The "Ministerial Exception:" Where Employment Law & Religious Autonomy Collide

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At the beginning of this year, religious employers across the country – from book stores and counseling centers, to parochial schools and universities – were handed a real, although slight, victory by the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC, et al*. 132 S.Ct. 694 (Jan. 11, 2012). There, the Supreme Court held that a fourth-grade teacher, who taught mostly non-religious subjects at a church-operated school, could not sue her employer for retaliation. *Id.* at 707-08. The reason was the "ministerial exception," a doctrine which bars ministers from suing their employers for discrimination after they have been terminated. In the words of the Supreme Court, "[r]equiring a church to accept or retain an unwanted minister … intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving [it] of control over … those who will personify its beliefs." *Id.* at 706. This doctrine, the Court stated, is necessary to prevent violations of both the Free Exercise Clause and the Establishment Clause. *Id.* And under the facts of this particular case, the teacher in question was determined to be a "minister," so her case was accordingly dismissed.

Hosanna-Tabor is equally significant for what it does *not* say, however, as for what it does. Yes, the decision cements the "ministerial exception" as a firm constitutional doctrine, but beyond the particular facts of the case, it stops short of illuminating the exception with a specific test to apply in the future. Moreover, the Supreme Court "express[ed] no view" on the prospect of other actions being brought against religious employers, such as for "breach of contract or tortious conduct," and thus the parameters of the exception will have to be tested over time, in case after case. *Id.* at 710. Indeed, some of those cases have already been filed, having important implications for religious employers everywhere.

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I. The Details and Limitations of Hosanna-Tabor

Because the Supreme Court limited its holding to the specific facts of *Hosanna-Tabor*, understanding those facts is especially important to understanding the decision. The plaintiff, Cheryl Perich, began teaching kindergarten at Hosanna-Tabor Evangelical Lutheran School in 1999. The school – or more accurately, the congregation that operates it – is an official member of the Missouri Synod of the Lutheran Church and classifies its teachers into two categories: "lay" and "called." "Lay" teachers are required to have no religious training and do not have to be Lutheran. They are appointed to one-year terms by the school board and hired only when "called" teachers are not available. In contrast, "called" teachers are confirmed by their local church after (1) completing undergraduate courses in theology, (2) passing an oral examination by a faculty committee, and (3) obtaining the endorsement of their local Synod district. Upon completion of those requirements, "called" teachers are given the title of "Minister of Religion, Commissioned" and are employed for an open-ended period of time. Ms. Perich began her employment as a "lay" teacher, but she soon began the process of becoming "called," which she completed six years later. *Id.* at 699-700.

By the 2003-04 school year, Ms. Perich had become a fourth-grade teacher. Her duties included daily instruction in math, language, social studies, science, gym, art and music, as well as Bible class four days a week. Ms. Perich led her students in prayer and devotional exercises every day and took them to school-wide chapel services once a week. In addition, she was responsible for organizing those chapel services approximately twice a year. *Id.* at 700.

In June 2004, Ms. Perich was diagnosed with narcolepsy and took disability leave for the first half of the school year. She expressed her intent to return to work in January 2005, but the school relayed that it had contracted a "lay" teacher to replace her. Not long thereafter, the church which operated the school voted to offer Ms. Perich a "peaceful release" from her call, based on the belief that

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she would not be able to perform her job in the coming years due to her condition. Ms. Perich refused the offer, however, and produced a doctor's note stating her ability to return to work on February 22. Despite requests to reconsider, Ms. Perish reported to work that day and was asked by the school to leave. When she was told she would likely be discharged, Ms. Perich responded by expressing her intention to consult an attorney and sue. The church then held a meeting and voted to rescind Ms. Perich's call and terminate her employment. The reason given was her "insubordination" and "threat to take legal action," which violated the church's belief that Christians should resolve their disputes internally. *Id.*

The EEOC and Ms. Perich sued the school for retaliation under the ADA and its state law equivalent. After the Sixth Circuit ruled that the ministerial exception did not apply to her employment, the school appealed to the Supreme Court. Certiorari was granted, and in January 2012, the Court unanimously reversed.

In holding that Ms. Perich was a minister, a number of facts were particularly important to the Court, although none of them were alone dispositive. Ms. Perich's formal title as a commissioned "Minister of Religion" went a long way to determine her status, primarily because it was obtained through a multi-year process of academic study and ecclesiastical confirmation. Her resulting role as a "called" teacher had a similar effect. Ms. Perich's regular duties of teaching Bible classes, leading devotionals, guiding the students in daily prayer, and organizing chapel services were seen as overtly ministerial duties, even though the majority of her day was spent on other non-religious tasks. Finally, the Court also pointed out that Ms. Perich considered herself to be a minister (albeit, before litigation began) by voluntarily completing the commission process, claiming ministry-dependent allowances on her tax returns, and referring to her job repeatedly as a "teaching ministry." *Id.* at 707-08. These facts led the Court to conclude that Ms. Perich performed a role for the school that "convey[ed] the Church's religious message and carr[ied] out its mission." *Id.* at 708. As such, she was a minister and thus barred from suit.

As alluded to above, the Court declined to articulate a bright-line test for the "ministerial exception," saying "[w]e are reluctant … to

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adopt a rigid formula for deciding when an employee qualifies as a minister." *Id. at* 707. Instead, the decision merely tracks those facts that the Court considered persuasive and distinguishes those it did not. Although relevant, the Court was not persuaded by the fact that other "lay" personnel at the school also performed occasional religious duties, or the fact that Ms. Perich spent only 45 minutes a day on her exclusively religious tasks. *Id.* at 708-09. The Court simply held that "given all the circumstances of her employment," Ms. Perich was a minister and could not challenge her church's decision to fire her as retaliatory. The utility of this case going forward, therefore, will be primarily as a source of comparison—how are the facts in a new case similar to, or different from, those presented in *Hosanna-Tabor*? Sufficiently similar cases will be dismissed, and those that are not will proceed.

The Court's decision in *Hosanna-Tabor* is also limited to discrimination and retaliation suits. *Id.* at 710. The opinion expressly states that it does not comment on the permissibility of an employee's lawsuit for tortious conduct or breach of contract against his or her religious employer. *Id.* Emphasizing the limited nature of its ruling, the Supreme Court relayed that "[t]here will be time enough to address the applicability of the [ministerial] exception to other circumstances if and when they arise." *Id.* As a result, those subsequent circumstances and the cases that decide them will be paramount to understanding the full parameters of this newly-confirmed constitutional doctrine. As explained in more detail below, some of those cases have already begun.

II. Current Litigation Testing the Limits of the Exception

Three cases – two from nearby states, and one from right here in Tennessee – are currently testing the limits of the "ministerial exception." Paying attention to how the defendants in these cases define who their ministers are, and understanding why the courts ultimately agree with or reject their explanation, will be very useful and instructive for religious employers across the country. These organizations find themselves in the difficult position of having to draw the line, both specifically and persuasively, between

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employees who are responsible for ministry and those who are not. Knowing what explanations have worked in the past, and which have come up short, is the best way to know whether any organization's approach to *religious* employment rests on solid *legal* ground.

Two months after the release of *Hosanna-Tabor*, the Southern District of Ohio denied a Motion to Dismiss on claims that, at first glance, look a lot like Ms. Perich's. In *Dias v. Archdiocese of Cincinnati*, 2012 WL 1068165 (S.D. Ohio March 29, 2012), a Catholic school terminated one of its teachers, Christa Dias, after she revealed that she became pregnant out of wedlock. The school's initial reason for its decision was the fact that Ms. Dias had apparently engaged in premarital sex, which is contrary to the teachings of the Catholic Church, but after she explained that she had been artificially inseminated, the school changed the reason for her dismissal. Artificial insemination is "gravely immoral" to the Catholic Church, and thus Ms. Dias' use of the procedure became the school's new basis for her termination. *Id.* at *1. As soon as Ms. Dias filed suit for pregnancy discrimination and breach of contract, the defendants filed a Motion to Dismiss under Rule 12(b)(6). *Id.* at *2.

The Court denied the defendants' Motion because, in contrast to Ms. Perich's employment, Ms. Dias did not have any religious responsibilities whatsoever. Indeed, she was a non-Catholic teacher at the school who did not provide religious instruction to the students or otherwise lead them in any deliberate spiritual activities. *Id.* at *5. The school argued that, even so, the mere fact that she was teacher at a Catholic institution meant that Ms. Dias was a "role model" charged with carrying out the values and mission of the Catholic Church. The Court rejected this argument, stating that "the analysis of whether a teacher is a minister involves more than the teacher's affiliation with a religious school." *Id.* Her pregnancy discrimination claim was accordingly allowed to proceed.

But that is not the end of the story. As a non-Catholic teacher, Ms. Dias' employment was covered by a contract, which contained a morals clause that she must "comply and act consistently with the

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stated philosophy and teachings of the Roman Catholic Church." *Id.* at *6. The Court found the defendants' Motion to Dismiss on this issue, unlike the ministerial exception above, to be a rather "close call." Important to the Court's ruling was Ms. Dias' allegation that she did not know the Church's position on artificial insemination before she was fired. This averment allowed the Court to conclude that discovery was needed to determine whether there had been a "meeting of the minds" on this issue, so the defendants' Motion to Dismiss was still denied. Had Ms. Dias been instructed on basic Catholic doctrine as a condition of her employment, the outcome may well have been different.

Another recent case, on very similar facts, has been filed in Indiana and has received a fair amount of attention from the national press. *Herx v. Diocese of Fort Wayne-South Bend, Inc., et al,* Case No. 1:12-cv-0012-RLM (N.D. Ind. April 12, 2012). In that case, a Catholic school teacher named Emily Herx lost her job after revealing that she had received "in vitro" fertility treatments, a practice that is similarly condemned by the Catholic Church. Just like Ms. Dias, Ms. Herx is not Catholic, did not teach religion or lead spiritual exercises, and did not have to complete any Catholic training in order to get or retain her job. However, Ms. Herx's employment contract contains the same morals clause as Ms. Dias', and thus, the same issues in litigation will likely arise. These two cases highlight the thin line that religious employers must walk when their religious identity permeates virtually everything they do. The question of whether the law can change, or punish, employment decisions made on that basis strikes right at the heart of what the First Amendment is there for.

Finally, here in Nashville, the Southern Baptist Convention has been sued by two former missionaries, claiming that the organization retaliated against them for reporting shoddy construction practices while they were in the mission-field. *Nollner v. Southern Baptist Convention, Inc., et al,* Case No. 11-C-4185 (Circuit Ct., Davidson Co., Tenn. October 20, 2011). The plaintiffs in this case, Mr. and Mrs. Nollner, were hired as missionaries to oversee construction of an office building in India. They allege that they were terminated after complaining about the building's unsafe construction and the bribes

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offered by their architect to ensure it passed inspection. This case is interesting not only because the Nollners' position with the Southern Baptist Convention involved both religious and non-religious duties, meaning the ministerial exception will likely be a contested issue, but the allegedly illegal reason they provide for their termination does not appear to contradict a Southern Baptist belief. Now, the Convention may well disagree with me there, but this case has the potential to open a new avenue of jurisprudence on the intersection between religious autonomy and the requirements of employment law. How the Convention pursues its defense, and how the Court reacts to it, will provide a useful example for religious employers everywhere to incorporate into their overall approach.

III. Implications for Religious Employers

I graduated from David Lipscomb High School here in Nashville, which is affiliated with the Churches of Christ. I also attended a portion of college at a similarly religious school in Texas, called Abilene Christian University. Both are wonderful schools that prepared me well, personally and academically, for the challenges that awaited me as a young adult. Both schools also considered themselves to be intentional participants in the Christian mission upon which they were founded. As a result, each and every person who represented them – from their administrators to their educators and, even, their students – were expected to conduct themselves in a manner reflective of that mission. The recent cases discussed above pose a unique and nuanced challenge for schools like these, and all other religiously-minded employers. Litigation is forcing them to strike a credible balance between their secular functions and their spiritual functions, all for the sake of successfully navigating the requirements of our nation's employment laws. While that process is certainly challenging, there are some lessons to learn along the way which can help fortify their approach to "religious" employment going forward.

Know well who you consider to be a "minister," and why. As the cases above demonstrate, a "minister" under the exception does not have to be a pastor, reverend or priest. Yet, the mere fact of

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employment with a religious organization is not enough either. Religious employers of every kind ought to think critically about which of their employees have a key responsibility to convey their spiritual mission to others. Those folks can be reliably considered "ministers." Some others may fit the bill too, and given the state of the law, employers are certainly free to be broad here (but know that doing so carries with it some risk). At a minimum, engage in this process and be able to explain why you come down where you come down. And then relay your conclusions to the affected employees—your "ministers" ought to know they are "ministers."

Make your mission, and all related expectations, known. No employee should be surprised by a belief, conviction, or practice that is important enough to get him or her fired. Religious employers should thoroughly explain who they are to their workforce and anyone they are thinking about hiring. Obtain an acknowledgment of your core values and any other principle you hold dear. Prudence requires all employers to remove the possibility that their employees could plausibly deny knowing what is fundamentally important to them.

Practice what you preach. Everyone respects consistency, especially judges and juries. Classify your employees sincerely, and then treat them accordingly—all the time. Moreover, a lot of workforce litigation can be avoided by mere fairness. If a religious employer plans to hold someone accountable for violating one of its key principles, that employer should do at least two things before pulling the trigger.

First, it should make sure that all of its employees are being held to the same standard. While the rules that govern a religious organization may be different than those that govern a secular one, their application ought to be no different—the same rules apply to everyone. For instance, terminating an unmarried woman for getting pregnant due to premarital sex, when your male employees could very well be doing the same thing, might be sex discrimination. Make sure you are being careful, fair, and applying your rules equally.

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Second, make sure you are not guilty of a similar religious violation yourself. If compassion and understanding are central tenets of your faith, then be compassionate and understanding with your employees. You needn't be a pushover, but you needn't be excessively rigid either. Hypocrisy is a quick way to alienate fact-finders and invite lawsuits. Consider whether there is a plank in your own eye, but then don't be shy about removing the yeast from your dough.

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