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The Ministerial Exception, and How It Protects Religious Institutions

Courts reject employment discrimination lawsuits brought against religious groups by existing or former employees where the "ministerial exception" applies. This column will examine how courts determine when the exception requires judgment in favor of a defendant.

By **Barry Black and Lane Paulsen**

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Laws that prohibit employment discrimination are intended to promote equality. The Religion Clauses of the First Amendment, which prevent the establishment of religion by government and which protect the ability to freely exercise one's religious beliefs, also are of fundamental importance to this country.

In the context of employment disputes, the two core values of equality and freedom of religion sometimes conflict. Almost exactly a decade ago, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), the U.S. Supreme Court held that where a defendant in an employment discrimination action is able to establish that the "ministerial exception" applies, the First Amendment has "struck the balance" in favor of religious liberty.

Simply stated, the ministerial exception bars employment discrimination claims brought by ministers against the religious groups that employ or formerly employed them. After discussing the origins of the ministerial exception, this column will examine how courts determine when the exception requires judgment in favor of a defendant.

A Brief History

As Chief Justice John Roberts explained on behalf of the unanimous Court in *Hosanna-Tabor*, the ministerial exception's historical roots extend to the founding generation, which adopted the First Amendment "against th[e] background" of "life under the established Church of England." Among other things, the Religion Clauses ensure that the federal government, unlike the English Crown, has no role in filling ecclesiastical offices.

It was some time, however, before courts were asked to address the tension between employment discrimination laws and the First Amendment's guarantees. Nearly 50 years ago, in 1972, the U.S. Court of Appeals for the Fifth Circuit held that the First Amendment requires that a ministerial exception be applied to claims under Title VII of the Civil Rights Act of 1964. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (reasoning that "[m]atters touching" "[t]he relationship between an organized church and

its ministers…must necessarily be recognized as of prime ecclesiastical concern" because a church's "minister is the chief instrument by which [it] seeks to fulfill its purpose"). Thereafter, the U.S. Court of Appeals for the Second Circuit and every other circuit court to address the issue also concluded that the First Amendment requires a ministerial exception. See, e.g., *Rweyemamu* v. Cote, 520 F.3d 198 (2d Cir. 2008).

Then, in *Hosanna-Tabor,* the Supreme Court agreed with the courts of appeals that there is a "'ministerial exception,' grounded in the First Amendment, that precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." The Supreme Court made clear in *Hosanna-Tabor* that the First Amendment does not tolerate a judicial remedy for any minister claiming employment discrimination against his or her religious group, regardless of the group's asserted reason (if any) for the adverse employment action.

In essence, whether the ministerial exception bars employment discrimination claims against a religious organization depends on whether the employee qualifies as a "minister" within the meaning of the exception. The court in Hosanna-Tabor identified four factors it considered in ruling in that case that the exception applied to a former fourth grade teacher of a church-run Missouri Synod Lutheran school: the formal title given to the teacher-plaintiff by the church; the substance reflected in that title; the teacher-plaintiff's own use of that title; and the important religious functions she performed for the church.

Over the years, numerous federal and state courts throughout the country have analyzed the extent to which houses of worship, religious schools and universities, religious hospitals, and even funeral homes are protected from employment discrimination claims by former employees who fall within the category of "minister."

Second Circuit Decision

Consider the Second Circuit's analysis in *Fratello v. Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017).

The case arose when Joanne Fratello, the former principal of a Roman Catholic elementary school in Nanuet, New York, filed a lawsuit alleging that she had been terminated from that position on the basis of unlawful gender discrimination and retaliation. Relying on the ministerial exception, the defendants—the school, the church with which the school was affiliated, and the Archdiocese of New York—moved for summary judgment.

The U.S. District Court for the Southern District of New York granted the motion, and Fratello appealed. The issue before the Second Circuit was whether Fratello was a "minister" within the meaning of the exception; the circuit court decided that she was.

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In its decision, the Second Circuit explained that Justice Samuel Alito's concurring opinion in *Hosanna-Tabor,* in which Justice Elena Kagan joined, declared that a formal title indicating that the plaintiff was playing a religious role, though often relevant, was "neither necessary nor sufficient" and that "courts should focus on the function performed by persons who work for religious bodies."

The circuit court noted that Alito also stated that although each of the four considerations cited by Chief Justice Roberts were relevant in that case, "it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented" in cases involving the ministerial exception. Additionally, the circuit court continued, Alito observed that, "most faiths do not employ the term 'minister,' and some eschew the concept of formal ordination" while other faiths "consider the ministry to consist of all or a very large percentage of their members."

The Second Circuit agreed with Justice Alito's statements, declaring that where the four *Hosanna-Tabor* considerations were relevant in a particular case, courts should primarily focus "on the function[s] performed by persons who work for religious bodies."

Applying these principles to Fratello's case, the circuit court concluded that the ministerial exception barred Fratello's employment discrimination claims against the Archdiocese, the church, and the school. According to the circuit court, although her formal title—"lay principal"—did not connote a religious role, it was "clear" that she served "many religious functions" to

advance the school's Roman Catholic mission.

With respect to what the Second Circuit said was the "most important consideration"—whether and to what extent Fratello performed important religious functions for her religious organization—the circuit court ruled that it was "beyond doubt" that, as principal, Fratello "convey[ed]" the school's Roman Catholic "message and carr[ied] out its mission" insofar as she: (1) consistently managed, evaluated, and worked closely with teachers to execute the school's religious education mission; (2) led daily prayers for students over the loudspeaker, and other prayers at various ceremonies for faculty and students; (3) supervised and approved the selection of hymns, decorations, and lay persons chosen to recite prayer at annual special Masses; (4) encouraged and supervised teachers' integration of Catholic saints and religious values in their lessons and classrooms; (5) kept families connected to their students' religious and spiritual development through a newsletter; and (6) delivered commencement speeches and yearbook messages that were religious in nature. The circuit court added that not only did Fratello perform all these functions, "she was also evaluated on the quality of that performance."

Because Fratello performed several important religious functions as the school's principal, the Second Circuit concluded that the district court had properly dismissed her action.

Other Cases

The Fifth Circuit applied the ministerial exception to a church music director in *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012). In its decision, the circuit court said that "it [was] enough…that…[he] played an integral role in the celebration of Mass and that by playing the piano during services, [he] furthered the mission of the church and helped convey its message."

In another case, *Temple Emanuel of Newton v. Massachusetts Commission Against Discrimination*, 975 N.E.2d 433 (Mass. 2012), the Supreme Judicial Court of Massachusetts applied the ministerial exception to a teacher at a Jewish school because "she taught religious subjects at a school that functioned solely as a religious school," even though "she was not a rabbi, was not called a rabbi,…did not hold herself out as a rabbi," and the record did not disclose whether she had received religious training.

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Here in the Second Circuit, the court itself decided that the ministerial exception applied to a Title VII racial discrimination claim brought by a Catholic priest against his former Diocese and Bishop in which the priest alleged that they had misapplied canon law in denying him a requested promotion and, ultimately, in terminating him. The court' conclusion in that case, *Rweyemamu v. Cote,* 520 F.3d 198 (2d Cir. 2008), was unsurprising, given its recognition that the ministerial exception had been applied to a press secretary and to Jewish nursing-home staff.

Just last year, the U.S. Supreme Court again tackled the ministerial exception. In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the court held that the exception applied to bar employment discrimination claims brought by two elementary school teachers at Catholic schools whose teaching responsibilities were similar to those of the teacher in *Hosanna-Tabor,* even though the teachers in *Morrissey-Berru* were not given the title of "minister" and had less religious training than the teacher in *Hosanna-Tabor.* What matters, the court said, "is what an employee does."

Conclusion

The law is clear: The ministerial exception bars employment discrimination claims brought by ministers against religious institutions. Therefore, religious institutions of all kinds would be well served to consider the protections of the ministerial exception in drafting contracts, government documents, and corporate policies, as well as in their day-to-day operations.

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