

Your Monthly Legal Update – March 2009

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REPORT BACK FROM SUPREME COURT EXPERIENCE

Hello everyone! I am writing to you after a very nerve racking week. As you have probably seen in the press, I just completed oral argument in an employment case at the United States Supreme Court that dealt with a First Amendment decision. While this decision will not per se affect private industry, it might be of interest. That, and I have to admit my creativity is diminished regarding finding another topic.

This case, *Coulee Catholic Schools v. Labor and Industry Review Commission, Department of Workforce Development and Wendy Ostlund, District: 4, Appeal No. 2007AP000496 of Circuit Court Case No. 2006CV000193* has been going on since 2002. An important fact for all of you to be aware of in our review of how long it takes matters to move through the litigation process. This case is about a teacher who is now 60 years old (she was 53 years old at the time the lawsuit started) who was hired by St. Patrick's school and taught without any performance issue for 25 years until she was suddenly terminated in 2002. Coulee Catholic Schools has long stated that the only reason for this termination was related to a lack of a state certification in education, a certification that Wendy Ostlund was completing credits towards in compliance with her agreement with CCS at the time of her termination. Instead of dealing with this underlying issue, CCS decided to file a First Amendment motion arguing that the Wisconsin Fair Employment Act does not apply to them because Wendy Ostlund was a minister and therefore CCS could terminate her without the need to evaluate any employment anti-discrimination law.

At that time when the motion was filed before the Equal Rights Division, everything stopped and the parties went through a hearing, complete with witnesses and exhibits, before Administrative Law Judge Brown. After this hearing, Administrative Law Judge Brown concluded that teaching religion for 20 to 30 minutes per day four days a week, saying prayers at the beginning and end of the day and planning liturgies twice a year did not establish that this position's "primary duties" were religious. Therefore, the Administrative Law Judge concluded that since Ms.

Ostlund was not a minister, consistent with well established case law across the country on direct point with this factual situation, that the Wisconsin Fair Employment Act does apply to Coulee Catholic Schools and to teachers that are general elementary school teachers with these facts. A key part of this analysis was the fact that CCS has always admitted that there was no religious reason related to this discharge.

CCS then appealed to the Labor and Industry Review Commission and LIRC agreed with the decision of the Administrative Law Judge. CCS then appealed to the Court of Appeals, which resulted in a published decision cited at 2008 WI App 68. The full decision is also available on the home page of our firm website at www.dmharrislaw.com and we invite you to review it. This will better explain the historical legal precedent these arguments which involve the Separation of Church and State, along with unnecessary Constitutional entanglement in religion.

As you are probably aware from the press, this case was just now argued before the Wisconsin Supreme Court this past Tuesday. You can hear this one hour oral argument if you really want to on the Wisconsin Supreme Court's website at www.wicourts.gov/opinions/sliverorals.htm. The Court actually made their decision right after the oral argument but will most likely not release its decision until July 2009.

By the time the case reached the Court of Appeals, I was joined in my arguments with the Wisconsin Attorney General's office. Therefore, by the time the case got to the Wisconsin Supreme Court, my side of the argument was shared with the Attorney General's office which was an honor and privilege. Assistant Attorney General David Rice has argued many cases before the Supreme Court and still found this experience to be nerve racking.

This is my update this month and you can see how this case has taken quite a bit of time in recent months. It is my sincere hope that the Wisconsin Supreme Court will decide that the Catholic Church needs to conform with the anti-discrimination laws just like you do when the position is not primarily religious and the reason for the termination is not at all related to religion. I am able to comment on this case while it still exists in appeal because these details and arguments are already well established as part of the public record.