ARE RELIGIOUS HEALTH CARE ORGANIZATIONS PROTECTED BY THE "MINISTERIAL EXCEPTION" UNDER THE SUPREME COURT'S RECENT DECISION IN OUR LADY OF GUADALUPE?

The U.S. Supreme Court recently expanded its unanimous 2012 ruling in *Hosanna-Tabor Evangelical Lutheran Church*,[1] where it first applied to a parochial school teacher the "ministerial exception" to federal anti-discrimination employment laws. The exception is an outgrowth of the First Amendment's Free Exercise and Free Establishment clauses, which protect the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[2] The ministerial exception, traditionally applied to clergy members, excludes employment decisions from judicial interference so long as the employee's role is essential to the institution's central mission.[3]

On its face, the Supreme Court's recent decision in *Our Lady of Guadalupe School v. Morrissey-Berru* ("*OLG*")[4] merely applies its earlier *Hosanna-Tabor* holding to an expanded class of parochial school teachers. These teachers, unlike the plaintiff in *Hosanna-Tabor*, were not religiously trained or even adherents to their employer's faith, but nevertheless had religious duties as part of their job description.

A deeper analysis of the Court's broad holding, however, suggests that *OLG* may extend the ministerial exception to employees without any duties that one might consider traditionally "religious" in nature, so long as the employment decision involves a 'key employee' whose role furthers the institution's religious mission. The questions left for another day are (1) the threshold matter of the deference a court must give an institution's assertion that its mission and the employee's duties are in fact religious, and (2) the extent of the religious nature of the institution's mission and the employee's role necessary to support the exception.

OLG Case Summary

In the consolidated underlying cases, two California teachers employed by Roman Catholic schools brought suits alleging age and disability discrimination when the schools declined to renew their employment contracts. Both were employed under agreements that set out the schools' missions "to develop and promote a Catholic School Faith Community"; imposed commitments and standards pertaining to religious instruction, worship and personal modeling of the faith; and set forth performance review criteria on these bases.[5] Both teachers provided daily religious instruction in the classroom and worshipped or prayed with students.

Each school invoked the "ministerial exception" and successfully moved for summary judgment before the district courts. The Ninth Circuit reversed, however, concluding in both instances that, contrary to *Hosanna-Tabor*, no formal "minister" titles or credentials had been accorded and that the teachers had limited religious training and backgrounds; therefore, the exception did not apply and the discrimination suits could proceed as usual. The U.S. Supreme Court rejected the Ninth Circuit's treatment of the *Hosanna-Tabor* factors as a checklist of items that must be met in all other cases, and held that the exception applied.

Expanding Hosanna-Tabor

In *Hosanna-Tabor*, the Supreme Court suggested a variety of factors that may be important while explicitly declining to adopt any "rigid formula" for when employment decisions should be excepted from judicial review under anti-discrimination laws.[6] There, the Court applied the ministerial exception where (1) a church had given a teacher a distinct title of minister, which separated the role from that of others; (2) the position was reflective of a significant degree of religious training and a formal process of commissioning; (3) the teacher held herself out as a minister by accepting the formal call to religious service according to its terms and by claiming certain tax benefits; and (4) the job duties reflected a role in conveying the church's message and carrying out its mission.[7]

In *OLG*, the Court noted that the phrase "ministerial exception" did not indicate that one must be a minister for the exception to apply; rather, its colloquial description was based upon its earliest applications. The Court clarified that what matters most in determining whether an employment decision is excepted from review is what the employee does and how it serves the religious mission. The Court discussed the importance of how the religious organization views the employee's role in the life of its religion. Accordingly, the *OLG* Court concluded that

the two California teachers fell well within the ministerial exception, finding the record replete with evidence that they performed vital religious duties central to the schools' missions, including educating students in the Catholic faith and guiding students to live their lives in accordance with that faith, and that the schools, through the terms of their employment agreements and standards, viewed the teachers as playing a vital part in carrying out that mission.

Opening the Door to Traditionally Secular Employees

In a dissenting opinion, Justice Sotomayor suggested that the ministerial exception could now be interpreted to encompass "countless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions," so long as the institution asserted that the employee's role was central to its stated mission. If the dissenting opinion accurately captures the finding of the majority—and it appears to—the religious mission, rather than the employee's title, would be the key to applying the exception.[8]

Indeed, the *OLG* majority granted substantial deference to the religious institution's explanation of how the employee's role relates to the institution's self-proclaimed religious mission. Under Supreme Court precedent predating *Hosanna-Tabor*, courts have concluded that analyzing the merits of the institution's explanation "would necessarily lead to the kind of inquiry into religious matters that the First Amendment forbids."[9] Therefore, the institution itself may dictate the narrative for any future analysis under the ministerial exception. Additionally, *OLG* did not actually require the institutions to cite any religious tenet as the basis for termination to counter the discrimination claims.[10]

PRACTICAL TAKEAWAYS

- The Court's decision does not break new ground or endorse any specific checklist for application of the ministerial exception in employment discrimination cases involving key employees in religious institutions. It does, however, refine two considerations when applying the ministerial exception:
  - The organization must define its religious mission; and
  - The organization must define the role of key employees as vital in carrying out that mission through language in its employee handbook, employment agreements, job descriptions, performance evaluations and/or other employee-facing—and possibly *community*-facing—materials.
- The decision may leave the door open for religious organizations to assert the ministerial exception in defense of hiring and firing decisions that involve any employee whose duties are vital to furthering the stated religious mission, regardless of the religious nature of the duties themselves.
- Church-affiliated organizations that provide health care as their religious mission, whether to emulate the healing hand of God or to obey God's commands to care for the sick, may be afforded deference in determinations that at least some of their providers are integral to that mission, so as to invoke the ministerial exception.

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[references]

[1] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

[2] *Id*. at 186 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

[3] State fair employment laws often contain a ministerial exception as well. *See, e.g. Coulee Catholic Sch. v. LIRC*, 320 Wis. 2d 275, 768 N.W.2d 868 (2009); *see also Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829 (6th Cir. 2015)(federal rights supersede potential state law claims).

[4] *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. ___, 2020 WL 3808420 (2020).

[5] *Id.*, 2020 WL 3808420 at *4.

[6] *Hosanna-Tabor*, 565 U.S. at 190.

[7] *Id*. at 191-192.

[8] Justice Sotomayor, joined in her dissent by Justice Ginsburg, described the majority's holding as "collaps[ing] *Hosanna-Tabor*'s careful analysis into a single consideration: whether a church thinks its employees play an important religious role." *OLG*, 2020 WL 3808420 at *16.

[9] *Scharon v. St. Luke's Episcopal Presbyterian Hosps*., 929 F.2d 360, 363 (8th Cir. 1991) (citing, *inter alia*, *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)).

[10] *OLG*, 2020 WL 3808420 at *23 (J. Sotomayor dissenting) ("Our Lady of Guadalupe School has neither cited nor asserted a religious reason for the termination.").

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