The Supreme Court's Expansion of the "Ministerial Exception" Rule in Employment Discrimination Cases: *Our Lady of Guadalupe School v. Morrissey-Berru*

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In 2012, the United States Supreme Court formally recognized a doctrine known as the "ministerial exception" to the enforcement of state and federal employment discrimination laws. Reduced to its essentials, the doctrine states that religious institutions cannot be held liable under such laws for having terminated a minister's employment, for whatever reason. To do so would violate both the Free Exercise and the Establishment Clauses of the First Amendment to the United States Constitution. The doctrine had evolved and been gradually recognized in varying degrees by every federal Court of Appeals[1], but until the case of *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171, 132 S. Ct. 694 (2012), the Supreme Court had never squarely addressed it, and had never articulated exactly what the doctrine was, how it operated, and whether it was, in fact, a proper statement of Constitutional law. Just several weeks ago, on July 8, 2020, the Supreme Court addressed the issue again. In *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. ____, 140

[1] [1] *See Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989); *Rweyemamu v. Cote*, 520 F.3d 198, 204-09 (2nd Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303-07 (3rd Cir. 2006); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800-01 (4th Cir. 2000); *Combs v. Central Tex. Annual Conference*, 173 F.3d 343, 345-50 (5th Cir. 1999); *Hollins v. Methodist Healthcare, Inc.*, 474 F. 3d 223, 225-27 (6th Cir. 2007); *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 362-63 (8th Cir. 1991); *Werft v. Desert Southwest Annual Conference*, 377 F.3d 1099, 1100-04 (9th Cir. 2004); *Bryce v. Episcopal Church*, 289 F.3d 648, 655-57 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301-04 (11th Cir. 2000); *EEOC v. Catholic Univ.*, 83 F.3d 455, 460-63 (D.C. Cir. 1996).

S. Ct. 2049 (2020), the Court expanded the "ministerial exception" doctrine to reach employees of a religious institution who previously may not have fit our conventional notions of what a "minister" is. In so doing, the Court has provided religious institutions (and their insurers and defense lawyers) with an increasingly potent weapon in defending claims of discrimination brought against those institutions by employees who have been terminated or have otherwise suffered an adverse employment action.

This paper will describe the general parameters of the "ministerial exception" rule, as set forth in the *Hosanna-Tabor* case, and will explain how the Supreme Court has now expanded the rule in the recent *Our Lady of Guadalupe* case. I will also try to suggest some defense pointers for using the "ministerial exception" rule to the benefit of your insureds when faced with defending employment claims.

Hosanna-Tabor v. EEOC and the Adoption of the "Ministerial Exception" Rule

The Plaintiff in *Hosanna-Tabor* was Cheryl Perich, a teacher in a Lutheran Church School in Michigan. Ms. Perich was considered to be a "called" teacher, as opposed to a mere "lay" teacher. A "called" teacher is considered by the Missouri Synod of the Lutheran Church to have been called to their teaching vocation by God, through a congregation. A teacher who is considered "called" must complete a number of academic requirements, and once called, is referred to by the formal title "Minister of Religion, Commissioned." Thus, she was something less than, or at least different from, a fully ordained minister, but was something more than a garden-variety lay Sunday School teacher.

After teaching for several years, Ms. Perich developed a sleeping disorder, which required her to take a medical leave of absence. When she desired to come back to work, the Church School declined to re-hire her. When she made certain demands, and threatened legal action, she was formally terminated. She then brought an action in federal court under the Americans with Disabilities Act, claiming that she was fired in retaliation for having threatened to bring a discrimination lawsuit against the Church School. The U.S. District Court dismissed the case, but on Ms. Perich's appeal to the Sixth Circuit Court of Appeals, the dismissal was vacated.[2] The Church School then asked the Supreme Court to hear

[2] The lower court opinions can be found at *EEOC v. Hosanna-Tabor*, 582 F.Supp.2d 881 (E.D. Mich. 2008), and *EEOC v. Hosanna-Tabor*, 597 F.3d 769 (6th Cir. 2010).

the case, which it agreed to do, and on further review, the dismissal of Ms. Perich's lawsuit was reinstated in a unanimous 9-0 decision. The critical language in the Supreme Court's opinion is:

> We agree that there is such a ministerial exception. 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 beliefs. By imposing an unwanted minister, the state infringes the ***Free Exercise Clause***, which protects a religious group's right to shape its own faith and mission through its appointments.
>
> According the state the power to determine which individuals will minister to the faithful also violates the ***Establishment Clause***, which prohibits government involvement in such ecclesiastical decisions.

Hosanna, supra, 565 U.S. at 188-89, 132 S. Ct. at 706.

Turning to the critical question of whether the Plaintiff fell within the "ministerial exception", the Court stated that it was "reluctant . . . to adopt a rigid formula when an employee qualifies as a minister." *Id.*, 565 U.S. at 190, 132 S. Ct. at 707. The Court, however, emphasized several factors in determining that this particular Plaintiff fell within the parameters of the exception, even if she was not a pastor or a formally ordained minister in the conventional sense. The Church School actually held the Plaintiff out as a "minister". Her "call" by the congregation involved a significant spiritual component. She received a significant degree of religious training, followed by a formal process of commissioning, including an oral examination by a faculty committee at a Lutheran college, a process that took the Plaintiff six years to fulfill. Although her position as a teacher at the School involved any number of secular duties that were indistinguishable from those performed by the "lay" teachers, she was specifically tasked with a role in conveying the Church's message, carrying out its mission, "leading others toward Christian maturity, and teaching faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." *Id.*, 565 U.S. at 192, 132 S. Ct. at 708. In addition, the Plaintiff taught her students religious subjects on a regular basis, and led them in prayer three times a day. The Court concluded:

> In light of these considerations - the formal title given Perich by the Church, the substance reflected in that title, her own use of that tile, and the important religious functions she performed for the Church - we conclude that Perich was a minister covered by the ministerial exception.

Hosanna, supra, 565 U.S. at 192, 132 S. Ct. at 708.

The Court made one final, but very important point. The Plaintiff had argued that the School's reason for terminating her – *i.e.*, that her threat to sue the School had violated the Synod's commitment to internal dispute resolution – was pretextual, which is a common theme in employment termination cases. The Court responded to this argument as follows:

> That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful - a matter "strictly ecclesiastical" - is the church's alone.

Hosanna, supra, 565 U.S. at 194-95, 132 S. Ct. at 709.

Reduced to its essentials, the *Hosanna-Tabor* case means that a terminated "minister" has no right of action against the church under our employment discrimination laws, irrespective of the reason for the termination. In fact, a civil court cannot even inquire as to what the reason was. The critical issue left somewhat unresolved by the *Hosanna-Tabor* case was how to define who was a "minister", especially considering how fluid a term that can be among an almost infinite variety of religious denominations. The Court appeared to have little difficulty in concluding that the Lutheran Evangelical school teacher in *Hosanna-Tabor* was a "minister", given her formal, "commissioned" calling, her extensive theological training, the extent to which her teaching responsibilities involved instruction in overtly religious subjects and the regular leading of her pupils in daily prayer, and the fact that the School itself used the term "minister" to describe her position, even though she had not been formally ordained. But aside from identifying those factual considerations, the Court declined "to adopt a rigid formula for deciding when an employee qualifies as a minister." *Hosanna, supra*, 565 U.S. at 190, 132 S. Ct. at 707. On that subject, Justice Thomas wrote a concurring opinion, and suggested that courts ought simply to defer to a church's "good faith claim" that a certain employee's position is "ministerial". *Hosanna, supra*, 565 U.S. at 196, 132 S. Ct.

at 710 (Thomas, J., concurring). Justice Alito also wrote a concurring opinion, in which he emphasized a functional approach to determining who is considered to be a "minister", irrespective of whether that title is used:

> It 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 an 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.

Hosanna, supra, 565 U.S. at 199, 132 S. Ct. at 712 (Alito, J., concurring). Those thoughts would come into sharper relief just eight years later.

Our Lady of Guadalupe School v. Morrissey-Berru **and the Expansion of the "Ministerial Exception" Rule**

In July 2020, the Supreme Court addressed more directly the issue of what church employees might fairly be considered to be "ministers" for purposes of applying the "ministerial exception" acknowledged eight years earlier in the *Hosanna-Tabor* case. The *Our Lady of Guadalupe School* case is actually two consolidated cases, involving teachers at two Catholic schools in Los Angeles. The teacher in the first case, Agnes Morrissey-Berru, had been a 5th or 6th grade teacher at Our Lady of Guadalupe School, a Roman Catholic primary school. After "many years" of teaching at the School, her contract was not renewed, and she filed suit against the School under the Federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*

As an elementary school teacher, Ms. Morrissey-Berru taught her students all academic subjects, which included religion. Her college degree was in English Language Arts, and she held a California teaching credential. She also took some courses in religious education at the School's request. She had an annual employment contract that stated that the School's mission was "to develop and promote a Catholic School Faith Community", and that her duties as a teacher were to be "performed within this overriding commitment." *Our Lady of Guadalupe School v. Morrissey-Berru* (2020), slip op. at 8. The contract further stated that the School's review of her performance would be guided by its Catholic mission, and that teachers were expected to "model and promote" Catholic "faith and morals",

and to be "responsible for the faith formation of the students . . . each day." *Our Lady, supra,* slip op. at 8. Ms. Morrissey-Berru was also expected to teach her students certain prayers, to lead them in prayer and to pray with them, to take them to Confession and Mass, and to provide religious instruction every day. *Id.*, slip op. at 9. As pointed out in the dissent, however, Ms. Morrissey-Berru was not herself a Catholic, she had no training in Catholic pedagogy, and she only received some course instruction on the history of the Catholic Church "many years" after she had begun teaching at the School. The contract described her as a "lay employee", and the teacher handbook said that the School promised not to discriminate on the basis of race, sex, disability, or age. Ms. Morrissey-Berru was in her sixties when her contract was not renewed, and the School never gave a religious reason for doing so. *Id.*, slip op. at 49-50 (Sotomayor, J., dissenting).

The teacher in the second case, Kristen Biel, had worked for a half-year as a substitute 1st grade teacher and then a full year as a full-time 5th grade teacher at St. James School, a Catholic primary school in Los Angeles. Ms. Biel had a B.A. in liberal studies and a California teaching credential, but no additional formal schooling in religion, other than attending a half-day conference on "techniques on teaching and incorporating God" into the classroom. She was a Catholic, but as was the case with the other School, there was evidently no requirement that the lay teachers at the School be Catholic. *Id.*, slip op. at 11. Her employment contract with St. James was in all material respects the same as Ms. Morrissey-Berru's. Ms. Biel was required to teach religion for 200 minutes a week and to administer a test on religion every week. She also opened and closed every school day with her students in prayer, and was responsible for preparing her students to be active participants in the Catholic Mass. *Id.*, slip op, at 12-13. But again, as emphasized in the dissent, Ms. Biel did not actually "lead" the students in prayer; that was done by student "prayer leaders". Although she joined her students for a monthly Mass, officiated by a priest, her sole responsibility appears to have been "to keep her class quiet and orderly". *Id.*, slip op. at 47-48 (Sotomayor, J., dissenting).

Near the end of Ms. Biel's second year of teaching, she was diagnosed with breast cancer, and asked for a leave of absence in order to obtain medical treatment. The School, however, declined to renew her contract, allegedly on the basis of poor classroom performance: "a failure to observe the planned curriculum and keep an orderly classroom." *Id.*, slip op. at 13. The dissent suggests that the School never stated a religious reason for her termination. In any event, Ms. Biel then brought a disability discrimination claim against the School.

In each case, the defendant School raised the "ministerial exception" defense, and in each case, the District Court agreed, dismissing both cases at the summary judgment stage. Each of the two plaintiffs appealed the dismissal of her case to the Ninth Circuit Court of Appeals, and in each case, the Court of Appeals reversed, concluding that the "ministerial exception" did not apply.[3] The Court of Appeals found several factors important in determining that the Schools could not avail themselves of the "ministerial exception" to avoid liability under the federal antidiscrimination laws. Moreover, the Court of Appeals in each case purported to be following the lead of the Supreme Court in *Hosanna-Tabor* in identifying and focusing on these factors, and in using those factors to distinguish these two teachers from the Lutheran Evangelical teacher in that case. First, unlike the teacher in *Hosanna-Tabor*, neither one of the teachers was referred to as a "minister", and neither one of them self-identified as a "minister" or held herself out as being the equivalent of a minister. Second, the two teachers received religious training and instruction that was significantly less rigorous and exhaustive than the training received by the teacher in *Hosanna-Tabor*, whose formal religious training required years to complete. Third, the religious component of the two teachers' classroom duties, and their overall responsibility for the spiritual nurturing of their students was comparatively less than was the teacher's in *Hosanna-Tabor*.

The two schools sought further review in the Supreme Court, where the two cases were consolidated. Justice Alito wrote an opinion for a 7-2 majority, and reversed the two Court of Appeals' rulings, reinstating the dismissals of the discrimination claims against the schools on the basis of the "ministerial exception" rule. The Court was critical of the Court of Appeals' overly rigid analysis of the facts, which, it concluded, "produced a distorted analysis." *Our Lady, supra*, slip op. at 26-27. The Court faulted the lower court for over-emphasizing the fact that neither one of the two teachers were referred to as "ministers". It was more relevant that "[t]hey were Catholic elementary school ***teachers***, which meant that they were their students' primary teachers of religion." *Id.*, slip op. at 27 (emphasis in original). The Court also criticized the Court of Appeals for assigning too much weight to the relatively informal religious training that the two teachers had received, as compared to the teacher in *Hosanna-Tabor*. "The schools in question here thought that Morrissey-Berru and Biel had a significant understanding of Catholicism to teach

[3] The Court of Appeals decisions can be found at *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 Fed. App'x 460 (9th Cir. 2019), *reversing* 2017 WL 6527336 (C.D. Cal. 2017), and *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018), *reversing* 2017 WL 5973293 (C.D. Cal. 2017).

their students, and judges have no warrant to second-guess that judgment or to impose their own credentialing requirements." *Our Lady, supra,* slip op. at 28.

The Court was also unpersuaded by the fact that the two teachers' involvement in their students' spiritual lives may not have been as "close" as was the case in *Hosanna-Tabor*, or that neither school required their lay teachers to be "practicing Catholics". Justice Alito summarized the Court's ruling in these words, which echoed his prior advancement of a functional approach to determining those church employees who may properly be considered "ministers" for purposes of applying the ministerial exception:

> [W]e declined to adopt a "rigid formula" in *Hosanna-Tabor*, and the lower courts have been applying the [ministerial] exception for many years without such a formula. Here, as in *Hosanna-Tabor*, it is sufficient to decide the case before us. When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.

Id., slip op. at 30-31.

This is a broad, potentially far-reaching standard. As a practical matter, it encompasses a much wider circle of church personnel than what we might conventionally call "ministers", or even the sort of "called" or "commissioned" teacher who was the subject of the *Hosanna-Tabor* case, and gives broad leeway to churches and other religious institutions in making personnel decisions without reference to state or federal employment discrimination laws.

The principal takeaway for claims professionals who are tasked with adjusting or defending employment discrimination claims brought against insured churches or other religious institutions is that the *Hosanna-Tabor* and *Our Lady of Guadalupe* cases provide those defendants with a potent line of defense. Irrespective of whether a factual claim against an insured religious institution might state an otherwise valid cause of action under our employment discrimination laws, were they to be asserted against a secular institution, if the claimant can fairly be defined as coming within the functional parameters of the "ministerial exception" rule, then that claim cannot survive a motion to dismiss or for summary judgment.

There are some practical considerations to keep in mind in assessing whether the "ministerial exception" might be a viable defense in an employment discrimination case brought against an insured church, church school, church camp or retreat or recreational center, church-run hospital or drug and alcohol treatment center, church-associated nursing home or rehabilitation facility, or literally any other religious institution:

- How is the claimant's job described, irrespective of whether the word "minister" is used? Is there an employment contract or a job description? If the job is described in terms that include a religious component, either in terms of what the job itself entails, or in terms of the employee's personal conduct, an argument might be made that the position should be covered by the ministerial exception.

- Is there a periodic performance review of the employee in question? If so, does it include a review of the employee's responsibilities regarding the religious component of his/her job?

- What is the "teaching" component of the employee's position? The two Supreme Court cases described above involved schoolteachers in a fairly conventional sense. But what about coaches? Guidance or vocational counselors? Administrators? Music or drama or other extracurricular instructors?

- What credentials are required for the employee in question? Is there any requirement that the employee have a degree or other formal training in religious subjects? The formal religious training of the teachers in *Our Lady of Guadalupe* was, frankly, minimal, but was among the considerations identified by the Court as being relevant.

- How does the employee hold him/herself out to the community at large? Is there any sense that the employee considers him/herself to be engaged in a spiritual or religious undertaking, even if the job duties themselves appear to be almost entirely secular?

- Who are the employee's supervisors? Is the employment setting administered by members of the clergy? Does the employee report directly to clergy or to a lay administrator?

- Is the employee in question required to be a member of the faith community that employs him or her? Federal law permits religious employers to give hiring preferences to members of a particular faith, and while not necessarily dispositive, it is at least some evidence that the faith-based, spiritual attributes of the employee are considered to be important to the position for which that person was initially hired.

- Are religious celebrations, rituals, or ceremonies made a part of the employee's job, even if the employee is not the actual celebrant? This component appears to have been important to the Court in connection with all of these cases, regardless of how active the employee's role was in connection with those activities.

- Does the employer have a religious reason for the termination or other adverse employment action? Chief Justice Roberts, writing for the Court in the *Hosanna-Tabor* case, stated that the purpose of the ministerial exception "is not to safeguard a church's decision to fire a minister only when it is made for a religious reason." *Hosanna, supra,* 565 Mass, at 194, 132 S. Ct. at 709. But if a church does set forth a religious reason for a termination, a civil court may be more likely to hold that up as evidence that the employee's position was "ministerial".

My overall advice is to be aggressive in using the ministerial exception to attempt to shield religious employers from employment discrimination claims. The Supreme Court has shown a clear willingness to apply the exception in a broad-based way, and the decisions have not been close (9-0 and 7-2). Most cases will probably require a well-briefed motion for summary judgment in order to prevail on the defense, but if the outlines of the defense present themselves at the outset of a case, a carefully designed, efficient discovery plan should succeed in establishing the factual basis needed in order successfully to assert the defense.

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