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Competing Interests: Employment Anti-Discrimination Law Collides With The First Amendment Rights Of Religious Institutions

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In mid-January 2012, a mere 10 weeks after oral argument, a unanimous Supreme Court held that, under the First Amendment, religious institutions could hire and fire ministry personnel according to their own internal principles and needs. Although the Court rejected application of secular and neutral anti-discrimination laws in this context, the decision leaves open very important issues. Religious organizations can and should plan now to protect their rights as employers. This article reviews *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*; the questions left for future litigation; and the steps religious organizations can take now to stay ahead of the curve.

Background

As Americans, we cherish the freedom

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to believe and worship as we please, 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, perhaps even employees of those institutions, have not considered the rights and responsibilities of the religious workers vis-à-vis their employers.

Employees intuitively expect certain employment-related rights, such as the right to be free from discrimination. 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 after she said she would report to the EEOC the school's refusal to return her to service after a disability leave. Under the secular law, that kind of termination may be considered "retaliation," but her religious employer said she was a "minister," and reporting to the EEOC violated the school's religious principle of peaceful conciliation with its ministers. Weighing the interests, the Supreme Court held, as a matter of first impression, that 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 constitutional 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 some 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 significant and unanswered questions remain:

1. How does one 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?

We address each question 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 in the First Amendment, the definitional edge of who is a "minister" or a "church" belongs to the "church" rather than to the state. By "minister," we 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 reli-

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gious exercise and expression. Likewise, "church" here is a generic term that includes not only houses of worship, however they are named by a faith community, but also other mission-driven religious organizations.

In a diverse country, one size does not fit all, and the faith community has to show where it draws the line that demarcates what positions serve the essential purposes of its religion. 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 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 these terms be broadly construed, the Court does not announce any bright-line 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 exception bars claims contesting the terms and conditions of ministry. It is 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 and then denied review in two cases that presented some of those open issues.

Facing a Court-imposed barrier to anti-discrimination litigation, employees may use claims like defamation, breach of contract and emotional distress as a substitute path to the civil courts. The lower courts are divided over whether those claims 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 a 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 present every form and permutation of claim as lawyers look for ways around the First Amendment. Because the Court's ruling did not address claims outside of statutory discrimination claims – though other courts have (with mixed results) – applying the ministerial exception in other claims remains a question that will undoubtedly be hotly contested.

Third, the exception should be invoked at the threshold of litigation. 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. Delaying this determination to the merits runs the risk of entangling the civil courts in matters of religious doctrine.

The Court noted a division in case authority whether the exception bars the exercise of subject matter jurisdiction or is an affirmative defense. Without briefing or argument on this point, the Supreme Court attempted to resolve this conflict by proclaiming the exception an affirmative defense, not a jurisdictional question. 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 to 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, 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;
- 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 and bars the claim.

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 non-ministerial 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 policies and practices – before the next employment action results in litigation.

If you work for a religious employer and don't know your status, consult human resources personnel to determine whether you are considered a "minister." Do not assume that you are not a ministerial employee just because you are not ordained 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 or committing adultery).

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 important issues were 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, not as a jurisdictional question, will compound the difficulties that religious organizations may find in advancing 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.