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En Banc Seventh Circuit to Hear an Important Church Autonomy Case in *Demkovich v. St. Andrew the Apostle Parish*

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Can a former parish music director sue the Archdiocese of Chicago for a parish priest's supposedly "offensive" speech about plaintiff's sexuality and other matters? Or does the First Amendment's ministerial exception — which protects religious autonomy by barring secular authorities from interfering in a church's selection and supervision of ministers — preclude this type of "hostile work environment" claim? On February 9, the *en banc* Seventh Circuit is poised to consider this important issue of religious liberty, in *Demkovich v. St. Andrew the Apostle Parish*.

The Supreme Court unanimously recognized the ministerial exception in 2012 in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*. Last year, in *Our Lady of Guadalupe v. Morrissey-Berru*, the Court held 7–2 that the exception applied to two lay parish school teachers, reaffirming that "a church's independence on matters 'of faith and doctrine' requires the authority to select, supervise, and if necessary, remove" this type of key religious employee "without interference by secular authorities."

In *Demkovich*, the question is not "who" but "what." The plaintiff concedes the ministerial exception applies because he was a minister of the church, and his case was previously dismissed because his suit contested termination. So he repackaged the allegations to claim a "hostile work environment" based on allegedly offensive remarks by the priest who supervised him. He contends that the First Amendment does not bar this claim, because he says that allowing the church to be sued for a "hostile work environment" will not interfere with religious autonomy.

A divided Seventh Circuit panel agreed, holding 2–1 that the ministerial exception bars discrimination claims only if they involve "tangible" employment decisions such as the hiring or firing of religious personnel, not "intangible" employment actions such as those that create a hostile work environment. Judge Joel Flaum dissented, explaining that under the Supreme Court's decisions in *Hosanna-Tabor* and *Our Lady*, the ministerial exception must bar hostile-work-environment claims because "The Church's First Amendment right to select and control its ministers includes the ability to supervise, manage, and communicate with them free from government interference." The Becket Fund for Religious Liberty filed a petition for rehearing en banc on behalf of the Archdiocese, warning that the panel's decision, if left in place, would eviscerate the ministerial exception by allowing ministers to simply repackage barred discrimination claims as hostile-work-environment claims. The Seventh Circuit granted rehearing en banc, vacating the panel's decision.

At the petition for rehearing en banc stage, we filed an amicus brief on behalf of a group of religious-liberty scholars explaining that while abusive actions committed against a minister could in some instances be pursued by ordinary tort claims, the First Amendment should bar claims of discriminatory hostile work environments. This is because such Title VII claims differ from ordinary tort claims in two important respects. First, unlike ordinary tort claims, hostile-work-environment claims often require courts to probe

the alleged wrongdoer acted with a discriminatory intent. Second, hostile-work-environment claims typically arise out of allegedly offensive *speech* rather than objectively harmful *conduct*.

Amici on the other side disagree. For example, Lambda Legal filed a brief arguing that certain tort claims, such as intentional infliction of emotional distress, are like hostile-work-environment claims because they involve subjective inquiries into the offender's state of mind and, oftentimes, pure speech. But that misses the point for two reasons.

First, it would be a mistake to conclude that the ministerial exception *never* applies to *any* tort or contract claim. In *Hosanna-Tabor*, the Supreme Court reserved judgment on the issues. And in *Lee v. Sixth Mt. Zion Baptist Church*, where we filed an amicus brief supporting the church, the Third Circuit agreed that the ministerial exception bars certain breach of employment contract claims. Many courts before *Hosanna-Tabor* also took the same view. But because no tort or contract claims have been raised in *Demkovich*, the en banc Seventh Circuit need not resolve these issues. It may, like the Supreme Court in *Hosanna-Tabor*, decide to leave them for another day.

That said, the principles of religious autonomy set forth in *Hosanna-Tabor* and *Our Lady* certainly support applying the ministerial exception to some tort and contract claims that would infringe on the First Amendment. For example, if the minister in *Demkovich* had sought relief for intentional infliction of emotional distress based purely on the same allegedly offensive speech that gave rise to his hostile-work-environment claims, that tort claim should be barred by the ministerial exception for the same reasons his discrimination claim is barred: It would intrude on the Archdiocese's religious autonomy by inviting civil courts to police how the church communicates with its ministers. Put another way, the First Amendment does not allow courts to adjudicate a claim brought by a bishop against his cardinal for expressing church teaching in a manner that the bishop (or a jury) might deem offensive — regardless of whether such a claim is based in tort or discrimination law.

Second, contrary to the suggestion made in another amicus brief, we do not argue that the "ministerial exception generally bar[s] any consideration of a religious actor's mindset." Rather, we contend that the First Amendment bars judicial scrutiny of whether the *motivations* or *reasons* behind a church's interactions with its ministers are "legitimate" or "discriminatory." That inquiry arises in many claims alleging a discriminatory hostile work environment, but is absent from most (if not all) tort claims. Of course, all intentional torts require that the defendant's conduct be *intentional* as opposed to accidental, and some intentional torts (such as intentional infliction of emotional distress) require that the conduct be committed with a specific intent to cause harm. But in many hostile-environment cases, the claim turns not only on *whether* the act or the harm was intentional, but also *why* the defendant acted in the first place — i.e., whether the underlying *motive* was discriminatory or legitimate. And this intrusive inquiry requires courts and juries to analyze whether the discriminatory motive permeated the entire church-workplace "environment." As our brief explains, this latter inquiry raises First Amendment concerns because it invites judicial scrutiny of a church's proffered justifications for how it treats its key religious

"would dangerously undermine the religious autonomy that lower court case law has now protected for nearly four decades." Such scrutiny is not implicated in a claim of intentional infliction of emotional distress, which asks only *whether* the defendant intended to cause harm, not *why*.

In short, claims alleging a discriminatory "hostile work environment" are a species of discrimination claim similar to those the Supreme Court has already held are barred under the First Amendment because they interfere with church autonomy, at least when asserted by key religious personnel. That principle should decide the *Demkovich* appeal in the Seventh Circuit and should enjoy broad support at the Supreme Court if and when the issue reaches that level.

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

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