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## Employment Law

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# Justices Agree to Hear Bias Case, 'Ministerial Exception' Issue

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Jeffrey Campolongo

As a general matter, courts try to stay out of employment discrimination cases filed against religious organizations. Originally, Title VII of the Civil Rights Act of 1964 shielded religious organizations from religious discrimination claims by employees. Later, courts adopted the idea of a "ministerial exception" to protect religious organizations from most employment discrimination lawsuits by employees who perform religious functions. The reason for this is the concern that getting involved with employment policies and decisions would run afoul of the First Amendment bar on excessive government entanglement with religion.

The ministerial exception has been applied to any employee of a religious organization that provides services to the employer in some sort of religious capacity.

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The ministerial exception applies only to employees performing religious functions, but it bars all employment-law claims. Questions have traditionally centered on whom the ministerial exception applied to, and how it should be applied. These questions have been answered inconsistently across the circuit courts.

On March 28, the U.S. Supreme Court granted certiorari in *Hosanna-Tabor Church v. EEOC*, which will hopefully determine when religious organizations

are exempt from the requirements of Title VII, the ADA and the ADEA. Specifically at issue in *Hosanna* is whether the exception bars a discrimination claim by a parochial school teacher who teaches non-religious subjects while also participating in the religious activities of the school.

Cheryl Perich worked at Hosanna-Tabor Evangelical Lutheran Church and School in Michigan as a "called" teacher. To become a called teacher, Perich was required to complete college training in Lutheran theology and to be declared prepared for ministry. Called teachers were hired by a vote of the church congregation and could not be dismissed without cause. The school also hired teachers without these religious training requirements.

According to Hosanna's petition, Perich took a medical leave of absence when she became ill with narcolepsy. She had planned to be absent for an entire school year, but her doctor released her to work early. When Perich informed the school of this, they refused to allow her to return, citing the instability it would cause for the students to change teachers at that point, and citing safety concerns for the children in light of her medical condition. Perich threatened legal action if she was not restored to her position. A month later she was terminated for what the school board considered to be insubordination and disruptive behavior. Perich filed a complaint with the EEOC, which then filed a lawsuit against Hosanna on Perich's behalf, alleging retaliation in violation of the ADA.

The Eastern District Court of Michigan awarded summary judgment to Hosanna in 2008, based on the ministerial

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exception, in *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*. The district court was of the opinion that analyzing whether the church was correct in its view of the religious significance of the called teachers would potentially lead to second-guessing a religious organization's decisions and beliefs, which would violate the First Amendment.

The petition describes the religious duties and significance of Perich's position. Perich was subject to the same policies and disciplinary procedures as the church pastor, and she was authorized to claim a housing allowance for ministers on her federal income taxes. She was expected to serve as a "Christian role model" and to "integrate faith into all subjects." She taught religion classes four days a week, led students in daily devotional exercises, led students in prayer three times a day and attended chapel service with her students.

The 6th U.S. Circuit Court of Appeals, however, vacated the lower court's decision in March 2010, finding Perich's primary duties to be non-religious in nature. (See *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*.) The school hired teachers who were not "called" and who were not Lutheran, and teachers were not required to conduct religious activities. Teachers used standard, secular textbooks and were required to teach standard, secular subject matter. The 6th Circuit considered the majority of Perich's time to be spent performing secular duties, therefore the exception should not apply.

The petition requests clarification on when the exception is to be applied, and how to apply it. The Supreme Court's decision is expected to clear up a significant amount of uncertainty and confusion as to when employees of religious organizations can expect a claim of discrimination to be heard. The federal circuit courts have been in conflict for years about how they should determine the boundaries of the ministerial exception, causing conflicting results.

According to the petition, four circuits, including the 3rd Circuit, have adopted the "primary duties" test that was used by the 6th Circuit in *Hosanna*. In the "primary duties" test, the court determines whether the employee's primary duties were primarily religious or secular and whether the employee is essential to the spiritual mission of the organization. But even those circuits that agree on using this test do not always apply it in the same way.

The petition says that four of the circuits have rejected this test, because it is too arbitrary in how it evaluates an employee's position or too rigid in what it will consider. And the application of the test can be viewed as being an entanglement in religion by itself, as it requires the court to determine to what extent religious beliefs and responsibilities were involved in an employee's primary duties — and what the "primary" duties were. Instead, these courts generally look at all of the job duties the employee performs and view them in light of the underlying employment dispute. The rest of the circuits have not specifically opined on "primary duties" test and use varying methods of analysis on a case by case basis.

Any Supreme Court comment on this debacle is welcome. Even with the 3rd Circuit using the "primary duties" test, it is still difficult to advise a client as to whether he or she has a viable employment discrimination claim. The test is not clear on what employees it applies to, so it is difficult to advise individuals of their rights since it can be impossible to determine whether certain laws apply until the court decides what it thinks the "primary duties" of the employee are.

Religious organizations have a First Amendment right to, among other things, choose their teachers. But, it is unclear how far this exception goes. Presumably the courts did not mean to risk irresolvable civil rights violations by providing religious organizations a total blanket exception to the laws, so there needs to be some guidance on how to apply the ministerial exception. •

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