Will The Ministerial Exception Bar A Hostile Work Environment Claim?

Insights
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Religious schools expressed relief when the United States Supreme Court expanded the application of the ministerial exception in July 2020 in the combined cases of *Our Lady of Guadalupe School v. Morrisey-Berru* and *St. James School v. Biel*. However, schools and other religious employers should be aware that some courts have held that the ministerial exception does not categorically bar hostile work environment claims brought by ministers. A recent case out of the 7th Circuit Court of Appeals is a reminder of the limits of the ministerial exception.

Supreme Court Sets The Standard
The Supreme Court first officially recognized 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 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. Accordingly, she was deemed a "minister" and the Court held that the ministerial exception barred the employment law claims she brought related to her termination because her school had the right to choose its own ministers.

The Court revisited this exception recently in the consolidated cases Our Lady of Guadalupe School v. Morrisey-Berru and St. James School v. Biel. *These cases dealt with teachers at two different Catholic schools who separately challenged their terminations. In both cases, the teachers* integrated Catholic values into subjects they taught, educated their students on ceremonial traditions (e.g., communion, confession, etc.), and joined their students in daily prayer, Mass, and other religious services at their schools. When the teachers challenged their school's decision not to renew their respective contracts, their schools responded that their discrimination claims were barred by the ministerial exception.

While the 9th Circuit Court of Appeals sided with the teachers and found that they were not ministers based upon a strict analysis of all of the *Hosanna-Tabor* factors, the Supreme Court disagreed. In its decision, the Court noted that all of the *Hosanna-Tabor* factors need not necessarily be present, and that the teachers at issue were still "ministers" despite limited religious training and the fact that they were not called "ministers" internally. Instead, because they had primary duties that were religious in nature – namely teaching religion to students, praying with them, attending Mass with them, and preparing them for religious activities – they were ministers for the purpose of the ministerial exception.

Although *Hosanna-Tabor* and *Our Lady of Guadalupe School* were certainly wins for religious entities, they were also narrow in the scope of situations they apply to. *Hosanna-Tabor* limited itself to the specific situation of a termination of a minister. The Court noted that: "Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers." Accordingly, whether the ministerial exception will apply in these other types of claims remains at issue.

Recent Appeals Court Decision Draws Limits

On August 31, 2020, in *Demkovich v. St. Andrew the Apostle Parish*, the 7th Circuit Court of Appeals ruled that the ministerial exception did not bar hostile work environment claims brought by a gay employee of a church. While the court recognized that the ministerial exception would apply to a specific employment decision such as hiring and firing, it found that it did not extend to categorically bar all hostile environment claims by ministerial employees where there is no challenge to tangible employment actions.

The case involved Sandor Demkovich, the music director for a Catholic church who was openly gay and who was also overweight and suffered from diabetes and metabolic syndrome throughout his

employment. Demkovich claimed that his supervisor subjected him to frequent comments and epithets showing hostility to his sexual orientation. This hostility allegedly increased as Demkovich's marriage to his same sex partner approached, and Demkovich was fired following this ceremony. Demkovich also contended that he was harassed based upon his weight and medical conditions. Demkovich sued the Parish and the Archdiocese of Chicago for a hostile work environment under Title VII and the Americans with Disabilities Act (ADA). The church argued that it was protected by the ministerial exception, and the lower court dismissed the Title VII claim but allowed the ADA claim to continue.

In the appeal that followed, the 7th Circuit Court of Appeals noted that there was no dispute that Demkovich was a minister under the law. Demkovich in fact did not make any legal claims regarding his termination, apparently not disputing that the ministerial exception would bar such allegations. Instead, the issue was whether the ministerial exception also barred *all* hostile work environment claims by ministers.

In deciding that it did not, the court focused on the fact that religious organizations are not totally exempt from legal claims by ministerial employees, such as contract claims, and that criminal law may also reach crimes committed in the employment relationship. It also noted that while hostile environment claims may arise under the same statutes as claims involving hiring and firing decisions, they involve different elements and specially tailored rules for employer liability. Whereas the ministerial exception's application to hiring and firing decision protects a churches constitutional right to select its ministers, the same protection is not necessarily needed regarding the day to day treatment of those ministers. As the court explained, "an employer's need and right to control employees should not and does not embrace harassing behavior that the Supreme Court has defined in numerous cases in terms of what "unreasonably interferes with an employee's work performance."

The court also noted that there may be situations where the claims at issue involve entanglement concerns between the church and the courts such that the ministerial exception might apply. However, the court concluded that the risk that some entanglement may be at issue in certain scenarios is not a severe enough concern that the court it would categorically bar all hostile work environment claims for ministers.

Takeaways: What Do You Need To Know?

Schools who rely upon the ministerial exception should be aware that this exception continues to be reviewed and interpreted by the courts, and that it is highly fact specific. As an initial matter, 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. Details can include the extent to which teachers are expected to lead prayers, participate in or lead chapel, teach religious tenets, and infuse religious principles into lessons and disciplinary measures. Taking such steps will help strengthen a school's argument that a teacher qualifies as a minister under the *Hosanna-Tabor* and *Our Lady of Guadalupe School* guidance.

However, as was demonstrated by the court in *Demkovich*, even if an employee is a functional minister, it does not mean that all employment-related claims from this individual are barred. Allegations of hostile work environments in schools should be taken seriously and investigated as they would for any other employee, with the goal of maintaining a workplace of dignity and respect. Doing so will not only help schools strengthen their defense if they are subjected to an employment litigation, but also lessen the chances that they will have employment claims going forward.

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