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Ninth Circuit and California Court of Appeals Rule on Freedom of Religion Rights

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Sauce for the goose is sauce for the gander? Not necessarily. The Ninth Circuit and California Court of Appeals recently decided two cases that substantially limit the scope and application of freedom of religion rights rooted in the U.S. Constitution. Together, these cases narrow the definition of the term "minister," and expand the spectrum of employment law claims which may be brought against a religious employer. This new interpretation of freedom of religion rights may be difficult to reconcile with existing law from the U.S. Supreme Court which bars a minister from bringing employment discrimination claims against a religious employer.

In 2012, the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, confirmed the existence of a "ministerial exception," rooted in the U.S. Constitution, which broadly prohibits a minister, and certain other types of religious employees, from bringing employment discrimination claims against a religious employer. Although recognizing the importance of employment discrimination laws, the Court reasoned that giving judges "the power to determine which individuals will minister to the faithful [] violates the Establishment Clause" of the Constitution, and that this power "is the church's alone." However, the court did not decide whether a minister could bring other types of employment claims, and refused to adopt a rigid formula for determining when an employee qualifies as a minister. Instead, the court left religious employers this prosaic verse: "[t]here will be time enough to address the applicability of the [ministerial] exception to other circumstances if and when they arise." That time may be now.

Sumner v. Simpson University

In *Sumner v. Simpson University*, 27 Cal.App.5th 577 (2018), the plaintiff, a former dean, filed a lawsuit against the defendant, Simpson University, alleging breach of employment contract, defamation, invasion of privacy and intentional infliction of emotional distress, after her employment was terminated for "insubordination." The university moved for summary judgment against the plaintiff's claims, alleging that the plaintiff qualified as a minister, the university a religious employer and, therefore, the plaintiff's employment claims were barred by the ministerial exception. The trial court agreed, granting summary judgment in favor of the university.

On appeal, the California Court of Appeals reversed in part, holding that a minister could sue a religious employer for breach of employment contract. The court based its decision on two rationale: first, the reason for the plaintiff's termination, insubordination, could be evaluated based on "neutral principles of law" and "did not require the court to reach into church doctrine and polity"; second, the religious employer "voluntarily circumscribed its own autonomy" when it entered into an employment contract with its employee.

In contrast, the California Court of Appeals rejected the plaintiff's tort claims for defamation, invasion of privacy and intentional infliction of emotional distress. In affirming summary judgment as to these claims, the court found that the plaintiff's tort claims were "part and parcel" of the decision to terminate the plaintiff's employment. To allow tort claims based on termination of employment to proceed would "render the ministerial exception meaningless."

Biel v. St. James School

In *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018), the plaintiff, a former fifth grade teacher, filed a lawsuit against the defendant, St. James Catholic School, alleging that the school's decision to terminate her employment violated the Americans with Disability Act (ADA). The school terminated the plaintiff's employment after she contracted breast cancer, and needed to be absent for much of the school year to undergo chemotherapy. Citing to the ministerial exception, the school subsequently moved for, and the trial court granted, summary judgment against the plaintiff's ADA claim.

On appeal, the Ninth Circuit reversed, finding that the ministerial exception did not bar the plaintiff's claims because the plaintiff was not a minister. In so holding, the court focused on four factors: (1) whether the employer held the employee out as a minister, (2) whether the employee's title reflected ministerial substance and training, (3) whether the employee held herself out to be a minister, and (4) whether the employee's job duties included important religious functions. The court concluded that neither the school nor teacher held the plaintiff out as a minister, and that the plaintiff's job title, "Fifth Grade Teacher," did not reflect ministerial substance and training. Although a practicing Catholic, the plaintiff's lack of formal religious education (a one-day teaching conference) was important evidence that she was not a minister.

Other facts appeared to support the fourth factor, that the plaintiff's job duties included important religious functions. The plaintiff taught religious education to her students four times a week, thirty minutes a day. She joined her students in twice-daily prayers, and accompanied them to mass each month. The faculty handbook indicated that teachers should provide "quality Catholic education to students, educating them in academic areas and in Catholic faith and values." The plaintiff's job performance was evaluated by both secular and religious criteria. Nevertheless, the court doubted whether these activities constituted "important religious functions." Moreover, facts supporting only one of the four factors were insufficient to transform the plaintiff into a "minister" for purposes of the exception.

In finding for the plaintiff, the Ninth Circuit Court of Appeals concluded that the ministerial exception "does not provide carte blanche to disregard anti-discrimination laws when it comes to other employees who do not serve a leadership role in the faith," [] "preach their employers' beliefs, teach their faith, [or] carry out their mission…."

Paradoxical Results

Despite its bold proclamation that the ministerial exception unequivocally bars employment discrimination claims as between a minister and church, the U.S. Supreme Court in *Hosanna-Tabor*declined to decide whether the ministerial exception barred contract and torts claims, or adopt a rigid formula for determining who qualifies as a minister. Working within these areas of ambiguity, the Ninth Circuit and California Court of Appeals in *Sumner* and *Biel* proffer a restrictive interpretation of the ministerial exception, with inconsistent, even paradoxical, results.

For example, under *Sumner*, a church may lawfully discriminate, harass or retaliate against a minister in violation of employment discrimination laws, but may not terminate his employment for insubordination. Moreover, the argument adopted by the court in *Sumner,* that breach of employment contract claims can be decided on neutral principles of law, is the same argument rejected by the U.S. Supreme Court in *Hosanna-Tabor*, as applied to employment discrimination claims. Finally, the court in *Sumner* rejected the plaintiff's tort claims as "part and parcel" of her termination, and in the same breath found that the plaintiff's breach of employment contract claim was unrelated.

Similarly, the Ninth Circuit Court of Appeals in *Biel* found that a Catholic School teacher whose mission included teaching Catholic school children the doctrine, faith and values of the church, was not a "minister," when the U.S. Supreme Court in *Hosanna-Tabor* held that a minister is someone whose purpose is to preach, teach and otherwise carry out the mission of the church among its flock. As observed by the dissent in *Biel*, the religious school teacher in *Hosanna-Tabor* had strikingly similar job duties to the one in *Biel*, yet the two courts arrived at totally dissimilar conclusions of law.

Practical Advice for Religious Employers

In the wake of *Hosanna-Tabor*, religious employers declared a resounding victory for freedom of religion rights. In retrospect, that victory may be a hollow one. Religious employers should not assume that the ministerial exception will prevent their employees from litigating employment discrimination claims in court, save in the most obvious cases where that employee is a called, formally educated, and experienced minister, in the most traditional and accepted sense of that word. Even then, such employees may be able to bring contract claims, and some tort claims, such as battery or false imprisonment. If and until the U.S. Supreme Court finishes its treatment of the ministerial exception began in *Hosanna-Tabor*, only at its peril should a religious employer feel completely free to "choose those who will guide it on its way."