A Timely Analysis of Legal Developments

ASAP®

January 2012

Supreme Court Okays Ministerial Exception to Discrimination Law

By Jane Ann Himsel

In *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & School*, the United States Supreme Court approved a "ministerial exception" to federal anti-discriminations laws. The fact-specific opinion answers some questions, but leaves others – including the exact parameters of the exception – for future litigation.

Ministerial Exception Before Hosanna-Tabor

Both the Americans With Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 contain exemptions that entitle religious institutions to discriminate on the basis of religion, but they do not entitle such institutions to discriminate on the basis of race, sex, disability, or any other legally protected category. Thus, when an employee of a religious organization sues his or her employer, alleging discrimination because of something other than religion, the first issue to resolve is whether the plaintiff fits within the First-Amendment-based "ministerial exception" originally articulated in *McClure v. Salvation Army*.[1] Under this court-made doctrine, religious organizations must follow antidiscrimination laws with respect to their non-ministerial employees. However, religious organizations have complete control over all terms and conditions of employment of those who are deemed to act in a "ministerial" capacity; the antidiscrimination laws do not apply. The lower courts found a "ministerial exception" appropriate because to apply secular employment requirements to a religious organization's dealings with its ministers would undermine the religious organization's authority (thereby running afoul of the Free Exercise Clause), and/or cause the government to be unduly entangled in the affairs of the religious organization (thereby running afoul of the Establishment Clause). All of the Federal Circuits, as well as a number of states, have adopted some version of the "ministerial exception," relying on one or both of the religion clauses and applying slightly different tests to determine who qualifies as a "minister."[2] *Hosanna-Tabor* is the U.S. Supreme Court's first foray into this area.

Factual Background

The Equal Employment Opportunity Commission (EEOC) sued on behalf of Cheryl Perich, a teacher in a church-run elementary school. The Lutheran Synod to which the church belonged allowed two types of teachers in its schools, "lay" and "called." Lay teachers worked on a contract basis for fixed terms. Appointment to a "lay teacher" position required no theological training; some

lay teachers were not even Lutheran. In contrast, a "called" teacher needed to be Lutheran, have special theological training, pass an oral theological examination, and obtain the Synod's endorsement. Once a teacher met these criteria, a congregation could issue a teaching call or commission to him or her just as it would issue a call to a clergy person to lead the congregation. Once called, the teacher would gain the formal title "Minister of Religion, Commissioned." The called teacher would serve an open-ended term until such time as he or she resigned or the congregation rescinded the call. The school hired lay teachers only when called teachers were not available.

Perich started as a lay teacher, obtained theological training, received a congregational commission, and became a called teacher. She primarily taught secular subjects: math, social studies, and music. She also taught religion four days a week, frequently led her students in prayer and a daily devotional, and led worship services. These religious activities took approximately 45 minutes of each working day. All teachers at the school – whether lay or called – engaged in the same types of religious activities.

Perich took a leave of absence to recover from narcolepsy. School officials told her she would have a job when she returned. After several months of leave, when she was almost ready to return, school officials, at the direction of the church's congregation, asked her to resign. Their primary concern was the possible harm to the children if she returned and fell asleep at an inappropriate time. Perich threatened suit under the ADA. The congregation rescinded her call, and the school ended her employment, citing her threat to sue, which the congregation saw as contrary to the Synod's belief that Christians should resolve their disputes internally. Perich turned to the EEOC.

The Litigation

The EEOC sued, claiming the church had retaliated against Perich because of her threat to sue under the ADA. The church claimed the ministerial exception. The district court applied the ministerial exception, citing Perich's "called" status and the extensive religious activities in which she engaged with her students. The Sixth Circuit reversed, relying on a "primary duties" analysis to find that, because Perich spent the majority of her time teaching secular subjects rather than engaging in religious activities, the ministerial exception should not apply.

The Supreme Court reversed. Writing for a unanimous Court, Chief Justice Roberts explored the prior application of the First Amendment's religion clauses to the relationship between congregations and their ministers, stating "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." With this backdrop, he determined that there must be a "ministerial exception" to employment discrimination laws that is necessarily grounded in both the Establishment Clause and the Free Exercises Clause.

The rest of the Court's opinion is extremely fact-specific to the case. The Court declined to adopt a "rigid formula for deciding when an employee qualifies as a minister." Instead, it analyzed a series of factors before concluding Perich was a minister: (1) the church identified her as a minister, using the title Minister of Religion, Commissioned; (2) she had significant religious training and underwent a formal commissioning process, resulting in a call that only the congregation could rescind; (3) she held herself out as a minister; and (4) her job duties "reflected a role in conveying the Church's message and carrying out its mission."

Justice Roberts next explained the three ways in which the Sixth Circuit erred in its analysis: (1) the court wrongly said Perich's "title" – Minister of Religion, Commissioned – did not matter; (2) the court gave too much weight to the fact that lay teachers performed the same religious tasks as Perich; and (3) the court put too much emphasis on the fact that Perich's religious tasks took only about 45 minutes of each day. In addressing the third point, Roberts emphasized, "[t]he amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above."

Next, the Court rejected the EEOC's argument that, because Perich was not seeking reinstatement, the Court would not be interfering with the church's ability to select its own ministers by ruling on the merits of her claim. Perich sought money damages. Such damages would penalize the church for its ministerial selection, a penalty the First Amendment prohibits. Moreover, before it could award such damages, a court would have to find that the church was wrong to rescind Perich's call. To reach that conclusion, a court would be forced to analyze the church's internal religious processes, and the First Amendment prohibits such analysis.

Finally, the Court settled a split in the federal appellate courts, finding that a religious employer must raise the ministerial exception as an affirmative defense rather than as a bar to federal jurisdiction.[3]

Practical Application for Religious Employers

Hosanna-Tabor firmly ensconces the "ministerial exception" in U.S. law. It also clarifies that the right of religious organizations to pick and maintain relationships with their own leaders free from government interference arises not only from the Establishment Clause, but also from the Free Exercise Clause. The decision also establishes the "ministerial exception" as an affirmative defense rather than a jurisdictional bar. This means that unless the employer timely pleads this defense, it will be waived.

What the decision does not do is provide a clear test to be used in determining who is, and who is not, a "ministerial employee." It appears that looking solely at how much time an individual spends engaged in religious tasks is an inappropriate method of analysis. Also, if a religious organization formally identifies an employee as the equivalent of a minister, the employee has religious training, the employee holds herself out as the equivalent of a minister, and the employee's job duties reflect a role in carrying out the mission of the religious organization, then the employee will likely fit within the exception. What is unknown is exactly what combination of these factors will satisfy the exception. In other words, could the "lay" teachers in Perich's school fall within the exception? The majority opinion explicitly declined to answer this inquiry. Would it matter if a parochial school teacher, without the benefit of ordination or the equivalent of a call, continuously integrated religion into every secular subject she taught or spent half of every day engaging in explicit religious instruction? The majority opinion leaves these questions and others of a similar nature for another day.

It appears, therefore, religious employers will be well-served to:

- Strive to maintain workplaces free of discrimination on the basis of anything other than religion, keeping in mind that any employee without religious training or a "called"-type status may not be a ministerial employee.
- Clearly identify those teachers and others who are member of religious orders, are ordained, or otherwise have religious training, and highlight the importance of such training or status to the organization.

Finally, religious organizations, particularly those outside of a Christian Protestant tradition, would be prudent to study Justice Alito's concurring opinion, in which Justice Kagan joined. Justice Alito cautions courts against focusing too much on the majority's discussion of Perich's "called" status and formal title. He notes that many religious traditions do not actually use the term "minister" or have the equivalent of "ordination." To focus too much on what the religious organization calls the employee or what the employee calls herself would be detrimental. Instead, Alito urges courts to focus on the actual functions that an employee performs for a religious organization:

> "[the ministerial exception] should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position."

It is unclear whether the other seven justices will eventually adopt this "functional analysis" test, which is consistent with multiple pre-existing ministerial exception decisions, or instead choose a more restrictive application of the ministerial exception. The answer will have to await another case.

Jane Himsel is a Shareholder in Littler Mendelson's Indianapolis office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Himsel at jhimsel@littler.com.

---

[1] 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 1050 (1972).

[2] *See, e.g., Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010); *Rweyemamu v. Cote*, 520 F.3d 198, 206 (2d Cir. 2008); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039-41 (7th Cir.), *cert. denied*, 549 U.S. 881 (2006); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3rd Cir. 2006); *Werft v. Desert Southwest Annual Conference*, 377 F.3d 648, 655-657 (9th Cir. 2004); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999), *cert. denied*, 531 U.S. 814 (2000); *EEOC v. Catholic Univ.*, 83 F.3d 455, 460-63 (D.C. Cir. 1996); *Scharon v. St. Luke's Espiscopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *Coulee Catholic Schools v. Labor Indus. Rev. Comm'n*, 768 N.W.2d 868 (Wis. 2009).

[3] *Compare Tomic*, 442 F.3d 1036 (jurisdictional bar), *with Petruska*, 462 F.3d 294 (affirmative defense).