

Religion Law

Expert Analysis

When #MeToo Leads To Litigation Against a Church

Religious institutions in New York and elsewhere across the United States are free to hire—and often to fire—their clergy without fear that their decisions will be reviewed or reversed by federal or state courts. Indeed, in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012), an employment discrimination suit brought on behalf of a minister challenging her church’s decision to fire her, the U.S. Supreme Court held that the First Amendment protects religious employers from employment discrimination lawsuits brought by their “ministers,” which the court broadly defined as employees involved in ministerial duties. The court cited the “ministerial

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exception,” which insulates a religious organization’s employment decisions regarding its clergy from judicial scrutiny.

Significantly, the court in *Hosanna-Tabor* left open whether the ministerial exception prohibits secular courts from hearing and deciding other types of lawsuits brought by ministerial employees, including actions alleging tortious conduct or breach of contract by their religious employers. To date, New York courts have not yet issued a definitive ruling as to whether the ministerial exception applies to claims of sexual harassment against houses of worship, and circuit courts of appeals around the country are divided.

Ultimately, of course, the issue may have to be resolved by the U.S. Supreme Court.

A Bar

One side of the circuit split is reflected in the decision by the U.S. Court of Appeals for the Tenth Circuit in *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 1088, 181 L. Ed. 2d 976 (2012).

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The plaintiff in this case worked as the director of the Department of Religious Formation for the Roman Catholic Diocese of Tulsa. Throughout her time as director, the plaintiff allegedly received positive performance reviews but she ultimately

was fired. Following her termination, the plaintiff sued the diocese and the bishop of the diocese. Among other things, she asserted claims under Title VII for gender discrimination, disparate impact based on gender, and hostile work environment.

For its part, the diocese contended that the court lacked subject matter jurisdiction over the plaintiff's federal employment law claims. The district court granted summary judgment in favor of the diocese on the plaintiff's federal claims based on the ministerial exception, and she appealed to the Tenth Circuit.

The Tenth Circuit affirmed. In its decision, the circuit court explained that the ministerial exception preserves a church's "essential" right to choose the people who will "preach its values, teach its message, and interpret its doctrines" free from the interference of civil employment laws.

It then rejected the plaintiff's contention that her claims should be allowed to proceed notwithstanding the ministerial exception because they did "not involve a protected employment decision." The Tenth Circuit observed that "[o]f course churches are not—and should not be—above the law" and that they "may be held liable for their torts and upon their valid contracts." Nevertheless, it reasoned, allowing a hostile work environment claim

brought by a minister might "involve gross substantive and procedural entanglement with the [c]hurch's core functions, its polity, and its autonomy."

The circuit court concluded, therefore, that "any Title VII action brought against a church by one of its ministers" would "improperly interfere with the church's right to select and direct its ministers free from state interference." Thus, it held that the plaintiff's Title VII claims were barred.

The Ninth Circuit Rule

The Ninth Circuit reached the opposite result in its more nuanced decision in *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004).

The plaintiff in this case, an ordained Presbyterian minister, alleged that the church's pastor engaged in sexually harassing and intimidating conduct toward her, creating a hostile work environment. The plaintiff asserted she invoked church procedures and made a formal complaint of sexual harassment against the pastor to the church, which she said took no action to stop the harassment or alleviate the hostile work environment.

Moreover, the plaintiff contended, the pastor retaliated against her by relieving her of certain duties, verbally abusing her, and otherwise engaging in intimidating behavior.

Again, according to the plaintiff, the church, which knew or should have known of the pastor's improper behavior, failed to act.

The plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and received a right-to-sue letter. The plaintiff contended that the church placed her on unpaid leave and that she subsequently was terminated. The plaintiff also said that she was not permitted to circulate her church resume, or "personal information form," which effectively prevented her from acquiring other pastoral employment in any Presbyterian church in the United States.

The plaintiff filed a second charge of discrimination with the EEOC alleging unlawful retaliation and received a second right-to-sue letter.

The plaintiff sued the church and pastor in federal district court for the Western District of Washington, asserting federal causes of action for sexual harassment, hostile work environment, and retaliation in violation of Title VII. She sought back pay, front pay, and damages for emotional distress and harm to her reputation. She also sought injunctive relief, including a preliminary injunction requiring the defendants to permit her to circulate her personal information form.

The district court dismissed the plaintiff's Title VII suit for failure to state a claim. The court concluded

that her allegations implicated the church's constitutionally protected right to choose its ministers and, therefore, were barred by the ministerial exception. The court concluded that consideration of the plaintiff's claims would violate the church's freedom of religion under the First Amendment's Free Exercise Clause, interjecting the court into ecclesiastical decision-making and involving it in the church's choice of its ministers. Moreover, the court concluded that reviewing the plaintiff's retaliation claims would cause government entanglement with the church's internal governance, in violation of the Establishment Clause.

The plaintiff appealed to the Ninth Circuit, which reversed.

In its decision, the Ninth Circuit explained that, under the ministerial exception, a church's decisions about whom to employ as a minister were protected by the First Amendment. Thus, it ruled, to the extent the plaintiff's sexual harassment and retaliation claims implicated the church's ministerial employment decisions, those claims were "foreclosed."

The Ninth Circuit pointed out, however, that the plaintiff had stated "narrower" sexual harassment and retaliation claims that did "not implicate protected employment decisions." It reasoned that her sexual harassment claim could succeed if

she proved that she had suffered a hostile work environment, and if the defendants did not prove that the plaintiff had unreasonably failed to take advantage of available measures to prevent and correct that hostile environment.

Moreover, the circuit court said, the plaintiff's retaliation claim could succeed if she proved that she had suffered retaliatory harassment—here, in the form of verbal abuse and intimidation—because of her complaints to the church and the EEOC.

The Ninth Circuit added that if the church should be found liable on either of these claims, the plaintiff could recover damages for consequential emotional distress and reputational harm. Within this framework, the Ninth Circuit decided, the plaintiff's Title VII suit could provide her with "redress for sexual harassment and retaliation without attaching liability to ministerial employment decisions protected by the First Amendment." According to the Ninth Circuit, insulating the church's employment decisions did not foreclose the plaintiff from holding the church vicariously liable for alleged sexual harassment or retaliation, which were not "protected employment decision[s]." The district court could undertake a "restricted, secular inquiry" to determine whether the plaintiff could carry her burden of proving she was

sexually harassed, the Ninth Circuit ruled.

Conclusion

In *Elvig*, the Ninth Circuit rejected the argument that a minister may be subjected to the type of sexual harassment that Congress, in enacting Title VII, made clear should not be tolerated in the workplace; that once a woman (or man) became a minister, the First Amendment required that she (or he) surrender all rights to protection against such harassment even if the church's doctrine neither condoned nor tolerated the harassment; and that the federal courts were off limits because they were incapable of providing relief that respected both the individual rights Congress enacted and a church's constitutional right to be free of doctrinal interference. Will New York courts follow the Ninth Circuit's analysis or the Tenth Circuit's clear rule barring sexual harassment suits against religious institutions from being heard in the courts? Stay tuned.