



RELIGIOUS INSTITUTIONS UPDATE

***Hosanna-Tabor*: The Supreme Court Recognizes The Ministerial Exception To Employment Discrimination Laws**

On January 11, 2012, the Supreme Court provided helpful guidance to religious institutions concerning employment discrimination lawsuits in its unanimous opinion in *Hosanna-Tabor v. EEOC*. Religious institutions should consider reviewing their employment practices to ensure maximum protection in light of this new guidance.

The Supreme Court held (9-0) that ministers may not challenge religious institutions' hiring and firing decisions under employment discrimination laws. The opinion by Chief Justice Roberts marked the first time that the Supreme Court acknowledged this "ministerial exception" from anti-discrimination laws, despite its uniform acceptance by the courts of appeal. The Supreme Court noted that the scope of the ministerial exception would develop over time, but identified a number of guideposts to aid the lower courts in determining who qualifies under the ministerial exception. At both petition and merits stages in *Hosanna-Tabor Church v. EEOC*, Sidley represented a broad coalition of religious groups in support of the constitutional basis for a broad ministerial exemption.

The First Amendment Protects Religious Institutions From Employment Discrimination Suits Brought By Their Ministers

The Supreme Court held that both the Free Exercise Clause and the Establishment Clause protect religious institutions from employment discrimination litigation regarding their ministers. The unanimous court held that if the judiciary could force an unwanted minister on a church, the state would infringe on a religious group's right under the Free Exercise Clause "to shape its own faith and mission through its appointments" and would violate the Establishment Clause, which "prohibits government involvement in such ecclesiastical decisions."

Unlike the Title VII statutory exemption permitting religious institutions to require their employees to adhere to certain religious beliefs, the ministerial exception exempts religious institutions from any employment discrimination litigation—concerning allegation of race, sex, national origin, sexual orientation, or disability discrimination—so long as the employee is a minister.

Lower Courts To Decide Extent Of Exemption

Significantly, the Supreme Court recognized the ministerial exception as an affirmative defense that religious institutions may raise when a minister brings an action. The Court rejected the view that the ministerial exception was a jurisdictional bar that prevented courts from even hearing such suits. By permitting courts to consider whether an

employee is a minister, the Supreme Court functionally recognized the judiciary's role in defining the extent of the exemption, and, to some degree, who is a minister. Religious institutions should consider reviewing their employment practices to ensure ministerial hiring is conducted in such a manner that courts will recognize their ministers as ministers. While the Supreme Court decline to approve any specific test, a closer look at the Supreme Court's analysis of the facts in *Hosanna-Tabor* provides some helpful guidance.

In the case, the Court decided that Ms. Perich, a "called" teacher in a parochial school, was a minister. The school employed both lay and called teachers. Perich taught kindergarten and fourth grade, including mostly secular subjects as well as religion classes. The lower courts found that she spent approximately 45 minutes a day on religious activities. To become a called teacher, however, she was required to take at least eight courses of theological study and to pass a faculty committee oral exam. After spending six years to obtain these prerequisites, she received the title "Minister of Religion, Commissioned." Perich claimed an IRS housing allowance for ministers. The Supreme Court concluded that she was a minister.

In doing so, the Court eschewed a "rigid formula" to decide which employees are ministers, instead looking at Perich's title as a minister, her role conveying the Church's message, and her outward expressions accepting the formal call to religious service. The Court specifically rejected the Sixth Circuit's "stopwatch" approach that relied heavily on the amount of time spent performing religious and secular duties. Similarly, the Court chastised the Sixth Circuit for placing undue weight on the fact that lay teachers performed the same duties as Perich.

In a concurring opinion, Justice Alito, joined by Justice Kagan, provided additional guidance for determining who is a minister. In that opinion, the Justices suggested that the lower courts "focus on the function performed," such that an employee is a minister when he or she "leads a religious organization, conducts worship services..., or serves as a messenger or teacher of its faith." In this case, Justices Alito and Kagan concluded that Perich played "an important role as an instrument of her church's religious message and as a leader of its worship activities." Indeed, they noted that the term "minister" is not used in several religions and that many religions eschew maintaining a separate ordained clergy. Through this reasoning, both Justices Alito and Kagan appeared to suggest that they would embrace a more expansive notion of what is required to qualify under the ministerial exception. Moreover, they cautioned against pretextual inquiries because these inquiries themselves would "pose grave problems for religious autonomy" and would require government factfinders to make the "ultimate judgment" as to what the church believes and how important each belief is to the church's mission.

In a separate concurring opinion, Justice Thomas also proposed a more deferential standard that would respect any religious institution's sincere understanding that an employee is a minister. As Justice Thomas's method acknowledges, determining who is a minister involves a religious question itself. Without proper deference to religious institutions' self-evaluation, court inquiries will likely encourage a religious institution to "conform[] its beliefs and practices regarding 'ministers' to the prevailing secular understanding."

The Court Leaves Open Whether The Ministerial Exception Applies Outside The Employment Discrimination Law Context

While the Supreme Court explicitly limited its decision to employment discrimination lawsuits brought by ministers, the opinion leaves open the possibility of broader application of the ministerial exception in other contexts. Thus, the Court reserved for subsequent cases whether breach of contract or tort lawsuits could lie even if an employment discrimination claims were barred.

Although this case leaves many questions open about the extent of the ministerial exception under *Hosanna-Tabor*, the unanimous Supreme Court clearly confirmed the constitutional basis for the ministerial exception, rejected a

quantitative “stop-watch” approach to determining whether an employee was a minister and embraced a more holistic approach that considers titles, roles, and outward expressions. This guidance should inform any religious institutions’ employment practices.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

The Religious Institutions Practice Group of Sidley Austin LLP

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We believe that effective representation of religious organizations requires a depth of experience, not only with the constitutional and statutory protections for religion generally, but also with many other features of the legal landscape that affect these institutions’ ability to carry out their missions. Our practice combines these attributes with an appreciation of the unique relationship between these institutions and their members.

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