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"Answering To A Higher Power"

I. THE MINISTERIAL EXEMPTION

The "ministerial exception" is a critical defense available to qualified religious institutions that are constitutionally exempt from actions under the discrimination laws by qualified "ministerial employees." In 2012, the Supreme Court issued an important opinion in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), that reshaped and clarified this exception afforded to religious institutions. To fully understand the importance of this decision, it is worth looking at the exception's history and development.

A. History and Development of the Ministerial Exemption

1. Roots in the United States Constitution

Preliminarily, it must be pointed out that there is no ministerial exception afforded by statute or law. Rather, the ministerial exception is a unique doctrine created by federal and state judges, rooted in the First Amendment's guarantee of religious freedom. Since the passage of the Civil Rights Act of 1964, federal law has prohibited discrimination for reasons such as race, gender, and religion. For decades, courts have universally understood that the First Amendment's establishment clause and free exercise clause prohibit the government's involvement in the selection or removal of those who serve in religious positions. In developing the ministerial exception, judges have interpreted the power of these First Amendment protections to take qualifying religious organizations outside the ambit of federal and state anti-discrimination laws. In essence, the ministerial exception reflects judicial acknowledgement that the United States' political origins trace back to religious groups fleeing persecution in Europe.

The religion clauses in the U.S. Constitution's First Amendment, adopted in 1791, constituted a promise that the new federal government would not interfere with the religious organizations created by those groups. Since that time, labor and employment regulation in the United States has expanded to include laws prohibiting discrimination based on protected classifications, governing collective bargaining, and setting wage and hour standards. The ministerial exception, as created and implemented by lower courts, however, operates to preempt these laws to maintain the promise of autonomy to religious organizations.

2. Ministerial Exception Development and Tabor

While the ministerial exception was first applied in the context of Title VII suits against religious employers, the exception has been extended to suits under the ADA, FLSA, ADEA and other laws as well. The circuits have applied the ministerial exception in a number of ways. The Sixth and Seventh Circuits have applied the ministerial exception as jurisdictional in nature, and as an appropriate ground for a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). The First, Third, Tenth, Ninth, and First circuits treat the exception as an affirmative defense under Fed. R. Civ. P. 12(b)(6), and the Eleventh and Fifth circuits treat it as a mandate to interpret the discrimination laws not to apply to claims between ministers and their churches.

On January 11, 2012, the U.S. Supreme Court, for the first time, adopted the lower court-created "ministerial exception" to the First Amendment of the Constitution, holding that the federal employment laws do not apply to ministers working at religious institutions.

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, a "called" teacher, working at a small Lutheran school, was placed on disability leave. Upon her return to work, the school told the teacher that her position was no longer available but offered to pay a portion of her health insurance in exchange for her resignation. The teacher refused and threatened to file a lawsuit, prompting the school to terminate the teacher because she "threatened to take legal action." The EEOC brought a suit on behalf of the teacher, alleging that the school retaliated against her in violation of the Americans with Disabilities Act. In response, the school moved for summary judgment, citing the court-created "ministerial exception" to the First Amendment. The school argued that because the issues concerned the employment relationship between a religious institution and a minister, the ADA did not apply. The Eastern District of Michigan agreed and dismissed the case. On appeal, the Sixth Circuit Court of Appeals vacated the decision, finding that the teacher did not qualify as a "minister" because her duties as a "called" teacher were identical to the duties of a "lay" teacher.

Having never decided whether the First Amendment incorporated a "ministerial exception," the Supreme Court granted the school's appeal and clarified that such an exception does exist and that because the teacher was named a minister and, at least at times, acted like a minister the ADA does not apply. The Court also held that because the exception is to ensure that a church maintains authority to select and control who will minister to the faithful, a church need not demonstrate that it fired a minister for a religious reason. A religious institution may fire for good reason, bad reason or no reason at all.

B. Definition and Application of the "Ministerial Exception" Post-*Hosanna-Tabor*

1. Procedure

Procedurally, *Hosanna-Tabor* clarified that the "ministerial exception" is an affirmative defense, not a jurisdictional bar. *E.g.*, *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 671
(N.D. Ill. 2012). The proper way to raise a ministerial exception defense is, therefore, through either a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or a motion for summary judgment under Federal Rule Civil Procedure 56. *Id.*; *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 171-72 (5th Cir. 2012). The more common successful method will likely be through a motion for summary judgment, as all the facts including job title and job duties of the employee will not appear on the face of the complaint. It follows that the burden is on the defendant to prove it has a proper ministerial exception defense.

2. The "Religious Institution" Requirement

To claim the ministerial exception as an affirmative defense over the employee's claims, the defendant must first qualify as a type of organization that can assert the exception. Since the *Hosanna-Tabor* decision, the courts faced with the issue have held that to properly assert the exception, the defendant must first qualify as a "religious institution." *Penn v. N.Y. Methodist Hosp.*, No. 11-cv-9137 (NSR), 2013 U.S. Dist. LEXIS 142109, at *19 (S.D.N.Y. Sept. 30, 2013); *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 833 (6th Cir. 2015); *Preece v. Covenant Presbyterian Church*, No. 8:13CV188, 2015 U.S. Dist. LEXIS 52751, at *5 (D. Neb. Apr. 22, 2015). Outside of traditional places of worship, courts have not uniformly defined a "religious institution," and scholars have disagreed over a workable definition.

According to the Sixth Circuit, the organization need not be tied to a specific denomination and need only be "a religiously-affiliated entity . . . whose mission is marked by clear or obvious religious characteristics." *Conlon*, 777 F.3d at 834. In this manner, the *Conlon* court held that a Christian organization whose purpose was "to advance the understanding and practice of Christianity in colleges and universities" was a religious institution for purposes of the ministerial exception. *Id.* Following the standard in *Conlon*, the Salvation Army was held to constitute a "religious institution." *Rogers v. Salvation Army*, No. 14-12656, 2015 U.S. Dist. LEXIS 61112, at *15 (E.D. Mich. May 11, 2015). Of particular note, the district court in *Penn* held that the New York Methodist Hospital had not demonstrated that it was a "religious institution," because of a document indicating that it had removed the Methodist church's affiliation through trustees. *Penn*, 2013 U.S. Dist. LEXIS 142109, at *26.

3. Which Employees Qualify for the Ministerial Exception

In applying *Hosanna-Tabor*, courts always note that the Supreme Court explicitly denied adopting a rigid formula. As a result, the application of *Hosanna-Tabor*'s principles has been inconsistent, but courts have generally approached this two ways: a four-factor analysis or a general "totality of the circumstances" inquiry. Courts adopting the four-factor analysis include the Sixth Circuit, the Northern District of Illinois, and the District of Nebraska. These four factors are: (1) whether the institution held the employee out as a minister and/or the formal job title; (2) whether the employee received some sort of theological training and/or process of commissioning; (3) whether the employee held himself/herself out as a minister; and (4) the job duties the employee performed in carrying out the mission and/or religious functions of the church. *Conlon*, 777 F.3d at 834; *Herzog*, 884 F. Supp. 2d at 672-73; *Preece*, 2015 U.S. Dist. LEXIS 52751, at *6. In *Herzog*, all four factors were present in favor of applying the ministerial exception. 884 F. Supp. 2d at 673. However, the *Conlon* court held that where only the first and fourth factors are present, the ministerial exception applies. 777 F.3d at 835.

The remaining courts have primarily engaged in a fact-specific inquiry related to job duties. The Fifth Circuit in *Cannata* engaged in a totality of the circumstances inquiry and held that it was sufficient that the employee, a music director, "played an integral role in the celebration of Mass and . . . furthered the mission of the church and helped convey its message to the congregation." *Cannata*, 700 F.3d at 177. Specifically, because music was an "integral role" in Mass, the employee played a "major" service by overseeing the church's music program, playing the piano during services, promoting musicians who sang and played instruments during Mass, and making important and unilateral decisions at Mass. *Id.* at 177-78.

The Northern District of Indiana has held that merely attending mass and prayer sessions in a supervisory capacity does not indicate that the job duties were ministerial. *Herx v. Diocese of Fort Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168, 1177 (N.D. Ind. 2014); *see also Bohnert*, No. 14-cv-02854-WHO, 2015 U.S. Dist. LEXIS 130519, at *43-45 (N.D. Cal. Sept. 25, 2015). Additionally, the duties of an administrative assistant for a religious institution were not "important to the spiritual and pastoral mission of the church" and did not involve matters of church governance and, therefore, did not invoke the ministerial exception. *McCallum v. Billy Graham Evangelistic Ass'n*, No. 3:09CV381-RLV, 2012 U.S. Dist. LEXIS 144394, at *17-18 (W.D.N.C. Oct. 5, 2012).

Regardless of the test, courts appear to uniformly accept that job title alone will not be determinative. *E.g.*, *Cannata*, 700 F.3d at 173. One court has also held that an institution's sincere belief that the employees are ministers alone is not sufficient. *Hough v. Roman Catholic Diocese of Erie*, No. 12-253Erie, 2014 U.S. Dist. LEXIS 27159, at *13-14 (W.D. Penn. Mar. 4, 2014).

Types of Claims

The overriding concern for courts in deciding cases under the ministerial exception is a religious institution's freedom from state interference in matters of internal governance and doctrinal decisions, especially the right to decide who it will employ. *See Cannata*, 700 F.3d at 172; *see also Penn*, 2015 U.S. Dist. LEXIS 142109, at *10. The Second Circuit encourages courts to consider the nature of the dispute when determining whether to apply the ministerial exception. *Penn*, 2013 U.S. Dist. LEXIS 142109, at *13. Thus, when the dispute involves "spiritual functions" of the employer, the ministerial exception is properly applied. *Id.* at *18-19. Therefore, in defending employment cases on behalf of religious organizations, it is important to emphasize that the matter speaks to an integral function of the organization's faith and mission.

When the exception applies, courts will clearly bar claims of discrimination against the institution, regardless of the reason. *Herzog*, 884 F. Supp. 2d at 674; *Saunders v. Richardson*, No. 5:12-CV-00511-FL, 2013 U.S. Dist. LEXIS 109636, at *8 (E.D.N.C. June 7, 2013), *adopted in* 2013 U.S. Dist. LEXIS 109637 (E.D.N.C. Aug. 5, 2013). It is unclear, however, if the ministerial exception bars breach of contract claims brought by employees. *See Conlon*, 777 F.3d at 838 (Rogers, J., Concurring) ("Our decision today does not require us to decide whether a religious employer could enter into a judicially-enforceable contract with a ministerial employee not to fire that employee on certain grounds (such as pregnancy)."). In another case, the Southern District of New York held that the ministerial exception will not apply to defamation claims from previous employees. *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 250 n. 10 (S.D.N.Y. 2014). Still, the court in *Kavanagh* barred the defamation claim against the church under the Establishment Clause, because the church had used its own internal adjudicatory procedures to terminate the employee pursuant to doctrinal rules, and attempting to determine the truth would have impermissibly entangled the court. *Id.* at 250. Therefore, having internal procedures for resolving disputes may help the organization further shield itself from liability.

The Eastern District of Washington held that the ministerial exception under *Hosanna-Tabor* is inapplicable to negligent hiring claims, because the court could determine the matter without resorting to religious cannons. *Doe v. Corp. of the Catholic Bishop*, 957 F. Supp. 2d 1225, 1231
(E.D. Wash. 2013). Finally, the Sixth Circuit has also held that agents of a religious institution may not be held personally liable for employment decisions that fall under the ministerial exception. *Conlon*, 777 F.3d at 837.

III. OTHER DEVELOPING AREAS

A. Same Sex Marriages

The US Supreme Court issued its 5-4 ruling in *Obergefell v. Hodges*, 135 S.Ct. 2584, on June 26, 2015. It held that the right to marry is fundamental under the Constitution and that under the Due Process and Equal Protection Clauses of the 14th Amendment, same sex couples may not be deprived of that right and liberty. The effect was that no state may now refuse to issue a marriage license to, or perform a marriage for a same sex couple, or refuse to recognize another states marriage of a same sex couple. Any state laws to the contrary are now void.

The ruling did not address religious ceremonies. However it did state that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction, that by divine precepts, same-sex marriages should not be condoned." The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths…" *Id*. at 2607. It seems unlikely that there would be an attempt to require a religious organization perform a ceremony which is contrary to its belief system. To lessen the risk of potential litigation the organization should take steps to make clear to members, prospective members or others who may utilize the facility what their doctrine is regarding marriage. There should be protocols for how marriage requests are handled by staff to make sure that responses are consistent and handled in the appropriate manner. Stopping a ceremony that should not have been allowed in the middle of the vows would likely present legal problems.

The law has not addressed the problematic issue of whether a religious facility can be used if the organization is not performing the vows. The answer may depend on the wording of various local, state and federal laws forbidding discrimination in places of public accommodation. Critically, does the facility qualify as a public accommodation? If so, are there exemptions available or are there constitutional protections based on judicial precedent. Limiting use to members may enhance constitutional protections. It is important to have clear guidelines regarding use of the facility. The more the facility is rented out or allowed to be used by the public for other outside purposes, the more there is a risk of a claim of discrimination in denial of accommodations depending on the jurisdiction involved.

The ruling leaves open a number of other questions: What is the impact on the religious organization as an employer? Can it terminate an employee who is part of a same sex couple?

Does it depend on the type of position so that it is considered ministerial? Must it provide benefits to the spouse in a same sex couple?

Title VII prohibits discrimination by employers on the basis of sex – which covers gender, pregnancy discrimination and sexual harassment. The EEOC released new guidance on discrimination against lesbian, gay, bisexual and transgender (LGBT) employees on October 31, 2014. The guidance made it clear that from the EEOCs perspective discrimination against LBGT employees is a form of sex/gender discrimination prohibited by Title VII. However, note that Title VII provides a specific exemption as to religious discrimination in the employment of individuals by religious organizations who are performing work connected with the carrying on the organization's activities.

B. Healthcare

The Affordable Care Act requires employers to provide employees with no cost coverage for contraception. ACA regulations include exemptions for religious employers including churches and other religious non-profits from the contraception requirements. These exemptions are provided as a religious accommodation and shift the cost of providing that coverage to the government. In 2014, the US Supreme Court ruled in *Burwell v. Hobby Lobby*, 134 S.Ct. 2751, that even closely held for profit corporations can qualify for the religious exemption from the contraception requirement in the Affordable Care Act if the basis was "sincerely held" religious beliefs. However, this only applied to the contraception requirement and not to other coverage requirements that might affect religious beliefs (i.e., blood transfusions, vaccinations, medications).

C. Pregnancy Discrimination

The Pregnancy Discrimination Act of 1978 amended Title VII to make it clear that the prohibition of discrimination in employment "because of sex" or "on the basis of sex" as used in Title VII includes "because of pregnancy, childbirth or related medical conditions." On July 14, 2014 the EEOC issued new guidelines showing a shift in how it would interpret the Pregnancy Discrimination Act. This was updated on June 25, 2015 to reflect *Young v United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015). It now requires that pregnant employees be offered the same light duty or other modifications that are offered to any temporarily disabled worker. It also is instructing employers to honor any medical restrictions for pregnant employees even though the traditional view is that pregnancy itself is not a disability under the ADA.

Young involved the question whether the Pregnancy Discrimination Act requires employers to grant work accommodations for light duty to a pregnant employee when similar accommodations were available to non-pregnant employees. The Supreme Court on March 25, 2015 vacated summary judgment that had been granted to the employer UPS and remanded the case for further proceedings. At issue will be whether the employee can prove that there was disparate treatment or whether the employer can justify its refusal to accommodate by relying on legitimate, nondiscriminatory reasons.

There are no exceptions to the Pregnancy Discrimination Act for religious organizations. The PDA applies to employers with 15 or more employees. However, Title VII does not apply to a religious organization with respect to employment of individuals who perform work connected with carrying on of the organizations activities. Issues arise when religious institutions attempt to take employment action against unwed female employees who are pregnant on moral grounds. It is important that this action be positioned so that it is not being taken because of the pregnancy status. Rather the preparatory work and explanation provided must be that action is being taken because of a violation of a code of conduct required by the religious faith i.e. sex outside of wedlock. This positions First Amendment protections as a defense.