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Expert Analysis

Exceptions and Exclusions Benefit Religious Institutions and Clergy

By **Barry Black**

And **John B. Madden**

Thirty years ago, in *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), the U.S. Supreme Court issued a decision that highlighted one of a number of significant differences in the law that applies to religious institutions and their clergy as compared to the law that applies to other not-for-profit and general business corporations and their executives.

In *Presiding Bishop*, the court upheld the validity of a statutory exception to the prohibition against discrimination on the basis of religion contained in Title VII of the Civil Rights Act of 1964. This article explores that decision and other examples of the law's special treatment of religious institutions and clergy members.

Title VII

Congress has exempted religious institutions such as churches, synagogues, and mosques from much of Title VII's prohibition against employment discrimination on the basis of religion. Specifically, pursuant to §702 of the Civil Rights Act of 1964, the prohibition against employment discrimination on the basis of religion does not apply to religious organizations "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [an organization] of its activities."

The question in *Presiding Bishop* was whether §702 was constitutional. The case involved The Deseret Gymnasium in Salt Lake City, Utah, a nonprofit facility, open to the public, run by the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints (CPB) and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints (CP), religious entities associated with The Church of Jesus Christ of Latter-day Saints, an unincorporated religious association sometimes called the Mormon or LDS Church.

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A building engineer who worked at the gymnasium was discharged because he failed to qualify for a temple recommend—a certificate indicating that he was a member of the LDS Church and eligible to

BARRY BLACK *and* JOHN B. MADDEN, *partners in the law firm Nelson Madden Black, serve the legal needs of religious institutions and individuals. They can be reached at bblack@nelsonmaddenblack.com and jmadden@nelsonmaddenblack.com, respectively.*

attend its temples. The engineer sued the CPB and the CP alleging, among other things, discrimination on the basis of religion in violation of §703 of the Civil Rights Act of 1964. The defendants moved to dismiss this claim on the ground that §702 shielded them from liability.

The engineer contended that if construed to allow religious employers to discriminate on religious grounds in hiring for non-religious jobs, §702 violated the Establishment Clause of the First Amendment.

The U.S. District Court for the District of Utah agreed with the engineer, and the dispute reached the U.S. Supreme Court, which reversed.

Supreme Court's Decision

In its decision, the court explained that the government may, and sometimes must, accommodate religious practices and that it may do so without violating the Establishment Clause—although, it observed, at some point accommodation might devolve into "an unlawful fostering of religion." This was not such a case, the court decided.

The court reasoned that a law was not unconstitutional simply because it allowed religious institutions to advance religion, which was "their very purpose." The court concluded that §702 did not impermissibly entangle church and state but, instead, effectuated a "more complete separation of the two," and it upheld the constitutionality of the exemption for a religious institution's secular nonprofit activities.

Since the court's decision in *Presiding Bishop* upholding the constitutionality of §702, it has been clear that, for instance, Title VII does not apply to Catholic schools when they discriminate by hiring and retaining Catholics in preference to non-Catholics.

A more recent decision, by the U.S. Court of Appeals for the Third Circuit, resolved whether Title VII applied to a Catholic school in Pittsburgh that discriminated against a non-Catholic because her conduct did not conform to Catholic mores. In this case, a Protestant teacher claimed that St. Mary Magdalene Parish, operator of a Catholic school, had discharged her in violation of Title VII after she had divorced and married a man who had been baptized in the Catholic Church without pursuing the "proper canonical process available from the Roman Catholic Church to obtain validation of her second marriage."

The Third Circuit, in *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991), broadly interpreted the §702 exemption and concluded that Title VII did not apply.

The circuit court decided that the permission granted in §702 to employ persons "of a particular religion" included permission to employ only persons whose beliefs and conduct were consistent with the employer's religious precepts. Thus, it concluded, a parochial school did not violate Title VII's prohibition of religious discrimination by discharging a Catholic or a non-Catholic teacher who had "publicly engaged in conduct regarded by the school as inconsistent with its religious principles." The exemption to Title VII covered the parish's decision to dismiss the Protestant teacher because of her remarriage.

By now, it is clear that §702 applies to a religious organization's religious activities and, as a result, a Catholic church can choose to hire a Catholic as its priest. It also is clear that §702 applies to a religious institution's secular nonprofit activities and, therefore, a religious institution can hire a Jewish receptionist or a Christian bookkeeper if it so desires.

Employee or Self-Employed?

Corporate employees are employees for federal income tax purposes and are not self-employed individuals. The law is quite a bit more complicated when it comes to a clergy member employed by a house of worship.

In general, most clergy members are employees of their house of worship for federal income tax reporting purposes. Despite that, all clergy members are considered to be self-employed for Social

Security and Medicare tax purposes (with respect to the services they perform in the exercise of their ministry). As stated in IRS Publication 517, "members of the clergy are treated as self-employed individuals in the performance of their ministerial services."

Thus, clergy members pay 100 percent of their own Social Security and Medicare taxes under the federal Self-Employment Contributions Act and are not subject to the Federal Insurance Contributions Act, which generally provides that employers and employees share in paying Social Security and Medicare taxes.

Some time ago, a minister challenged this rule, denying that he was self-employed and questioning why the self-employment tax provisions of the Internal Revenue Code (the IRC) should apply to him, an employee of the churches he served.

The tax court, in *Silvey v. Commissioner*, T.C. Memo 1976-401 (Tax Ct. 1976), ruled against him, explaining that the answer to the minister's question as to why he was taxed as a self-employed person when, in fact, he was an employee of the churches he served, was one as to which "a page of history" was "worth a volume of logic." The tax court noted that, for as long as federal income taxes had any potential impact on houses of worship, religious institutions had been "expressly exempt from the tax."

The tax court concluded that it seemed understandable—in the exercise of its "benevolent neutrality toward churches"—that "Congress chose not to place the onus of participation in the old-age and survivors insurance program upon the churches, but to permit ministers to be covered on an individual election basis, as self-employed, whether, in fact, they were employees or actually self-employed."

Double-Dipping

Finally, there is a provision of the IRC that permits members of the clergy to "double-dip."

IRC §265(a)(1) states the general rule that a taxpayer is not allowed to take a deduction for an otherwise deductible expense that is allocable to tax-exempt income. Congress enacted §265 to prevent taxpayers from reaping a double tax benefit by using deductions attributable to tax-exempt income to offset taxable income.

An exception in §265(a)(6) makes it clear that §265(a)(1) does not prohibit a clergy member from deducting interest on a mortgage (pursuant to §163(a)) or from deducting real property taxes (under §164(a)(1)) on a home owned by the clergy member even if he or she has received a "parsonage allowance" that is excludable from gross income.

The exception to the prohibition in §265(a)(1), which also applies to certain federal government employees who receive housing allowances, essentially permits a clergy member to "double-dip" by excluding a parsonage allowance from the clergy member's gross income while permitting the clergy member to deduct mortgage interest and property tax payments paid with the parsonage allowance.

The tax court, in *Induni v. Commissioner*, 98 T.C. 618 (Tax Court 1992), observed that the IRC should not be interpreted to allow the practical equivalent of a double tax benefit "absent a clear declaration of congressional intent." It then found a clear declaration of congressional intent and upheld §265(a)(6). Its decision was affirmed by the U.S. Court of Appeals for the Second Circuit. *Induni v. Commissioner*, 990 F.2d 53 (2d Cir. 1993).

Conclusion

Certainly, religious institutions and clergy members must comply with the vast majority of laws and regulations applicable to everyone else. But the numerous areas where religious institutions and clergy members are subject to different rules, including the subjects discussed in this article, can have a significant practical impact and should be kept in mind by counsel representing these institutions or their clergy.