

U.S. Supreme Court Holds Ministerial Exception Is Defense to Employment Discrimination Claims

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Religious organizations and those they employ have anticipated guidance from the U.S. Supreme Court's first opinion addressing the ministerial exception in the employment discrimination context. With its January 11, 2012, decision in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, U.S., No. 10-553, the Court clarified that the First Amendment's Establishment and Free Exercise Clauses bar the government from interfering with the "decision of a religious group to fire one of its ministers." The Court recognized the "interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." Consequently, the Religion Clauses of the First Amendment give religious organizations the freedom to select their own ministers, and they trump employment discrimination laws.

Cheryl Perich was a teacher at Hosanna-Tabor Evangelical Lutheran Church and School ("Church"), regarded as having been "called" to her vocation by God through a congregation, and titled a commissioned minister. In addition to teaching a curriculum of primarily secular subjects, she spent approximately 45 minutes each day teaching a religion class and leading students in daily prayer or devotional exercises. Perich also took her students to a weekly school-wide chapel service, which she herself led twice per year. In 2004, Perich developed narcolepsy and was unable to work for a period of time. When she expressed interest in returning to work in early 2005, she was informed that her position had been filled. Perich later visited the school and refused to leave, telling the principal that she intended to assert her legal rights. Her employment ultimately was terminated on the basis of "insubordination and disruptive behavior," as well as damage to her working relationship with the school. Perich filed a charge of discrimination against the Church with the Equal Employment Opportunity Commission ("EEOC"), alleging that she had been discharged because of a disability, in violation of the Americans with Disabilities Act. Following investigation and the issuance of a "cause" finding, the EEOC initiated a lawsuit against the Church on Perich's behalf.

The Church moved for summary judgment on the ground that the suit was barred by the First Amendment's ministerial exception, which generally allows religious employers to avoid liability for discrimination when making employment decisions concerning employees who qualify as "ministers." The U.S. District Court for the Eastern District of Michigan granted the motion, but the U.S. Court of Appeals for the Sixth Circuit vacated and remanded the case back to the district court. Noting that Perich's duties as a called

teacher were identical to duties of a lay teacher, the Circuit Court opined that Perich did not qualify as a “minister,” and, thus, the Church could not benefit from the immunity granted under the ministerial exception. The Supreme Court reversed, holding that “[b]ecause Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of [her] employment discrimination suit against her religious employer.” The Supreme Court’s decision clarifies a number of issues that previously had resulted in a circuit split and differing opinions among the lower courts.

For the first time, the Supreme Court held that “there is a ministerial exception grounded in the Religion Clauses of the First Amendment.” Opining that “[t]he church must be free to choose those who will guide it on its way,” the Court held that requiring a church to retain a minister goes far beyond an employment decision and intrudes upon its inherent rights under the Establishment and Free Exercise Clauses.

The Court clarified that “the ministerial exception is not limited to the head of a religious congregation.” Although it declined to “adopt a rigid formula for deciding when an employee qualifies as a minister,” the Court provided guidance on the factors that it found important in determining that Perich was a minister. The Court emphasized the following facts: (1) the Church held Perich out as a minister and periodically reviewed her skills of ministry and ministerial responsibilities; (2) Perich’s title as minister reflected a significant degree of religious training followed by a formal process to become a commissioned minister; (3) Perich held herself out as a minister, including claiming a special housing allowance on her taxes that was available only to ministers; and (4) Perich performed important religious functions for the Church, as her job duties reflected a role in conveying the Church’s message and carrying out its mission (for example, Perich taught her students religion four days a week and led them in daily prayer and devotion). The Court further clarified for religious employers that an employee’s title matters and that performance of secular duties along with religious duties does not abrogate the ministerial exception. It did not matter that Perich’s religious duties consumed only 45 minutes of each workday while the rest of her day was devoted to teaching secular subjects.

The Court also responded to the EEOC’s argument that the Church’s asserted *religious* reason for firing Perich was pretextual and that she really was fired because of her disability, and, therefore, the ministerial exception could not apply. It explained that the ministerial exception “ensures that the authority to select and control who will minister to the faithful . . . is the church’s alone”; thus, a religious organization need not assert a “religious reason” for its challenged employment action.

Procedurally, the Court clarified that the ministerial exception is an affirmative defense to an employment discrimination claim, not a jurisdictional bar, explaining that the issue presented by the ministerial exception is “whether the allegations the plaintiff makes entitle him to relief,” not whether a court has the “power to hear [the] case.” Thus, under *Hosanna-Tabor*, lower courts continue to have the power to consider employment discrimination claims brought against religious employers and to decide whether the claim can proceed or is, instead, barred by the ministerial exception.

Implications Beyond Discrimination Cases

Although the *Hosanna-Tabor* decision provides some welcome guidance for religious employers on issues that, to date, have been subject to differing lower court interpretations, the Court specifically declined to express any “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.” In some employment contexts, however, the contract and tort claims may be so rooted in the religious organization’s governing documents, bylaws, principles, policies, or procedures – or implicated by them – that the ministerial exception defense may be particularly compelling.

What Employers Should Do Now

- 1) Review ongoing litigation and administrative matters with legal counsel to ensure that, where appropriate, the ministerial exception is asserted as an affirmative defense.
- 2) Review the job descriptions of any employees performing ministerial/religious duties to ensure that the descriptions accurately portray the religious duties of the position, even if they account for only a small portion of the daily responsibilities, and the religious educational requirements for the job.
- 3) Identify governing documents, bylaws, principles, policies, or procedures of the religious organization that govern the employment relationship or the evaluation of performance.
- 4) Document any authorization or approval required from a religious organization’s governing body, committee, or congregation to create the employment relationship or to continue employment in the position.
- 5) Ensure that job postings and vacant position advertisements clearly set forth religious education requirements for the position, including any requirements that the position be ordained, commissioned, etc.; the religious duties to be performed; and the position’s role in conveying the religious organization’s message and carrying out its mission.
- 6) Obtain appropriate confirmation that individuals accepting or holding ministerial positions are conveying the religious organization’s message and carrying out its mission.
- 7) Ensure that documentation concerning the termination of religious organization workers includes, where relevant, reference to the organization’s right to choose and retain its own leaders to minister to the faithful.
- 8) Continue to train managers and decision-makers regarding compliance with applicable laws, including discrimination laws, understanding that the *Hosanna-*

Tabor decision does not provide a *carte blanche* defense to all legal challenges to adverse employment actions by employees of religious organizations.

- 9) Recognize that some challenges to adverse employment actions may be asserted by ministerial employees in a forum allowed by the religious organization or otherwise available to an employee – outside of a secular judicial or administrative arena – in a manner that does not implicate the First Amendment’s Establishment and Free Exercise Clauses.

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