Are Your Teachers Ministers?

Insights
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Religious schools should be aware of the ministerial exception, its potential application to certain employment decisions, and the fact that courts across the country may interpret and apply it very differently.

The United States Supreme Court first clarified the ministerial exception in the landmark 2012 decision, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*. In this decision, the Court barred disability discrimination and retaliation claims under state and federal law by a teacher at a church school based upon the ministerial exception by recognizing that, under the First Amendment, churches and religious schools must be free to make employment decisions regarding their ministers.

In *Hosanna-Tabor*, the teacher at issue, Cheryl Perich, alleged that the Lutheran school where she worked fired her after she was diagnosed with narcolepsy in violation of the ADA. In finding for the school, the Court held "the members of a religious group put their faith in the hands of their ministers. Requiring a Church to accept or retain an unwanted minister, or punishing a Church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the Church, depriving the Church of control over the selection of those who will personify its belief."

While not all employees at a religious school will be considered ministers, Ms. Perich was legally deemed to be one. In deciding who would be a minister for purposes of this exception, the Court focused on a few main factors: (1) whether the employer held the employee out as a minister, (2) whether the employee's title reflected ministerial substance and training, (3) whether the employee held herself out as a minister, and (4) whether the employee's job duties included "important religious functions." Ms. Perich was considered a "called teacher" instead of a "lay teacher," had extensive religious training, and was held out by the School as a "Minister of Religion, Commissioned." She taught an array of secular subjects to her fourth-grade students, but also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. She also led the chapel service herself about twice a year.

However, although *Hosanna-Tabor* was certainly a win for religious entities, there has been a split recently on when teachers in religious schools will be considered ministers under this exception and how strictly courts will construe the *Hosanna-Tabor* factors.

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In February 2018 in *Grussgott v. Milwaukee Jewish Day School*, the 7th Circuit Court of Appeals ruled that Hebrew teacher Miriam Grussgott was a minister for the school, and thus that her ADA claims related to her termination after being diagnosed with a brain tumor were barred by the ministerial exception. The court noted that Ms. Grussgott's title of "grade school teacher" and the fact that she did not hold herself out to the community as an ambassador of the Jewish faith counted against her classification as a minister.

However, the court also focused on the facts that Hebrew teachers were expected to integrate religious teachings into their lessons, and that Ms. Grussgott had significant religious teaching experience, which was a critical factor in the school hiring her. Further, Ms. Grussgott taught her students about Jewish holidays, prayer, and the weekly Torah readings; and she practiced the religion alongside her students by praying with them and performing certain rituals. Accordingly, the court concluded that the factors weighed in favor of Ms. Grussgott being a minister and granted the school summary judgment on her claims.

However, in December 2018, the 9th Circuit Court of Appeals took a more strict reading of the exception in *Biel v. St. James Catholic School* when deciding that teacher Kristin Biel was not a minister after she claimed her termination from her fifth grade teaching position at St. James Catholic School was discriminatory. The court noted that Ms. Biel had no ministerial background and that there was no religious component to her education. Her title was "Grade 5 Teacher," and she was not held out to the community as being a minister or an expert in the Catholic faith.

However, similar to Ms. Perich and Ms. Grussgott, she did have religious teaching duties. Specifically, she taught lessons on the Catholic faith four days a week, and incorporated religious themes and symbols into her overall classroom environment and curriculum, as the school required. Notwithstanding these religious responsibilities, the court concluded that: "We do not, however, read *Hosanna-Tabor* to indicate that the ministerial exception applies based on this shared characteristic alone. If it did, most of the analysis in *Hosanna-Tabor* would be irrelevant dicta, given that Perich's role in teaching religion was only one of the four characteristics the Court relied upon in reaching the conclusion that she fell within the ministerial exception." The court thus held that Ms. Biel was not a minister and that her ADA claims against the school were not barred by the ministerial exception. The Court also expressed doubt that *Grussgott* was correctly decided.

The 7th Circuit noted the 9th's Circuit apparent disapproval of its *Grussgott* ruling in the August 2019 decision *Sterlinski v. Catholic Bishop of Chicago*, by summarizing the *Biel* decision as the 9th Circuit "essentially disregarding what Biel's employer (a Roman Catholic school) thought about its own organization and operations. The judges who dissented from the denial of rehearing in *Biel* disagreed with that approach—which asks how much like Perich a given plaintiff is, rather than whether the employee served a religious function—as do we."

Plainly, there is a split in how courts will interpret the *Hosanna-Tabor* factors in deciding when a teacher at a religious school will be classified as a minister. A cleaner case for the school will

involve a teacher with a large amount of religious training, who is called to her position, and who is considered (and classified) internally to be a minister or a "called teacher." A less clear case will involve a teacher without a religious background who nonetheless teaches religion or leads prayers. Religious schools should be aware of the highly fact specific nature of the ministerial exception and the varying legal opinions nationwide before counting on it to always apply in its employment decisions.

Schools that would like to depend upon the ministerial exception should stress the religious nature of the positions and job duties at issue in their own internal documents, including clarifying this in job descriptions and titles. Details can include the extent to which teachers are expected to lead prayers, participate in or lead chapel, teach religious tenants, and interfuse religious principles into lessons and disciplinary measures. Further, schools can require religious training and certifications for certain positions. Taking such steps will help strengthen a school's argument that a teacher qualifies as a minister under the *Hosanna-Tabor* guidance.

For more information, contact the author at LMcglynn@fisherphillps.com or 813.769.7518.

Related People

Lisa A. McGlynn
Partner
813.769.7518
Email