

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

RESURRECTION CEMETERY AND
MT. OLIVET CEMETERY, INC.,

Plaintiffs, Case No. 149-083

vs.

DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS,

MEMORANDUM DECISION

Defendant.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is an action by the two plaintiff cemetery corporations to review a decision of the defendant department dated October 13, 1975, which modified the findings of fact of the appeal tribunal in one particular and affirmed the appeal tribunal's decision as so amended. The appeal tribunal's decision held that the plaintiffs as employers are subject to the provisions of ch. 108, Stats., beginning January 1, 1972.

THE ISSUE AND APPLICABLE STATUTE

There is no dispute that plaintiffs are nonprofit organizations which are operated, supervised, controlled or principally supported by a church or convention or association of churches. Nor is there any dispute that each had four individuals in employment for some portion of a day on at least twenty days, each in a different calendar week in 1972, within the meaning of Sec. 108.02(4)(b), Stats.

The sole issue is whether such employment was excluded under Sec. 108.02(5)(g) 7.a., Stats., which provides as follows:

"(g) The term 'employment . . . shall not include:

"7. Service for a nonprofit organization:

"a. In the employ of a church or convention or association of churches or an organization which is operated primarily for religious purposes and which is

"operated, supervised, controlled or principally supported by a church, or convention or association of churches, . . ."

In 1970 Congress enacted the "Unemployment Security Amendments of 1970" to the Federal Unemployment Tax Act. This enactment became effective January 1, 1972, and is to be found in sections 3306 et seq., Title 26, USCA. The provisions of Sec. 108.02(4)(b) and 108.(5)(g) 7. a., Stats., constitute part of the changes which the 1971 legislature made in the Wisconsin Unemployment Compensation Act to conform to the new amendments to the federal act by enacting ch. 53, Laws of 1971. Prior to these recent federal and state amendments both the federal and state acts exempted from mandatory coverage nonprofit corporation employers.

SUMMARY OF EVIDENCE

The testimony of Monsignor Kinney established that, prior to the Incorporation of Resurrection Cemetery, there were two Roman Catholic Cemeteries in Madison: Holy Cross and Calvary. Calvary Cemetery was owned and operated by St. Raphael's Cathedral. Holy Cross was owned and operated by Holy Redeemer Parish. (Tr. 10-11). In 1952, the two cemeteries were merged into what is now Resurrection Cemetery, Inc. (Tr. 15). The Monsignor testified that

" The merger occurred under the direction of Bishop O'Connor because he felt for one thing, that the division was uneconomical. He felt that more scientific methods could be used and it would prevent the duplication of physical machinery, for example, in the taking care of both and besides it would do away with the legacy or the policy that we had fallen heir to over the years of the division between what seemed to be Irish or English and what seemed to be German." (Tr. 12-13).

Mt. Olivet Cemetery was originally owned and operated by St. Patrick's Parish in Janesville, and it was incorporated for similar reasons in 1957, although no merger of cemeteries was involved. (Tr. 15).

All of the parishes were incorporated as religious societies under ch. 187, Stats. Resurrection Cemetery was incorporated under ch. 182, Stats. Mt. Olivet Cemetery was incorporated as a non-stock corporation under ch. 181, Stats. (Exhibit 1, p. 3; Exhibit 2, p. 3.)

Article 1, Section 2 of the respective Articles of Incorporation is identical:

"The purpose of this corporation is to establish, lay out, promote, maintain, purchase, hold and regulate, a cemetery or cemeteries; to acquire, purchase, buy, take, hold, own, lease, mortgage, exchange, convey and dispose of any and all kinds of property, real, personal and mixed; to borrow and lend money, and to do allotted things necessary, proper or incidental to the aforesaid purposes or the carrying on of the business of the corporation."

With regard to the operation of Resurrection Cemetery, the wages of its employees were largely determined by its superintendent, who also performed much of the maintenance work at the cemetery. (Tr. 27, 38.) Three maintenance workers and three office workers were regularly employed by the corporation. (Tr. 47.) Their wages were paid out of a separate corporate bank account, and the only deductions made were for withholding and social security taxes. (Tr. 31, 48.)

Except for a few charitable bequests, the income of Resurrection Cemetery was totally derived from interment fees, from the sale of burial lots referred to as "payment for the grave", and from easement and income care payments. (Tr. 29-30.) Fees were paid only by the families of the deceased, and no support came from the Roman Catholic Church or the Diocese of Madison. (Tr. 30, 43.) The Monsignor testified as follows with regard to the fees charged by Resurrection Cemetery:

"Q Do all your plots there cost the same amount?

A No, they don't. They once did, but they don't anymore because we found out we, on account of everybody around us and the general practices in the Madison area, we had to vary the situation . . . we found out that we have to charge considerable more for those graves that have above ground monuments . . .

"Q And the price then is related to your cost of maintenance of these places?

A Right, right."

Any excess of income over operating costs is used solely for the maintenance of the cemetery. (Tr. 26.)

Burial is limited to Roman Catholics and their non-Catholic spouses. (Tr. 21-22.)

Although the third part of a three-step ecclesiastical ceremony is performed at the cemetery, none of the employees of the cemetery are involved in the ceremony itself. (Tr. 39-40.)

THE FINDINGS OF FACT

The appeal tribunal's findings of fact, as amended and adopted by the department, read as follows:

"The employers are nonprofit corporations organized under and by virtue of the laws of the State of Wisconsin to operate cemeteries in the cities of Madison and Janesville. Each corporation has a board of directors, officers and employees to conduct its business affairs which include the sale and maintenance of burial lots and opening and closing grave sites. Office workers are employed as well as grave diggers who open and close graves, mow grass, and generally maintain the appearance of the cemeteries.

"Funds for operation of the cemeteries are provided from the sale of cemetery lots to families who wish to bury their dead and such sale price usually includes sufficient sums of money for investment for perpetual care and maintenance of grave sites.

"Wage payments to workers employed by the employers are paid by bank checks imprinted with the name of each corporation and deductions for Social Security and State and Federal income taxes are made from each paycheck.

* * *

"The employers are corporate nonprofit organizations and have legal entities distinct and separate from any church or association of churches. The employees of such corporate nonprofit organizations are not 'in the employ of a church or convention or association of churches' but in the employ of the legal entities operating the cemeteries. The fact that members of the Board of Directors of such legal entities may be connected and

closely identified with a church or association of churches does not make the paid employees of such legal entities 'employees' of a church or association of churches.

* * *

"The employer corporations are operated, supervised, controlled, or principally supported by a church or convention or association of churches. Although certain sectarian religious ceremonies are performed before, during and after interment of the dead, the employers are nonprofit organizations operated primarily to bury the dead, and are not 'operated primarily for religious purposes.'"

THE COURT'S DECISION

The plaintiffs contend that each qualified for exemption under both alternative provisions of sec. 108.02 (5) (g) 7.a., Stats., viz.:

- (a) As being in the employ of a church or association of churches;
and
- (b) An "organization operated primarily for religious purposes."

A. As Being in the Employ of a Church or Association of Churches

Plaintiffs place great reliance on the provisions of Article III, Section 2, of each plaintiff's articles of Incorporation, and the fact that the Incorporators of each were the Bishop, the Chancellor and the Vicar General of the Diocese.

Article III, Section 2, of each set of articles of Incorporation provided:

"This corporation is organized to provide a convenient vehicle whereby the several Roman Catholic Congregations organized under Section 187.12 of the Statutes of Wisconsin and located in or near the [City of Madison, Dane County, Wisconsin, (in the case of Resurrection Cemetery)] and [City of Janesville, Rock County, Wisconsin, (in the case of Mt. Olivet Cemetery, Inc.)] (respectively) may purchase, own, hold, regulate, control and manage for their joint and several benefit cemeteries or places for the burial of the dead."

Article V of each set of articles of Incorporation specify who are to be the five members of the corporation and of its board of directors. Three of the five are the Bishop, the Vicar General and the Chancellor of the Diocese, and their respective successors in office. The remaining two are priests selected by the Bishop. Thus the members of the corporation are neither congregations of the Diocese nor persons who serve as representatives of any particular congregation, but rather as representatives of the Diocese. It is true that each corporation serves the purposes of all the congregations of the Roman Catholic Church in the respective areas described in each set of articles of incorporation. This in itself does not have the effect of making each corporation operated, supervised, or controlled by an association of churches.

The enactment into federal unemployment tax legislation of the phrase "association of churches" was traced by a federal court in De La Salle Institute v. United States (N.D. Cal., 1961), 195 F. Supp. 891, a case which held that the income from the winery of the Christian Brothers, a Catholic religious order, was not exempt from taxation as income of a "church or convention or association of churches" despite the fact that under Roman Catholic Canon Law, the income from the winery was considered the income of the Roman Catholic Church itself.

At page 899, the federal court noted that the Senate Finance Committee added the phrase "or convention or association of churches" in response to a request from a spokesman for the Southern Baptist Convention as being a convention of churches rather than a church. At page 901, the court held:

"Plaintiff obviously is not a convention or association of churches, nor is the Christian Brothers Order a convention or association of churches. Plaintiff is an integral organization, as is the Christian Brothers Order. The

Roman Catholic Church is a 'church.'
Consequently, if plaintiff's income would not have been exempt under the original wording of the statute, exempting 'churches' it was not made exempt by the Senate Amendment, adding 'conventions or associations of churches.' In fact, I regard the Senate Amendment as mere clarifying language, and making no substantial change whatever."

The Court does not understand that the plaintiffs contend a single church to be the employer.

In plaintiffs' reply brief State ex rel. University Building Corporation v. Barels (1950), 257 Wis. 497, 12 N.W. 2d 134, is cited for the proposition that the separate incorporation of an organization does not negate that it may be operated as an agency of the body creating it to carry on a particular purpose of the creator. The reply brief asserts the plaintiff cemetery corporations were created as a convenient vehicle to provide a common cemetery for the several congregations in their vicinity - all as required by the laws of the Roman Catholic Church, and are merely the agent of the congregations in their vicinity to provide a common cemetery for their principals to carry out a required religious rite of the Roman Catholic Church.

The case of State ex rel. University Building Corporation v. Barels, supra, is unique in that the City of Madison sought to impose a property tax on certain properties owned by a holding corporation set up by the Board of Regents. The holding corporation was required to transmit all of its income to the Board of Regents, but the plaintiff cemetery corporations do not and cannot transmit their income to the Roman Catholic Church.

In a subsequent interpretation of Barels, the Wisconsin Supreme Court contrasted the rules of construction applicable in Barels with the general rules of construction applicable to taxing statutes:

"Although the general rule of taxation is that all property, wherever located and by whomever owned, is subject to taxation with the property owner having the burden of proving that he falls within an exception to that rule, it has been held that an exemption in favor of the state must be construed to make the exemption the rule and taxation the exception. (Citing Bareis.)"

* * *

"The use made of property determines whether it is subject to taxation or whether it is entitled to tax exemption. (Citations omitted)"

"In the absence of a statutory definition, the common and generally understood meaning of a word should be applied in the construction of a statute. (Citation omitted)" State (Board of Regents) v. Madison, 55 Wis. 2d 427, 432-433, 198 N.W. 2d 615 (1972).

The rules of construction applied in Bareis are directly opposite to the rules applicable in the instant case, where the state is seeking to levy a tax rather than be exempt from a tax. Furthermore, under the Wisconsin Unemployment Compensation Act even a wholly owned subsidiary corporation engaged in activities similar to the parent corporation is treated as a separate employing unit.

This Court concludes that the department's determination that the employees of each of the plaintiffs are not "In the employ of a church or convention or association of churches" (emphasis supplied) is a permissible interpretation of sec. 108.02(5)(g) 7.a., Stats., and is one to which the Court accords due weight because the department is the agency charged by the legislature with administration of the statute. See Beloit Education Assoc., Wis. Education Assoc. Council v. Wis. Employment Relations Comm. decided June 2, 1976, by the Wisconsin Supreme Court. After according such due weight this Court adopts this interpretation made by the department.

B. An Organization Operated Primarily for Religious Purposes

Plaintiffs' brief stresses this evidence adduced at the hearing before the appeal tribunal: "The expert testimony of Monsignor Edward M. Kinney, Diocesan Director of Cemeteries, and the Canon Law of the

Roman Catholic Church is that a deceased member's body must be buried, that it is an obligation of members of the Roman Catholic faith to be buried, that this burial must occur in a blessed cemetery, that burial is the third part of a tri-part religious rite, and that the Resurrection Cemetery and Mt. Olivet Cemetery were formed for the sole purpose of serving as, and were designated as, common cemeteries for the several congregations in the immediate geographical area of the respective cemeteries."

The department contends the everyday meaning of the term "operated primarily for religious purposes", and not the tenets of the Roman Catholic Church must be used to answer the question of whether or not cemetery workers are engaged in covered employment under Sec. 108.02(5)(g) 7.a., Stats. The department made this distinction when it found as a fact that

"Although certain sectarian religious ceremonies are performed before, during and after interment of the dead, the employers are nonprofit organizations operated primarily to bury the dead and are not 'operated primarily for religious purposes.'"

Some courts have recognized this distinction, while others have not. Those courts which have made the distinction have held that the operation of a cemetery, even a cemetery affiliated with a particular religion, is not a religious activity. Other courts have not recognized this distinction and have allowed the tenets of a particular religion to determine the meaning of a statute.

The federal court in De La Salle Institute v. United States, supra, at page 903, in considering the argument that Roman Catholic canon law controlled the interpretation of a federal tax exemption statute applicable to churches, declared:

"The tenets of the Catholic Church are cited as holding that religious teaching including religious teaching of the usual secular courses required by the compulsory education laws of the State of California is a 'church' function. The tenets of the Church cannot broaden the statutory exemption. What is a 'church' for purposes of the statute must be interpreted in the light of the common understanding of the word. 'An organization established to carry out 'church functions' under the general understanding of the term, is a 'church.' When a church held as a fundamental part of its creed that the duty of a church was to teach Christian principles by example, by operating businesses in everyday life, the United States Court of Appeals for the Ninth Circuit held that this creed could not be controlling for tax exemption purposes. Rikek v. Commissioner, 9 Cir. 244 F. 2d 220. The church involved in that case held (on the basis of an apparently sincere conviction and a logical argument) that operating a restaurant was a church function. The court did not deny the church the right to engage in the restaurant business, but did hold that that business was not an exempt church function." (Emphasis supplied.)

Similarly, the definition of the statutory phrase "operated primarily for religious purposes" the department contends must be ascertained from the everyday meaning of that phrase, and not from the tenets of the Roman Catholic Church.

The courts which have carefully adhered to this principle have held that cemeteries are not operated primarily for religious purposes. In Chesed Shel Emeth Society v. Unemployment Compensation Comm. (Mo. 1957), 203 S.W. 2d 454, the Supreme Court of Missouri, in a unanimous decision, held that a non-profit cemetery corporation which limited burial solely to those of the Jewish Faith was required to pay unemployment taxes on the wages of its employees. After first noting that cemetery companies generally are not exempt from the payment of social security taxes, the court held at page 458:

"The appellant maintains and operates a synagogue for memorial services and worship. This synagogue is primarily used in connection with the operation of the cemetery. Appellant does not contend that it

is exclusively a religious organization. It is not a religious organization, even though religious rites accompany the burial of the dead in the cemetery. Proprietors of Cemetery of Mount Auburn vs. Fuchs, et al., supra. We hold that appellant is not exclusively a religious organization under the above-quoted exemption clause."

Likewise, in Proprietors of Cemetery of Mount Auburn v. Fuchs, (Mass. 1940), 25 N.E. 2d 759, 763, the Massachusetts Supreme Judicial Court held that a cemetery was required to pay unemployment taxes on the wages of its employees:

"We are of the opinion that it must be taken to be established that the 'dominant purpose and single chief activity' and 'single function' of the plaintiff is to furnish a burial place for the dead It is not a religious society even though religious rites may accompany the burial of the dead in the cemetery. . . ."

The plaintiffs rely on O'Leary v. Social Security Board (3rd Cir. 1946), 153 F. 2d 704, and four unreported decisions or rulings, three by state agencies administering the unemployment compensation acts of their states, and the fourth by the National Labor Relations Board.

The O'Leary case cannot be distinguished on its facts from the instant case except the statute involved was not an unemployment compensation statute, but the federal Social Security Act, and the question was whether or not service performed for the cemetery association by an employee thereof was "covered employment" within the meaning of that act. The non-profit cemetery association was organized for the "forming and maintenance of a public cemetery for the burial of deceased Roman Catholics who may be entitled for burial according to the law, rules and regulations of the Roman Catholic Church". The specific statutory interpretation issue was whether the cemetery association was a corporation "organized and operated exclusively for religious . . . purposes." The court held it was. The rationale of the decision appears from this statement in the decision (page 706):

"We think the question concerning the claimant's employment is to be settled in accordance with what the Roman Catholic Church, itself, declares through its ecclesiastical law, through its authorized spokesmen and through the rules it establishes for the guidance of its members. These rules and precepts of the Church do not become the law of the land. But they do show the position of the Church with regard to the matter in question and the rights and duties of communicants of the Church with respect thereto. If the Church regards the burial of its deceased communicants and the maintenance of the burying place as part of its religious observances we think that fact makes the operation of the described burying ground a religious function." (Emphasis added.)

The key word in the phrase "primarily for religious purposes" appearing in sec. 108.02(5)(g) 7.a., Stats., is "primarily". If the interpretation of this word is dependent on the canon law, rules and regulations of the Roman Catholic Church, then the test enunciated in O'Leary would require a determination that the plaintiffs are employers exempt from coverage of the Wisconsin Unemployment Compensation Act. This Court, however, is not satisfied that the department was required to adopt this test in interpreting sec. 108.02(5)(g) 7.a.

Many of the functions performed by plaintiffs are secular rather than religious in character. The work of the six employees of Resurrection Cemetery were all of a secular nature. A religious purpose is served by interring members of the Roman Catholic Church in the two cemeteries operated by plaintiffs, and in conducting religious rites in these cemeteries. However, most of the functions performed in these cemeteries are no different in character from those performed in secularly operated or nondenominational cemeteries. Applying an objective test, the department could rationally determine, as it did, that the plaintiff employers "are not 'operated primarily for religious purposes'."

While the four unreported administrative rulings and decisions, copies of which are attached as appendices to plaintiffs' brief, reached the opposite statutory interpretations from that made by the department, they of course are not controlling of the outcome here. In point 18 this statement

made by the Wisconsin Supreme Court in Moorman Manufacturing Co. v. Industrial Comm. (1942), 241 Wis. 200, 207, 5 N.W. 2d 741:

"We do not perceive that it matters how courts of other states have construed their unemployment acts even though they are duplicates of or based upon our own. It is for us to construe our own act as to us seems to meet its purpose and intent, taking care of course to give each provision its especial force."

The department's interpretation is in accord with the underlying objective of the Wisconsin Unemployment Compensation Act. Sec. 108.01(1), Stats., takes cognizance of the crushing burden created by unemployment in this state and notes that

"Each employing unit in Wisconsin should pay at least a part of this social cost, connected with its own irregular operations, by financing compensation for its own unemployed workers."

The Wisconsin Supreme Court made the following statement with regard to effectuating this legislative declaration:

"This must be given great - even - controlling - effect, in determining who are employees under the act as it is employees who are to receive the compensation provided for, . . ." Moorman Mfg. Co. v. Industrial Comm., supra, p. 205.

The Supreme Court of Illinois has followed similar rules of construction.

"The statute is a police power act, to be liberally construed so as to effectuate the legislature's intention of helping protect workers against the consequences of unemployment, (Citation omitted.), and exemption provisions are strictly construed against the one claiming the exemption. (Citation omitted.) Common-law concepts of master and servant are not controlling, nor is the title or description by which the parties describe personnel or service conclusive." Ross v. Cummins, (1956), 7 Ill. 2d 595, 181 N.W. 2d 521, 523.

There is a further reason that favors the objective test applied by the department in making the interpretation it did rather than the subjective one employed by the federal court in O'Leary v. Social Security Board, supra, and that is it will promote greater uniformity of result

and lessen the danger of possible denial of the equal protection of the laws clause of the Fourteenth Amendment.

In oral argument counsel for the plaintiffs alluded to the free exercise of religion clause of the First Amendment in connection with the consideration to be accorded to the canon law of the Roman Catholic Church. The Court does not consider that the department's interpretation of sec. 108.02(5)(g) 7.a., Stats., in any way interferes with the free exercise of religion by the Roman Catholic Church or its members.

Inasmuch as the Court has concluded that the department's interpretation of sec. 108.02(5)(g) 7.a., Stats., is a permissible one, and after according the same due weight the Court approves the same.

Let judgment be entered confirming the department's decision here under review.

Dated this 9th day of June, 1976.

By the Court:


Reserve Circuit Judge