 360 N.W.2d at 553.

In reviewing a grant of summary judgment, we employ the same methodology as the trial court and review its decision de novo. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 314-15, 401 N.W.2d 816, 820 (1987). We must grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Both parties agree that the issue before this court is whether the trial court has subject matter jurisdiction to decide Perri's contract and property rights claims. Both agree that this depends on whether the exercise of subject matter jurisdiction would violate the state and federal free exercise and establishment clauses of the federal and state constitutions. Finally, both agree that the issue of subject matter jurisdiction must be resolved before the trial court can decide those claims. We agree. See *Young v. Northern Illinois*

Conference of United Methodist Church, 21 F.3d 184 (7th Cir.), cert. denied, 115 S. Ct. 320 (1994) (affirming dismissal of Title VII claims because First Amendment denied district court subject matter jurisdiction).

Perri argues that, unlike in *Black*, there is a dispute in this case as to whether the reason for not renewing Perri's contract was ecclesiastical. Perri contends that this case is more like *Sacred Heart Sch. Bd. v. LIRC*, 157 Wis.2d 638, 460 N.W.2d 430 (Ct. App. 1990). In *Sacred Heart*, we ruled that the investigation of an age discrimination complaint by a third-grade teacher at a religious school did not violate the free exercise clause of either the federal or state constitutions because Wisconsin's Fair Employment Law was a "neutral principle of law." *Id.* at 642-43, 460 N.W.2d at 432. We distinguished *Black* on the ground that in *Black* there was no dispute that the reason for termination was ecclesiastical, whereas in *Sacred Heart*, the teacher alleged that the proffered ecclesiastical reason was a pretext for age discrimination. *Id.* at 640, 460 N.W.2d at 431.

Since briefing was completed, we decided *Jocz v. LIRC*, ___ Wis.2d ___, 538 N.W.2d 588 (Ct. App. 1995), in which we held that the State of Wisconsin may not enforce the Wisconsin Fair Employment Act against religious associations when the employment position serves an inherently "ministerial" or "ecclesiastical" function. *Id.* at ___, 538 N.W.2d at 597. This limitation was necessary, we concluded, in order to protect the free exercise of religion,⁴ which prevailed over the compelling governmental interest to eradicate discrimination. *Id.* at ___, 538 N.W.2d at 596.

In *Jocz*, we adopted this test for determining if an employment position is ministerial or ecclesiastical:

As a general rule, if the employee's primary duties consist of
teaching, spreading the faith, church governance,
supervision of a religious order, or supervision or

⁴ In *Jocz v. LIRC*, ___ Wis.2d ___, 538 N.W.2d 588 (Ct. App. 1995), we looked to the federal religion-clause cases in interpreting both the First Amendment and article I, section 18 of the state constitution, following *King v. Village of Waunakee*, 185 Wis.2d 25, 55, 517 N.W.2d 671, 684 (1994).

participation in religious ritual and worship, he or she should be considered "ministerial or ecclesiastical." While this test is not meant to provide the exclusive definition of "ministerial" or "ecclesiastical" functions, it should provide a basic framework for reviewing agencies or courts to follow when addressing the prima facie question of whether a position is entitled to constitutional protection from state interference.

Id. at ___, 538 N.W.2d at 598 (citation omitted).

We concluded that Jocz's position with the Sacred Heart School of Theology was a ministerial or ecclesiastical position. The Sacred Heart School of Theology educated priest-candidates for the Roman Catholic Church. The Field Education program, which Jocz directed, was governed by church norms, religious beliefs, church doctrines and church policies. As director, Jocz helped prepare, evaluate and recommend for ordination the priest-candidates according to church norms. *Jocz*, ___ Wis.2d at ___, 538 N.W.2d at 599.

The ministerial or ecclesiastical test we adopted in *Jocz* focuses on the nature of the position involved, not on the reason for the termination or nonrenewal, which was our approach in *Black* and *Sacred Heart*. "Emphasis on the [nature of the position] rather than the reasons for [the] rejection underscores our constitutional concern for the unfettered right of the church to resolve certain questions.... In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content." *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). While it is the court's duty to determine whether the position is ministerial or ecclesiastical, once the court has done so, it may not inquire whether the reason for the action has some grounding in theological belief. *Id.*

Perri conceded at oral argument that, in light of *Jocz*, if Perri's position was ministerial or ecclesiastical, the trial court did not have subject matter jurisdiction. Both parties stated, and we agree, that there is no reasoned basis to apply a different test simply because this case involves a contract dispute, rather than an employment discrimination claim. If the compelling

government policy of eradicating discrimination is not sufficient to overcome First Amendment free-exercise rights in this context, then private contractual and property rights would surely not suffice.

Perri nevertheless contends that summary judgment was improper because there are factual disputes on the question of whether his position was ministerial or ecclesiastical. We disagree.

Perri does not dispute that he was employed by the Diocese full-time to teach Roman Catholic religious doctrine at a Roman Catholic high school during the 1991-1992 school year. Although he was also the girl's basketball coach, he does not contend, and nothing in the record indicates, that this was a primary part of his responsibilities. Perri also does not dispute the Diocese's description of the courses he taught, the textbook he was assigned to use, or the religious content of those courses. Indeed, he avers that he always used the textbooks assigned to him in a manner consistent with the Church's teachings and that he taught Roman Catholic doctrine properly. The factual disputes created by Perri's affidavits go to the circumstances of his resignation, communications with him about problems with his performance, and whether there were problems with his performance. None of these disputes affects the nature of the position he filled as teacher of religion, which is the relevant inquiry under *Jocz*.

Since the relevant facts are undisputed, whether Perri's position is ministerial or ecclesiastical presents a question of law. *Jocz*, ___ Wis.2d at ___, 538 N.W.2d at 598. We conclude that it is. Perri's primary duties involve teaching students the doctrines of the Roman Catholic Church, preparing them for participation in the church sacraments and assisting them in the development of their faith. We have no doubt that this position is ministerial or ecclesiastical. The trial court therefore does not have subject matter jurisdiction over Perri's contract claims or property right claim.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.