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## The Facts Matter in Applying the Ministerial Exception to Discrimination Claims

A decision in the Southern District of New York illustrates why careful religious organizations should design their employment systems and mission materials to validate which positions are occupied by “ministers.”

All recent employment disputes between ministers and their religious employers reflect the seminal 2012 opinion in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, where a unanimous Supreme Court ruled that state and federal regulators may not enforce antidiscrimination rules against religious communities with respect to the selection and retention of ministers. Both religion clauses of the First Amendment carve out a “ministerial exception” to secular workplace rules for ministry positions. The Supreme Court identified four facts in the record to support its holding that the former teacher in *Hosanna-Tabor* was a minister: (1) the teacher was “held out” as a minister by the school, (2) the teacher’s title connoted a religious “calling,” (3) the teacher “held herself out” as a minister and (4) the teacher had religious responsibilities.

Both state and federal courts occasionally have stumbled in applying *Hosanna-Tabor* by treating these four record facts as precedential factors or criteria. As noted previously (see <http://www.stradley.com/insights/publications/2016/07/nonprofit-alert-july-2016>), and given the wide variety of religious denominations in the United States, it seems highly unlikely that the Supreme Court wanted to exclude religious bodies from protection under the First Amendment simply because the relationship between the entity and its ministers might not fit the record in *Hosanna-Tabor*. One thing is certain, however: The record evidence in these disputes is critical. Because the ministerial exception is an affirmative defense, religious entities will be required to prove the relationship between the organization and the position occupied by the former employee. The record starts with the description of the position, the selection and training of the occupant of the position, and the ongoing application of religious tenets and principles.

These principles are well-illustrated by *Fratello v. Roman Catholic Archdiocese of New York*, 2016 WL 1249609 (S.D.N.Y. Mar. 29, 2016), a decision dismissing discrimination claims brought by the former lay principal of a Catholic elementary school based on the ministerial exception. That case offers a blueprint for dealing with these issues.

The principal had worked for the school for four years when the school made the decision not to renew her annual contract. In her subsequent lawsuit, the principal claimed that the school based its decision on gender discrimination and retaliation in violation of federal and state antidiscrimination laws. She also alleged contract theories under state law, and sought damages from the school, the parish and the Roman Catholic archdiocese.

Rejecting the federal claims based on the ministerial exception, the district court relied on a well-formed record that began with the mission statements and policies of the archdiocese and the school. Specifically, among other evidence, the court noted that the mission of the archdiocese’s schools is “to ensure [its] schools are Christ-centered, academically excellent and welcoming communities that teach students to be life-long

learners and leaders energized by fidelity to Christ, the Church and one another.” The job description for the principal in the archdiocese’s manual similarly emphasized faith: “The principal is the leader of the school, a unique Catholic educational institute.” Even the principal’s contract required her to agree that she “recognizes the religious nature of the Catholic school and agrees that the employer retains the right to dismiss principal for immorality, scandal, disregard or disobedience of the policies or rules of the Ordinary Archdiocese of New York, or rejection of the official teaching, doctrine or laws of the Roman Catholic Church.” The principal embraced this aspect of her position, even creating a new prayer program for students and offering rosary beads to students and faculty members in need. The school’s pastor, the regional superintendent and many teachers recognized the principal’s strong religious leadership in their evaluations of her performance.

In reviewing the record of the teacher’s role as a religious leader against the record in *Hosanna-Tabor*, the district court ultimately found that only two of the four factors weighed strongly in favor of applying the exception. The principal was held out as a minister based on the inclusion of religious leadership in her job description and performance evaluations. The court also concluded that the principal’s job responsibilities included a ministerial role, again relying in part on her evaluations. The court found that the principal at least somewhat held herself out as a minister to the public, even if she “did not claim the formal trappings of a ministerial position” by name. However, the court found that her title of lay principal did not weigh in favor of applying the exception, as it did not require substantial religious education or training, unlike the title of the “called” teacher who was the complainant in *Hosanna-Tabor*. Nonetheless, the court concluded, based on all the evidence, that “on balance” the exception should apply, since the factors were not to be treated as strict requirements.

The court was not persuaded by the principal’s arguments that only a small percentage of her time was spent on her religious responsibilities, those responsibilities mirrored those of other lay faculty and she was “acting at the direction of” the archdiocese and the pastor when carrying them out. The court also rejected the principal’s arguments that the court should rely on canon



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law for its definition of minister and avoid “opening the door to a ‘parade of horrors’” by permitting wide application of the exception.

Applying the ministerial exception defense, the court granted summary judgment to the defendants on the principal’s federal discrimination claims. Left without a federal action, the court declined to exercise supplemental jurisdiction over the state law discrimination and contract claims. Thus, all the principal’s claims were dismissed. The Southern District of New York’s decision has been appealed to the Second Circuit. Notably, the same constitutional rule should bar state law claims in any subsequent litigation.

The decision may serve as a blueprint for religious organizations seeking to ensure that certain positions integrally related to their mission are protected by the ministerial exception. Institutions can lay the groundwork for application of the exception by emphasizing their religious purposes in policies and mission statements and on their websites. For particular jobs, they can include religious language and expectations in their contracts and job descriptions. Institutions can also include religious ideals in their job evaluation rubrics.

The facts matter in applying the Constitution, and that is true no more than in the wake of *Hosanna-Tabor*. Prudent organizations are taking steps to ensure they are well-positioned to defend against potential litigation.

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