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Does the Ministerial Exception Apply to Hostile Work Environment Claims?

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There is no longer any doubt that the ministerial exception exists, and courts and litigants now have more detailed guidance as to who is a minister, thanks to the Supreme Court's decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe*. But what is less clear and is now subject to litigation is the kinds of claims to which

the ministerial exception applies. The two cases from the Supreme Court on the ministerial exception addressed whether the ministerial exception applied to termination of certain teachers at religious schools. In the course of holding that it did, the Court in *Our Lady* made clear that "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." This ministerial exception recognizes that "a church's independence . . . requires the authority to select, supervise, and if necessary, remove" certain key employees "without interference by secular authorities," as the Court explained in *Our Lady*. Those decisions, however, did not directly address whether the ministerial exception would apply to a minister's claim of a hostile work environment, rather than wrongful termination.

Earlier this week, the Seventh Circuit heard en banc the case of *Demkovich v. St. Andrew the Apostle Parish*, which raises this precise issue. There, a parish music director, who conceded that he is a ministerial employee, first filed suit based on wrongful termination. The court dismissed it based on the ministerial exception. He then repackaged his claims as based on "hostile work environment" rather than wrongful termination or some other "tangible" employment action. The panel held that the ministerial exception did not apply and adopted a rigid categorical distinction between discriminatory employment claims based on hostile work environment and those based on firing or other "tangible employment actions." Because the allegations were all speech-based, the panel emphasized that the music director's boss, "Reverend Dada[,] could have chosen to express Church doctrine on same-sex marriage, or to exercise his supervisory powers, in non-abusive ways that would not add up to a hostile environment." The panel's approach effectively would involve courts in policing how a higher positioned individual in the church hierarchy expresses himself to his subordinate.

The Becket Fund for Religious Liberty successfully sought en banc review, and many amicus briefs were filed on each side. I am counsel of record on an amicus brief filed in support of petition for rehearing en banc, representing Profs. Robert F. Cochran, Jr., Teresa Collett, Carl H. Esbeck, Richard W. Garnett, Michael P. Moreland, Robert J. Pushaw, and Eugene Volokh. My colleagues and I previously wrote about some of the arguments raised in our brief and rejoinders by other amicus briefs.

In the course of an hour-long oral argument, a few notable themes emerged. First, Demkovich's attorney kept referring to the ministerial exception as a statutory bar to the suit. Judge Diane Sykes finally corrected him, pointing out that the ministerial exception is constitutional, not statutory. That is a crucial distinction, which means that Congress cannot abrogate it through legislation and that its scope must be determined by reference to the understanding at the time of the adoption of the First Amendment. Indeed, this is what the Supreme Court said in *Hosanna-Tabor*.

Second, Demkovich's attorney repeatedly categorized the ministerial exception as merely an affirmative defense belonging to the Church. This is too narrow. To be sure, it is not a jurisdictional bar, as *Hosanna-Tabor* noted. But the ministerial exception has a structural component as well. As Professor Paul Horwitz has observed in a law review article in 2013, it is about "recogniz[ing] the limits of the state and the separate existence of the church." This prevents courts from meddling in religious affairs or controversies. And so, several courts of appeals, such as the Third and Sixth Circuits (on two separate occasions), have explicitly recognized that structural component, and they have held that a failure to raise this defense at the outset does not result in a waiver and that a court can raise it sua sponte. This is also an important distinction: Demkovich's narrower version would disregard the harm – to religious organizations and to courts – from having the latter entangled in religious disputes or internal affairs.

Third, surprisingly, Judge Frank Easterbrook pursued a lengthy line of questioning about whether the appropriate line is whether a religious justification is necessary for the church's action. Not surprisingly, Demkovich's attorney was embracing this suggestion and also emphasizing that a church must assert with specificity how the conduct alleged was religiously motivated. As Judge Sykes said later in the argument, however, *Hosanna-Tabor* clearly held that a religious justification is not necessary as it would miss the point of the ministerial exception.

Fourth, some judges posed hypotheticals about workplace abuse between a minister (e.g., a teacher at a religious school) and a student or a parent. Judge Sykes again correctly pointed out that the limiting principle for the ministerial exception is relationships between ministers. So the ministerial exception would not apply to situations where the person bringing the action is not a minister or when a minister brings an action against those not within the church or its hierarchy (e.g., students or parents).

Fifth, there were quite a few questions about the availability of other remedies – whether tort or criminal – if the court were to hold that the ministerial exception applies to hostile work environment claims. There were several suggestions that the ministerial exception would not apply to tort claims. The Supreme Court has left this question open. As it said in *Hosanna-Tabor*, "[w]e 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." And while it is correct that the exception would not apply to certain tort claims (discussed in the aforementioned amicus brief and *National Review* article), whether the ministerial exception may apply to at least some tort claims remains an open question. For example, in *McRaney*, several judges dissented from a denial of rehearing en banc by the Fifth Circuit, on this precise issue. It would not be surprising if the Supreme Court weighed in on this issue soon.

In the meantime, the Seventh Circuit's decision will have important and far-reaching consequences for how ministerial exception is interpreted and applied.

The views and opinions set forth herein are the personal views or opinions of the author; they do not necessarily reflect the views or opinions of the law firm with which she is associated.

Victoria Dorfman