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Nonprofit and Religious Organizations Alert

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Competing Interests – Employment Anti-discrimination Law Collides With the First Amendment Rights of Religious Institutions

by Mark E. Chopko and Marissa Parker

In mid-January 2012, only 10 weeks after oral argument, a unanimous Supreme Court vindicated the rights of religious institutions to hire and fire ministry personnel according to their own internal principles and needs. While the Court rejected application of the anti-discrimination laws, the decision leaves open very important issues. Religious organizations can and should plan now to protect their rights as employers. This newsletter reviews that new decision, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC;*[1] the questions left for future litigation; and steps religious organizations can take now to stay ahead of the curve.

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Background

For centuries, an enduring part of the American cultural landscape has been its diverse religious institutions. Tocqueville and others have commented how these institutions dot that landscape. We cherish that we have the freedom to believe and worship as we please in the United States, but we often do not consider how the "business of religion" is conducted. We take for granted the familiar forms of churches and schools, hospitals and colleges, and other agencies. But it is probably fair to say that most Americans have not considered how the business of religion is conducted through the workforces of these religious organizations, and their rights and responsibilities vis-à-vis their employers.

Whether or not employees know the precise details of the laws that regulate their relationship with their employers, they intuitively understand and expect certain employment-related rights, such as the right to be free from discrimination based on race, sex and other characteristics. Some employees of religious organizations, therefore, may be surprised to learn that their employer's religious rights sometimes trump their own rights to freedom from employment discrimination. The *Hosanna-Tabor* case began when a religious school teacher was terminated because she said she would take to the offices of the EEOC the school's refusal to return her to service after a disability leave. Under the secular law, that kind of termination is called "retaliation." But her religious employer said taking her termination to the EEOC violated its religious commitment to peaceful conciliation with ministers, and teachers were considered ministers in the church. Weighing the interests, a surprisingly unanimous

Supreme Court held that, as a matter of first impression, the establishment and free exercise clauses of the First Amendment bar suits brought on behalf of "ministers" against their "churches" for allegedly violating employment discrimination laws. In so holding, the Court rejected the position of the EEOC, which argued that the religion clauses of the First Amendment provide no such protection for religious institutions.

In the language of the law, this principle is called the "ministerial exception," because in suits between ministers and their churches, courts have held that the First Amendment carves out an exception to the secular employment law that might ordinarily apply.

The explicit and unanimous recognition of a ministerial exception by the U.S. Supreme Court offers a modicum of certainty for disputes arising between ministers and churches, recognizing that the Constitution allows churches to hire, supervise and fire their ministers without intervention by the EEOC or a similar state agency. That employment relationship is considered a matter of internal church discipline. But beyond this square and unanimous holding, significant and unanswered questions remain:

1. How and who will define a "minister" and a "church"?

2. What types of claims fall within the exception?

3. How and when should the exception be invoked in litigation?

Each of these questions is addressed in turn below as propositions we think that courts should follow.

Unresolved and Contested Issues

First, because the ministerial exception flows from the protections for religious belief and expression enshrined in the First Amendment, the definitional edge of who is a "minister" or a "church" belongs to the "church" rather than the state. We use "minister" to refer to a person within a faith community who is selected by that religious community to fill a position that carries out or advances the "business of religion": preaching, teaching, proselytizing, inculcating, caring, curing, and other forms of religious exercise and expression. Likewise, "church" is a nonspecific term that includes houses of worship, however they are named by a faith community, and other entities that may encompass mission-driven religious organizations. It is for the faith community to draw these lines necessary to the essential purpose of religion, meaning that teachers, missionaries and even administrators may serve in positions of ministry subject to the exception. Likewise, entities that hold themselves out as having an explicitly religious character, including certain hospitals, universities and charities, may presumptively be "churches" as that term is judicially developed and therefore able to invoke the exception. To be sure, the decision about which works are ministry lies with the faith community; to allow the courts to define and redefine ministry would chill and limit religious freedom, something the First Amendment was designed to prevent. That said, although some justices clearly prefer that those terms be broadly construed, the Court does not refine those terms or suggest any test or definition. The competing definitions extant in the trial and appellate cases around the country will persist, as will litigation designed to shape them.

Second, the claims that fall within the exception are those that bear on the terms and conditions of ministry. Underlying the ministerial exception is the well-established law that churches must be able to govern their internal affairs according to the tenets of their religion. The exception therefore forbids the government from scrutinizing the relationship between faith communities and those whom they choose to place in positions of ministry according to their own religious law, tradition and customs. In the context of that relationship, although ministry employees may not now litigate anti-discrimination claims, the *Hosanna-Tabor* Court reserved whether the exception embraces other kinds of statutory or common law claims. The Court said there would be "time enough" to sort out these issues. But, following *Hosanna-Tabor*, the Court denied review in two cases that presented some of those open issues. Facing a court-imposed barrier to anti-discrimination litigation, defamation, breach of contract, emotional distress and other kinds of claims may become a substitute. The lower courts are divided over whether those matters are just a back-door way to litigate matters that in fact involve the terms and conditions of the ministerial relationship. It is difficult to square allowing such claims with the Court's rationale. However a claim is framed or labeled, the exception should sensibly apply if resolving the dispute would require the Court to scrutinize the internal rules and

expectations of the church with respect to one of its ministers and weigh those religious rules against secular norms, for pretext or other evaluative purposes. Historically, most ministerial exception cases involve every form and permutation of claim as lawyers look for ways around the First Amendment. And because the Court's ruling did not address claims outside of federal statutory discrimination claims, the proper procedural vehicle for applying the ministerial exception in other claims remains an open question, one which the split in the circuits may still inform. Those issues, however, will persist in continuing litigation.

Third, the exception should be invoked at the threshold of litigation. There is little consensus among the Courts regarding when, in the course of litigation, the applicability of the ministerial exception should be determined. Given the rights at stake, the question of whether the ministerial exception applies should be resolved at the threshold to minimize the possibility of constitutional injury to the church, as well as to give the litigants a clear picture of how the Court sees the claims and defenses and how the case ought to proceed. Delaying this determination runs the risk of entangling the civil courts in matters of religious doctrine. Without briefing or argument on this point, the Supreme Court attempted to resolve this conflict in passing by proclaiming the exception an affirmative defense, not a jurisdictional question.[2] This superficial resolution leaves litigants and jurists wanting, as the practical implications are most severe at the outset of litigation: the allocation of the burden of proof, the burden of production and the vulnerability of conversion of a motion to dismiss to a motion for summary judgment. Moreover, litigants may waive affirmative defenses, and the prospect that some courts might permit litigation of essentially religious questions would seem to violate the very principles the Court embraced. That issue is one that the Court will need to reconsider.

Because religious organizations will have to show that they are qualified to invoke the exception with respect to litigation brought by former employees, they will need to consider how that case is made. To the extent that discovery is required in cases where the ministerial exception is raised as a defense, it might narrowly focus on whether:

- the "church" is a religious body entitled to assert the defense;

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- the plaintiff holds or held a "position of ministry" related to some core religious function for that religious body; and

- the dispute necessarily implicates the *qualities* – not just the *qualifications* – necessary for that position.

The burden is on the religious organization to show that the exception applies.

Practical Steps

If you are a religious employer, consider taking steps to educate staff and manage expectations in advance of employment disputes. For instance, review written job descriptions or letters of appointment or renewal that serve to notify staff who may qualify as ministers that, unlike with nonministerial employees, the terms of their employment may not be governed by anti-discrimination laws such as the ADA, Title VII of the Civil Rights Act of 1964, and corresponding state and local laws. Consider providing existing employees with a statement explaining your expectations and their role in your religious work. Consider adopting or improving any internal grievance or dispute resolution policies that offer staff an opportunity to resolve workplace conflicts and concerns in a manner consistent with religious tenets. This is the time to seek assistance to review internal polices and practices before the next employment action results in litigation.

If you work for a religious employer, consult human resources personnel to determine whether you qualify as a "minister." Do not assume that you are not a ministerial employee just because you are not ordained as a "minister" or serve in an organization other than a house of worship. Ask for an explanation of the policies and procedures that will govern any disputes or concerns that might arise between you and your employer. Be aware that sometimes even conduct outside work can be grounds for termination if it violates the principles of your employing religious organization (e.g., cohabiting with an unmarried partner, having a child out of wedlock, committing adultery).

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A First Step Only

The Court's unanimous endorsement of the First Amendment rights of religious institutions to select and retain those persons with the qualities needed for ministry is a landmark holding whose lasting importance cannot be understated. But because of the important issues explicitly left unresolved, including the definitions of key terms such as "church" and "minister," the Court's decision ensures that the boundaries between church and state will be defined in future litigation. These concepts require care and expertise in their applications. Moreover, the conclusion that the First Amendment applies as a defense, but not jurisdiction, will compound the difficulties that religious organizations may find in applying and defending their rights.

But every journey begins with a single step, and the Court's decision in *Hosanna-Tabor* is a giant step for religious institutions.

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[1] No. 10-553, 565 U.S. – (2012).

[2] Id., Slip Op. at 20 n.4.