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Harassment Claim by Gay Church Employee Not Barred by Ministerial Exception

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By **Jeffrey Campolongo** | September 17, 2020

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The intersection of employment laws never ceases to amaze me. The last two articles this column (https://www.law.com/thelegalintelligencer/2020/06/18/impact-of-scotus-decision-on-lgbtq-rights-at-the-state-and-local-level/) addressed dealt with sexual orientation becoming a protected class (finally!) and

the ministerial exception for religious institutions under Title VII (https://www.law.com/thelegalintelligencer/2020/07/23/high-court-catholic-teachers-deemed-ministers-bars-discrimination-suits/). Naturally, it should surprise no one that the current topic du jour is an amalgam of those two recent U.S. Supreme Court decisions.

In this month's episode of "where do we go from here," we take a look at a decision from the U.S. Court of Appeals for the Seventh Circuit, which allowed a sexual harassment suit by a gay, music director for a Catholic church, to go forward. See *Demkovich v. St. Andrew the Apostle Parish*, No. 19-2142, (7th Cir. Aug. 31, 2020).

Sandor Demkovich was the music director at St. Andrew the Apostle Parish, a Catholic church in Calumet City, Illinois. Demkovich alleged that he was subjected to hostile comments and epithets regarding his sexual orientation, weight and medical issues. He was fired in 2014. Demkovich, who is gay, had been with his partner (now husband) for over a decade. Demkovich alleged that his supervisor, Rev. Jacek Dada, repeatedly and often subjected him to comments and epithets showing hostility to his sexual orientation, and increased the frequency and hostility after learning that Demkovich intended to marry his partner and again as the date of the ceremony approached. According to the opinion, after Demkovich was married, Dada demanded Demkovich's resignation because his marriage violated Church teachings. Demkovich refused, and Dada then fired him.

At the time Demkovich initiated his claims, there was no federal statutory protection for discrimination or harassment based on sexual orientation. That obviously changed with the U.S. Supreme Court's landmark decision that held that discrimination on the basis of sexual orientation amounts to discrimination based on sex, generally prohibited in employment under Title VII of the Civil Rights Act of 1964. See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). In his federal complaint Demkovich sued the St. Andrew the Apostle parish and the Archdiocese of Chicago asserting hostile environment claims under both Title VII and the Americans with Disabilities Act. The church moved to dismiss for failure to state a claim, invoking the ministerial employee exception. See *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). The district court granted the motion in part, dismissing the Title VII claim but allowing the ADA claim to proceed.

While the district court's decision preceded the Supreme Court's interpretation of the ministerial exception by almost two years, the argument advanced by the church in the lower court was essentially that "any claim brought by a minister against a church is barred by the ministerial exception." See *Demkovich v. St. Andrew the Apostle Parish*, 343 F. Supp. 3d 772, 779 (N.D. Ill. 2018). The district grappled with this broad sweeping interpretation and drew a distinction between claims involving tangible employment actions (i.e., termination) versus claims without tangible employment action (i.e., hostile work environment). Notwithstanding this distinction, the district court dismissed the hostile work environment claims that were based on Demkovich's sexual orientation.

The Seventh Circuit resurrected the claims and noted that religious organizations are not totally exempt from all legal claims by ministerial employees. The court recognized that ministerial employees may be able to sue their employers and supervisors for at least some breaches of contract and for torts, including those committed in an employment relationship. While the defendants argued that the First Amendment categorically bars all claims under federal discrimination statutes, the court said not so fast. The court reasoned that religious organizations can select and control their ministers through tangible employment actions (hiring and firing), without the need for harassing behavior. Hostile work environment claims, on the other hand, might still entangle the court in ministerial issues, but the risk of entanglement was not so great as to prohibit all hostile work environment claims by ministerial employees.

The court explained that the ministerial exception ensures that religious organizations are able to “select and control” their ministers without interference from civil law like employment discrimination statutes and their procedures for enforcement. That purpose, the court said, can be accomplished by applying the ministerial exception to all tangible employment actions, which give religious employers ample tools to both select and control their ministerial employees.

“Selection is clear enough. Hiring, firing, promoting, retiring, transferring—these are decisions that employers, including religious organizations, make to select those who carry out their work. Further control is available through a host of other tangible employment actions, including decisions about compensation and benefits, working conditions, resources available to do the job, training, support from other staff and volunteers … the list could go on” wrote the majority. The decision was 2-1.

Labeling hostile environment claims essentially tortious in nature, the court drew distinction between employment decisions that are made or caused by the employer, as opposed to behavior that creates a hostile environment which is not essential for management supervision and control of employees. Hostile environment claims are different because they concern the behavior of individual co-workers and/or supervisors that is generally treated as outside the scope of employment.

So, what we thought we learned from the Supreme Court in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) about a religious institution’s constitutional right to self-govern, we now know has its limits. Harassment claims are not barred. Traditional discrimination claims are barred. This can create a myriad of uncertainty in enforcement. Take, for example, someone who is harassed to the point where he has no alternative but to resign. Such as the case in a constructive discharge. There, the tangible employment action is the constructive discharge. Applying the court’s logic here, such a claim should be barred because it’s in the nature of a traditional discrimination claim.

Stated another way, a harassed employee who is forced to quit has no recourse, but the one who sucks it up and tolerates it can sue and get around the ministerial exception. Huh? It’s not clear how that makes much sense. To the harassed employee, the pain, humiliation and stigma of being harassed is no different whether you suck it up and stay versus resigning. I can certainly understand the court’s rationale for allowing certain employment claims to go forward. What I do not understand is why an artificial distinction should determine the fate of the claim. At some point, it is very likely this issue will need to be resolved by the Supreme Court.

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