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Kennedy v. St. Joseph's Ministries: New Considerations For Religious Employers? The Fourth Circuit Expands Title VII's Religious Exemption

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In *Kennedy v. St. Joseph's Ministries*, the Fourth Circuit extends Title VII's religious exemption from hiring and firing decisions to the totality of the employment relationship. This article examines this case and answers the question the decision raises: Does *Kennedy* change a religious employer's approach to the employment relationship with employees possessing different religious views?

While Title VII makes employment discrimination unlawful, the exemption allows religious organizations, under certain circumstances, essentially to discriminate against employees on the basis of religion.¹ This exemption recognizes the constitutionally protected right of religious organizations to make religiously motivated employment decisions by employing individuals whose conduct or religious beliefs are consistent with the organization's religious tenets.

But what exactly does "employment" mean in the context of the religious exemption? The statute states that "[Title VII] shall not apply to . . . a religious corporation, association, educational institution, or society **with respect to the employment of individuals of a particular religion**" and courts have interpreted "employment" to mean hiring and firing decisions.² But could employment also include conduct occurring during the employment relationship? According to *Kennedy v. St. Joseph's Ministries, Inc.*,³ a recent case out of the United States Court of Appeals for the Fourth Circuit, the answer is a resounding "yes." In short, the Fourth Circuit determined that Title VII extends the religious exemption from hiring and firing decisions to the totality of the employment relationship. Thus, religious organizations are allowed to discriminate, harass, and retaliate against employees on the basis of their religious views. Consequently, it is important for religious employers to review and understand this case as well as its implications on their operations.

Background

St. Joseph's Ministries, a tax-exempt organization operating under the principles and beliefs of the Roman Catholic Church, manages a nursing care facility. It employed the plaintiff as a geriatric nursing assistant from 1994 to 2007.⁴

Because St. Joseph's operates the facility in accordance with Catholic principles, it engages in numerous religious exercises and practices, including the following: (1) conducting daily facility-wide prayers; (2) making communion available daily; (3) holding mass each Wednesday; (4)

providing Catholic symbols on its campus, including crucifixes in every room and statues of the Virgin Mary, Jesus, and its patron saint St. Catherine Laboure; (5) issuing a handout summarizing its Catholic values to each new employee; and (6) maintaining the employee handbook, which confirms St. Joseph's Catholic identity.⁵

Plaintiff, however, is not Catholic, but is a member of the Church of the Brethren.⁶

The Brethren practice at issue in *Kennedy* is the requirement for women to wear modest, long dresses or skirts and to wear a prayer covering, such as a veil, over their hair.⁷ At some point during the plaintiff's employment, the Assistant Director of Nursing Services allegedly told the plaintiff that her long dresses, skirts, and head covering were inappropriate for a Catholic facility and were making patients and their families uncomfortable.⁸ The plaintiff also alleged that the Assistant Director continually told her she needed to adhere to a more traditional mode of dress.⁹ The plaintiff then communicated to the Assistant Director that her religious beliefs mandated that she continue wearing such attire. As a result, St. Joseph's terminated the plaintiff's employment on May 17, 2007, and the plaintiff then filed suit under Title VII, alleging religious harassment, retaliatory discharge, and discriminatory discharge on the basis of her religion.¹⁰

The district court barred the plaintiff's discriminatory discharge claim under the religious exemption to Title VII. However, the court held the exemption did not bar the plaintiff's religious harassment and retaliation claims because such alleged conduct did not involve discriminatory employment decisions, which would otherwise have been protected by the religious exemption.¹¹ Because of the significance and undeniable effect this ruling would have on religious exemption cases, the defendant applied for and was granted an interlocutory appeal to the Fourth Circuit Court of Appeals to decide this issue before the case continued at the district court level.

Fourth Circuit's Analysis

On interlocutory appeal, the Fourth Circuit examined the issue of whether the religious exemption also protects religious organizations from liability for alleged religious harassment and retaliation. The plaintiff, consistent with the district court holding, argued that the plain language of the religious exemption clearly does not apply to religious harassment and retaliation claims against a religious organization. The plain language of the exemption, in relevant part, states:

This subchapter [of Title VII] shall not apply to . . . a religious corporation, association, educational institution, or society **with respect to the employment of individuals of a particular religion** to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.¹²

In its examination of the district court's ruling and the parties' arguments, the court focused first on statutory construction of Title VII and the religious exemption.

The Court's Statutory Construction Examination

The Fourth Circuit Court of Appeals disagreed with the plaintiff's argument and the district court's reading of the term "employment" as being "synonymous" only with employment decisions like hiring and firing.¹³ The court found the term "employment" could not be read so narrowly. Applying the principles of statutory construction, the court reasoned that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."¹⁴ At the time the exemption was drafted, and today, "employment" means "the relationship between master and servant" and "the state of being employed."¹⁵ Based on the plethora of definitions and case law contrary to the plaintiff's argument, the court opined that the definition of "employment" could in no way be limited to hiring and firing decisions and must incorporate the entire relationship between an employer and employee.

The court bolstered its conclusion regarding the definition of "employment" by citing to other areas within Title VII where the plain language surrounding "employment" evidences its meaning beyond the actions of hiring and firing.¹⁶ Additionally, the court reasoned that if Congress had meant to limit the term "employment" in the religious exemption provision to hiring and firing, it would not have used the broader term "employment" and instead favored the more specific "hiring and firing" phrase.¹⁷

Finally, the court focused on the fact that the religious exemption specifically states that the "subchapter . . . shall not apply" to religious organizations on the terms of employment.¹⁸ Because religious discharge, harassment, and retaliation all arise from the same Title VII subchapter, the court reasoned none of those claims can be actionable when an individual is employed by a religious organization.¹⁹

Congressional Intent and Logical Reasoning

Following its intensive review of the statutory construction of Title VII and the religious exemption, the court noted that its conclusion regarding the meaning of “employment” was consistent with both Congressional intent concerning the religious exemption and logical reasoning. The court cited, through case law, to the legislative history of the 1972 religious exemption, which clearly indicated the sponsors of that bill desired an exemption that allowed religious organizations to make employment decisions without government intervention. Indeed, the Congressional Record shows bill sponsor Senator Samuel Ervin (D., N.C.) stated clearly during the Senate’s debate on this bill that:

“I would allow the religious corporation to do what it pleased. That is what my amendment would allow it to do. It would allow it liberty. It would take it out from under the control of the EEOC entirely.”²⁰

Based on the above, the Fourth Circuit concluded that Congress had chosen the wording of the religious exemption purposely to make religious organizations entirely exempt from government intervention into the employment of their employees. This exemption “reflect[s] a decision by Congress that the government interest in eliminating religious discrimination by religious organizations is outweighed by the rights of those organizations to be free from government intervention.”²¹

Finally, the court expounded that looking at the meaning of “employment” in any other way would simply be illogical and lead to nonsensical results. The court gave the example of the plaintiff’s view of discharge versus harassment in her own case: The plaintiff admitted that under the exemption the defendant could terminate her employment and she was without recourse. However, under the plaintiff’s argument that the religious exemption did not extend to harassment, the defendant would suffer liability just because it spoke to the plaintiff about her dress in an effort to help the plaintiff remain employed. This result, the court declared, would be inconsistent with Congress’s intent for a cooperative and accommodating workplace environment and would result in immediate terminations rather than discourse between religious organization employees and employers.²²

Accordingly, on the basis of statutory construction, legislative intent and logical reasoning, the Fourth Circuit held that the religious exemption of Title VII excuses religious organizations from claims of religious discrimination (including harassment and retaliation) and reversed and remanded the case to the district court.

Effect of the Court’s Decision

The Fourth Circuit’s decision raises the distinct possibility that other circuits will adopt this holding if they are faced with a similar issue. It is also possible that this case will discourage plaintiffs’ attorneys from bringing these types of claims in other circuits because *Kennedy* is the first case of this kind and a notable flag for defense counsel to raise and wave on summary judgment.

Employer Considerations and Concerns

There are several issues employers should consider as a result of this decision:

1. *Kennedy* is not a license for a religious employer to harass or retaliate on the basis of religion. Although the plaintiff in this case brought only Title VII claims, there are several tort claims (such as intentional or negligent infliction of emotional distress) that could be part of a lawsuit based on alleged harassment or retaliation. Therefore, it is still important to maintain a policy and train your employees on anti-harassment and anti-retaliation issues, including religion-based harassment and retaliation.
2. *Kennedy*, and other statutes and case law on the religious exemption, do not apply to Title VII claims based on protected categories other than religion (such as race, gender, color, national origin, etc.). A religious employer is still subject to liability for discrimination, harassment, and retaliation based on a number of protected categories. Accordingly, as mentioned above, a religious employer should still have an anti-discrimination, anti-harassment, and anti-retaliation policy and train its employees on the same.
3. Be vigilant regarding religious harassment and retaliation issues, especially if your organization is not located within the Fourth Circuit (North Carolina, South Carolina, Maryland, Virginia, and West Virginia). One important factor regarding the alleged religious harassment in *Kennedy* that was not discussed by the court was whether the alleged conduct was severe or pervasive enough to rise to the level of actionable harassment. In a jurisdiction that has not adopted *Kennedy* (or declines to adopt *Kennedy*), the matter of severe or pervasive

conduct will likely be at issue. In *Kennedy*, the court interpreted the Assistant Director's conduct towards the plaintiff to be that of a helpful supervisor trying to engage in dialogue to help the plaintiff keep her job. In other circumstances, religious harassment could take the form of hateful slurs, jokes, physical conduct, or threats. In a jurisdiction that has not adopted *Kennedy*, such conduct may not be looked upon kindly and a court could be persuaded to find a way to distinguish such a case from *Kennedy*. Therefore, it is important to be vigilant about such issues in the religious workplace even though *Kennedy* has been adopted in the Fourth Circuit.

4. *Kennedy* does not apply to non-religious employers. Employers not considered "religious" under Title VII must remain vigilant in prohibiting discrimination, harassment, and retaliation based on religious beliefs.

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¹ 42 U.S.C. §§ 2000e-1(a) and 2000e-2(a)(1).

² 42 U.S.C. § 2000e-1(a) (emphasis added); see *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) ("The decision to employ individuals 'of a particular religion' under § 2000e-1(a) and § 2000e-2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."); *Little v. Wuerl*, 929 F.2d 944, 951 (3rd Cir. 1991) (Title VII exemption included decision of parochial school to terminate teacher who failed to validate her second marriage by first seeking an annulment of her previous marriage through proper canonical procedures of the Catholic church); *Killinger v. Samford Univ.*, 113 F.3d 196, 198 (11th Cir. 1997) (Title VII exemption included decision of Baptist university to remove a Baptist faculty member because his religious beliefs differed from those of the dean).

³ 2011 U.S. App. LEXIS 18936 (4th Cir. Sept. 14, 2011).

⁴ *Id.* at **2-3.

⁵ *Id.*

⁶ The Church of the Brethren originated in 1708 in Germany after the Protestant Reformation. While the Church of the Brethren shares the beliefs of Protestants (justification by grace through faith in God, Jesus Christ, and the Holy Spirit), a number of issues separate them from the other Protestant denominations and thus also the Catholic Church. The Church of the Brethren rely only on the New Testament for spiritual guidance and seek to live a life of peaceful action and plain living. Brethren practices, which they refer to as "Our Ordinances," and consider to be instructions from God, include adult baptism, feet-washing, Love Feast and Communion (in celebration of the Last Supper), and anointing (the application of oil to the forehead of one in physical or spiritual need). See Church of the Brethren, *History of the Church of the Brethren*, <http://www.brethren.org/about/history.html>; see also Church of the Brethren, *What We Believe*, <http://www.brethren.org/about/beliefs.html>.

⁷ See Harold S. Martin & Kenneth Nell, *Modesty in Dress: A Vanishing Virtue*, Brethren Revival Fellowship, July/August 2006, Vol. 41, No. 4, available at <http://www.brfwitness.org/?p=939> (last visited Sept. 15, 2011); see also Harold S. Martin & James F. Myers, *The Sister's Prayer Covering*, Brethren Revival Fellowship, September/October 1992, Vol. 27, No. 5, available at <http://www.brfwitness.org/?p=590> (last visited Sept. 15, 2011).

⁸ 2011 U.S. App. LEXIS 18936, at *3.

⁹ *Kennedy v. Villa St. Catherine's, Inc.*, 709 F. Supp. 2nd 404, 406 (D. Md. 2010).

¹⁰ 2011 U.S. App. LEXIS 18936, at *4.

¹¹ 709 F. Supp. 2nd at 413.

¹² 42 U.S.C. § 2000e-1(a) (emphasis added).

¹³ 2011 U.S. App. LEXIS 18936, at *9.

¹⁴ *Id.* (citing *Bilski v. Kappos*, 130 S. Ct. 3218, 3226 (2010)).

¹⁵ *Id.* (citing Black's Law Dictionary 9th ed.). See also Merriam-Webster's Collegiate Dictionary (11th Ed. 2004) (defining "employment" as "activity in which one engages or is employed" or "the act of employing: the state of being employed."). The court also found the following definition persuasive: "[E]mployment' connotes the initial act of employment as well as the consequent state of being employed." (citing *Associated Gen. Contractors of Am., Houston Chapter*, 143 N.L.R.B. 409, 412, enforced, 349 F.2d 449 (5th Cir. 1965)).

¹⁶ 2011 U.S. App. LEXIS 18936, at **10-11. The court notes that the term "employment" is used in the operative prohibition against discrimination in Title VII: "to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . ." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The court reasons that, if the drafters meant for "employment" to apply only to hiring and firing, the second clause of this operative direction would have been "superfluous." 2011 U.S. App. LEXIS 18936, at *11.

¹⁷ 2011 U.S. App. LEXIS 18936, at * 11.

¹⁸ *Id.* at **11-12; 42 U.S.C. § 2000e-1(a).

¹⁹ 2011 U.S. App. LEXIS 18936, at **11-12.

²⁰ *Id.* at *13 ("Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'") (quoting *Little*, 929 F.2d at 951).

²¹ *Id.* at *13 (citing *Little*, 929 F.2d at 951).

²² *Id.* at **13-14.