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Religion and Discrimination in Employment (2)

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In our last article under this rubric, we looked at some of the laws relating to employment discrimination, as well as some notable exceptions for religious organizations. It was noted that the United States Supreme Court was preparing to hand down a decision pertaining to the ministerial exception. The ministerial exception, as you may recall, is the legal principle based upon the First Amendment to the United States Constitution, which keeps the government from interfering with the internal affairs of the church, especially in matters of doctrinal instruction. The Court has since ruled in that case, and in this article we will analyze the decision more closely.1

The case involved a claim of discrimination by a teacher against a private Lutheran school in Michigan. The Supreme Court ruled unanimously that the First Amendment to the Constitution did require maintaining a ministerial exception, and that this exception required dismissal of the teacher's discrimination suit in this case. The unanimous decision in this case is noteworthy, since the Court has often been divided five to four, with four conservative justices, four liberal justices, and Justice Anthony Kennedy throwing the deciding vote for either side. The unanimous decision is also noteworthy in upholding the ministerial exception, since the current administration had advocated that the ministerial exception be abolished entirely.2

As believers, we can certainly be thankful for the Court's resounding affirmation of the ministerial exception. Once again we see the Lord's hand protecting His church from government intrusion through this means. Although the case dealt with an employment issue in the context of a school, the case has very important implications for our churches, as the Supreme Court unanimously ruled that the government cannot interfere with churches in matters of doctrinal instruction. The majority explained that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter

has been carried, the legal tribunals must accept such decisions as final, and as binding on them."3

As the case dealt with the context of a teacher in a school, we might jump to the conclusion that the case also precludes government interference in employment decisions in our covenant schools. However, while the decision in this case is certainly good news for our own schools, we should be careful not to interpret the court's ruling as a broad application of the ministerial exception to any teacher in a private school. The circumstances of the teacher's employment in this case were quite different than in our Protestant Reformed schools. As was mentioned before, the current administration advocated that the ministerial exception be abolished, and the outcome was contrary to the position of the EEOC. In future cases, we can expect that these parties will seek to limit this decision to the specific facts of this case, and will try to use factual differences to distinguish other cases so that the exception does not apply. In order to fully understand the implications of this case, we must look at the specific facts of the case more closely.

The case involved a claim of discrimination by a teacher against Hosanna-Tabor Evangelical Lutheran Church and School, a Lutheran school located in Michigan. The teacher developed narcolepsy, a disorder that caused sudden episodes of sleeping from which she could not be awakened. After a period of leave, the teacher announced that she was coming back to work, against the school's wishes. When she appeared at the school and refused to leave until they acknowledged that she had reported for work, she was terminated for insubordination. The EEOC brought suit against the school for discrimination, but the school moved to dismiss the suit based on the ministerial exception.

The school in this case was actually run by the Lutheran church. The school hires two types of teachers. "Called" teachers complete a course of academic study in theology, obtain the endorsement of their local Synod district, and are called by the local congregation. They then receive the title of "Minister of Religion, Commissioned." "Lay" teachers did not receive training in theology and were not even required to be Lutheran. Lay teachers were hired only when called teachers were unavailable. The teacher in this case was a called teacher. The Supreme Court found that under these circumstances, the ministerial exception applied.

Obviously the process for becoming a "called" teacher is similar to the process of becoming a minister in our own churches, so there is no doubt that the ministerial exception would apply to churches. The question, then, is whether the exception would apply to the teachers in our schools. The Supreme Court in the *Hosanna-Tabor* case focused on the circumstances of the teacher's employment. The Court noted that she was held out as a "minister," and that the title of minister reflected "a significant degree of religious training followed by a formal process of commissioning."4 She claimed a housing allowance on her taxes, which is available only to employees earning their compensation "in the exercise of the ministry." The Court noted that her job duties included a role in conveying the Church's message and carrying out its mission, and that she taught religious classes to her students four days a week. In summary, the Court relied on four factors: 1) the formal title given to the teacher as a "minister," 2) the substance reflected in that title, 3) her use of that title, and 4) the important religious functions she performed for the Church.5

In our own schools, teachers do not have the title of "minister," and do not perform their duties

directly for the Church. They do not receive specialized religious training, and are not called to their position by the Church. All of these factual differences would undoubtedly be used by opponents to argue that the ministerial exception would not apply to our teachers. Because of these factual differences, it is not entirely clear that our teachers would come under the ministerial exception. The Court in *Hosanna-Tabor* stated that they were "reluctant to adopt a rigid formula for deciding when an employee qualifies as a minister," but that the circumstances of employment in this case warranted a finding that the exception applied.6

While the *Hosanna-Tabor* case does not provide a clear indication that our teachers would be covered by the ministerial exception, it certainly does not preclude the possibility. The majority of the Court noted that every Court of Appeals that considered the question has concluded that the exception is "not limited to the head of a religious congregation."7 Justice Thomas wrote a concurring opinion, in which Justice Alito joined, which emphasized the autonomy of religious organizations to determine who will minister the faith. Justice Alito wrote a separately concurring opinion in which Justice Kagan joined, in which he specifically noted that he felt it would be a mistake if the term "minister" or the concept of ordination were viewed as central to the issue of religious autonomy. Justice Alito wrote that, in his opinion, the ministerial exception applied in the *Hosanna-Tabor* case because the teacher

> played a substantial role in "conveying the Church's message and carrying out its mission." [citation omit ted]. She taught religion to her students four days a week and took them to chapel on the fifth day. She led them in daily devotional exercises, and led them in prayer three times a day. She also alternated with other teachers in planning and leading worship services at the school chapel, choosing liturgies, hymns, and readings, and composing and delivering a message based on Scripture.[8]

The duties described by Justice Alito sound very similar to the duties of our own teachers as they teach the students, lead them in devotions and singing, and plan chapel services. Justice Alito's concurring opinion does not reflect the opinion of a majority of the Court, but it is significant that this opinion of Justice Alito was joined by Justice Kagan, who is generally considered to be on the "liberal" wing of the Court.

Most of the discussion in the Court's opinion was based on applying the ministerial exception to those under the direct supervision of churches, so we cannot predict whether the Court would extend the exception to religious organizations affiliated with churches, as many of our schools are. In being "affiliated" with churches, I refer to the language in the Articles of Incorporation or Bylaws of some of our schools, which indicates that the schools are established to further the instruction of our children in the doctrines held by our churches. The extent to which this language shows that the school (and therefore the teachers) instructs in accordance with the doctrines of our churches could be the basis as to whether the ministerial exception is extended to that school. Requirements that members of the school society be members of the denomination would also tend to show the connection between church and school.

The reasoning behind the ministerial exception would also support an extension of the exception to schools. The reason for the exception is that otherwise the state would indirectly control who will provide religious instruction, if employment laws regulated who a church could hire or discharge. The same would hold true for a religious school. Whether or not the school is directly

run by a church, those operating the school should be free to make employment decisions that will ensure that the instruction given in the school is in agreement with their faith.

Until the question is addressed by the courts, we will not know how far the ministerial exception will be extended. In the meantime, we can be thankful that the autonomy of the churches has been preserved for the time being. In a future article, Lord willing, we will look at how language in Articles of Incorporation and Bylaws, decisions of ecclesiastical bodies, and practices can clarify the religious purpose and positions of our churches and organizations.

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1 *Hosanna-Tabor Evangelical Lutheran Church and School, v. Equal Employment Opportunity Commission,* 132 S.Ct 694 (2012).

2 *Hosanna-Tabor,* 706.

3 *Hosanna-Tabor,* 704.

4 *Hosanna-Tabor,* 707.

5 *Hosanna-Tabor,* 708.

6 *Hosanna-Tabor* 707.

7 *Hosanna-Tabor,* 707.

8 *Hosanna-Tabor,* 714-15.