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Circuits Divide in Application of Ministerial Exception

by Mark E. Chopko and Jennifer A. Gniady

A recent decision of the 7th Circuit, *Sterlinski v. Catholic Bishop of Chicago* (https://scholar.google.com/scholar_case?case=15041212559862508722&hl=en&as_sdt=6&as_vis=1&oi=scholar), adds to the divergent approaches to the “ministerial exception” in employment cases against religious organizations. The 7th Circuit’s decision clarified that court’s approach by asserting the ministerial exception defense acts to shift the burden to the plaintiff to demonstrate the defense is a pretext before the court will inquire behind the defense. The proposed burden-shifting function is, according to the court, designed to prevent judicial entanglement in ecclesiastical matters while providing assurances the defense is not a pretextual justification for impermissible discrimination. In the case, the plaintiff had argued the ministerial exception could not be applied to his role as an organist, a role in which he had no discretion over the musical selections to be played at services. This approach comes closer to the balance we have counseled in our prior alerts (<https://www.stradley.com/insights/publications/parker-publications-to-add/nonprofit-amp-religious-organizations-alert-febr>) and scholarly journals (<https://www.stradley.com/-/media/files/publications/2012/05/university-of-north-carolina-school-of-law-first-amendment-law-review--chopko--parker.pdf?la=en&hash=1BF9056D07211981E749B66C6209708B>) between the need to inquire and the protected First Amendment rights of religious organizations.

The decision comes roughly two months after the 9th Circuit rejected rehearing en banc in a ministerial exception case, over strong and vocal objections from a number of its judges. The 9th Circuit decisions so far show only a limited deference to the ministerial exception rights of religious entities. In contrast, the 2nd and 5th Circuits have each adopted a broader approach similar to that in the 7th Circuit. However, the 7th Circuit clarification regarding the burden-shifting examination for pretext represents an important insight into its application that ought to be adopted by advocates and reviewing courts.

7th Circuit Burden-Shifting Clarification

In *Sterlinski*, the plaintiff had worked as the director of music for Saint Stanislaus Bishop & Martyr Parish in Chicago until 2014 when he was demoted by the parish priest to the job of organist. As director of music, Sterlinski selected music for services, led choirs, participated in budgeting and served on the music committee for the archdiocese. Following his demotion, in the role of organist his job was to play the musical works previously selected for each service. Sterlinski was subsequently fired from the organist job in 2015. In his lawsuit, he alleged employment discrimination based on his Polish ethnicity and his age.

At the district court, the judge accepted the traditionally important role of music in Catholic services to find that the director of music position was subject to the ministerial exception. And the court found the exception extended even to the “organist,” based on express statements in church documents. Sterlinski’s appeal argued that the limited duties of the organist (he “just played the notes on the sheet of music” and performed “robotically”) were insufficiently

ministry-related, and urged the court to decide for itself whether any given job should be within the ministerial exception.

In rejecting Sterlinski's argument, the 7th Circuit noted its approach in *Grussgott v. Milwaukee Jewish Day School, Inc.* (https://scholar.google.com/scholar_case?case=8694297047666712789&q=Grussgott+v.+Milwaukee+Jewish+Day+School,+Inc.&hl=en&as_sdt=6,33&as_vis=1), where it examined a variety of factors to determine whether the employee served a religious function but otherwise declined to make an independent decision on the issue to resolve the dispute. It observed that this approach has also been taken by judges in the 2nd and 5th Circuits.

The court noted the crux of the problem with this position is the potential for such a hands-off approach to permit prejudice under the guise of ministry. The answer, at least for the 7th Circuit, is to find a way to separate honest justifications from those that are mere pretext for prejudicial actions. The court therefore adopted an approach from Title VII litigation. As illustrated in *St. Mary's Honor Center v. Hicks* (https://scholar.google.com/scholar_case?case=18165245625373387733&hl=en&as_sdt=6&as_vis=1&oi=scholar), the employer first must state a reason for the employee's discharge, and then the court asks whether that reason is honest (though it does not inquire whether the reason is correct). If the court finds the employer believed its given reason in good faith, then the burden shifts to the plaintiff to show the reason was pretextual – an excuse to hide illegal discrimination. The court did not expand further on what limits it might face in making further inquiries if a pretext were shown.

Ministerial Exception Background

The ministerial exception was recognized unanimously by the Supreme Court in 2012 in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* (<https://s3.amazonaws.com/becketnewsite/SCOTUS-Opinion-in-EEOC-v.-Hosanna-Tabor.pdf>), holding that antidiscrimination rules may not be enforced against religious communities concerning the selection and retention of ministers. The Court specifically considered four facts in that case to support finding the teacher in *Hosanna-Tabor* was a minister: (1) the teacher was "held out" as a minister by the school, (2) the teacher's title indicated religious "calling," (3) the teacher "held herself out" as a minister and (4) the teacher had religious responsibilities. However, the Court declined to create a specific formula or bright-line test for defining a minister.

Most circuit courts, such as the 2nd, 5th and 7th, consider the facts examined by *Hosanna-Tabor* instructive but do not consider them to be strict requirements to finding that the ministerial exception applies. Model cases for this approach include *Fratello v. Archdiocese of New York* (https://scholar.google.com/scholar_case?case=12999889804267308355&hl=en&as_sdt=6&as_vis=1&oi=scholar) and *Cannata v. Catholic Diocese of Austin* (<https://scholar.google.com/>



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[scholar_case?case=9044081740945591863&hl=en&as_sdt=6&as_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=9044081740945591863&hl=en&as_sdt=6&as_vis=1&oi=scholar)). These cases note that the Supreme Court did not set a "rigid formula" for determining whether an employee is a minister within the meaning of the ministerial exception, but viewed "all the circumstances" of employment in *Hosanna-Tabor*.

A different – and we think incorrect – approach is to apply the ministerial exception when a pending case closely tracks the above factors from *Hosanna-Tabor*. The 9th Circuit followed this approach in the recent case *Biel v. St. James School* (https://scholar.google.com/scholar_case?case=8420578345801942083&hl=en&as_sdt=6&as_vis=1&oi=scholar), to find that a fifth-grade teacher who taught religion, among other classes, at a Catholic school was not within the ministerial exception based on a stringent compare-and-contrast exercise using the factors considered in *Hosanna-Tabor*. The dissent in that case disagreed based on both a consideration of the four factors cited in *Hosanna-Tabor* and the necessary inquiry into all of the circumstances. The result of the 9th Circuit's decision led to a petition for rehearing en banc that, while denied, (https://scholar.google.com/scholar_case?case=10870737712236989798&hl=en&as_sdt=6&as_vis=1&oi=scholar) generated strong dissent from nine of the court's 28 judges. That dissent rejected the 9th Circuit's divergence from a function-focused approach, in favor of the majority's misreading of *Hosanna-Tabor* as requiring both an important religious function and one or more of the fact considerations found in that case. Subsequent cases to *Biel* in the 9th Circuit have relied on it for the proposition that courts can examine more than the employee's duties when deciding whether the ministerial exception applies.

With the 7th Circuit adding a burden-shifting analysis and other courts potentially considering their own interpretive applications, the divide among the circuits continues to grow. This disagreement only serves to highlight the need for religious organizations to emphasize the religious purposes of jobs when hiring, in order to increase their ability to exercise the ministerial exception. With a proliferation of cases brought, and disparate results, the Supreme Court may need to provide its own clarifications in the future.