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Religion and Discrimination in Employment (Part 1)

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In the United States, the law protects individuals from being discriminated against in employment based on religion. At the same time, believers enjoy a great deal of freedom in operating and governing churches and schools free from government interference. These institutions are subject to many of the laws of the land regarding employment, including certain laws prohibiting discrimination. Often there is confusion as to whether or how a law applies to a church or school.

Sometimes believers mistakenly believe that a church or school is subject to laws that it is not, or that it is exempt from laws that really do apply. Employment laws contain some notable exceptions for religious organizations, and recently several federal circuit courts and the United States Supreme Court have looked at some of these issues. In this article, we will look at religious freedom in the context of employment discrimination law.

The government in the United States has prohibited employment discrimination in many forms for years. The Equal Employment Opportunity Commission (EEOC)is an independent commission established by Congress after passage of the Civil Rights Act of 1964 to investigate and prosecute cases of alleged discrimination in employment. An employee may have an individual claim against an employer based on illegal discrimination, and the EEOC may assist the employee in investigation, but may also independently prosecute cases.

The Civil Rights Act of 1964 is often thought of as the law that prohibited discrimination based on race. While it is true that this law did prohibit such discrimination, Title VII of the Act also contained provisions preventing discrimination based on religion. This act applies only to companies with 15 or more employees, but where it does apply, it provides some valuable protection for Christians in the workplace. However, for Christian business owners the act also requires that other religions be accommodated.

The Act generally prohibits an employer from treating a person unfavorably because of his religious beliefs. Employers must treat employees of different religions equally in all aspects of employment, such as in hiring, firing, pay, job assignments, promotions, layoffs, training, and fringe benefits. Employers cannot allow employees to be harassed because of their beliefs, or restrict them to certain jobs or areas because of their beliefs. Employers must also make reasonable accommodations so that employees can maintain their sincerely held religious beliefs.

This law provides some protection to believers working in today's world. One obvious example is for Sabbath observance. More and more employers are opening their doors for work on Sunday. Many cases have found that employers have not accommodated employees' religious beliefs when they require them to work on the Sabbath as a condition of employment. The question of whether the employer can reasonably accommodate an employee who won't work on Sunday depends on whether this would pose an undue hardship on the employer, which is usually determined on a case-by-case basis.

As mentioned above, employers have to accommodate only "sincerely held" beliefs. Written statements of a church's beliefs and doctrine are often the best evidence to show that an employee's beliefs are sincerely held. As will be seen later in this article, clear statements of beliefs and doctrines are also important when our churches and schools are in the role of employer. While we are always called to be clear and unwavering in holding fast to the truth, such clarity is also important when using the laws of the land in which God has placed us. As traditional "Christianity" recedes and apostatizes or is even replaced by other religions, our beliefs will be more and more strange in the world around us. As long as the law of the land provides protection for those beliefs, we must set them out clearly to avail ourselves of the protection of the law.

Many people mistakenly believe that, based on Title VII of the Civil Rights Act of 1964, our own schools or even churches are prohibited from discriminating by giving preference in hiring to members of our own denomination. However, there are two exceptions to the rules against discrimination, one for religious organizations, and one known as the ministerial exception.

The religious organization exception provides that religious institutions may give preference in employment to members of their own religion if the organization's "purpose and character are primarily religious."[1] Four of the factors considered by the EEOC and courts in determining whether an institution's purpose and character are primarily religious include: 1) Do its Articles of Incorporation state a religious purpose? 2) Are its day-to-day operations religious? (e.g., curriculum directed towards a certain religion) 3) Is it not-for-profit? 4) Is it affiliated with or supported by a church or other religious organization?[2]

It is important that as churches and schools we have our legal paperwork in order so that we can clearly show that our actions are consistent with our doctrines and beliefs. Articles of Incorporation, Bylaws, and IRS filings should be reviewed from time to time to ensure that they are clear in stating the basis for our institutions. Article 28 of the Church Order directs that the churches take legal measures so that they "for the possession of their property, and the peace and order of their meetings can claim the protection of the Authorities." For these same reasons we need to ensure that the legal status of our schools and churches allows us to avail ourselves

of the protection of the law, including employment laws, to the greatest extent possible without allowing the government to infringe upon the royal government of Christ over His church.

This religious-organization exemption remains firmly intact. Recently the Ninth Circuit Court of Appeals ruled that World Vision, a Christian humanitarian organization, was within its rights to fire three employees who did not agree with the statement of faith of the organization.[3] The United States Supreme Court refused to hear the employee's appeal of this decision, allowing it to stand.4

Some believe that since our schools and churches are religious institutions, they are free from all laws prohibiting discrimination. This is true only with regard to employees who are covered under the "ministerial exception," which will be discussed later. Employees who do not come under the "ministerial exception," must still be treated equally regardless of age, gender, or disability. What about different pay based on sincerely held religious beliefs, such as the belief that men are the head of the home and are to be the primary financial support for the family? The EEOC Compliance Manual contains the specific example of a day-care center that pays male employees more based on this principle, and concludes that this would be illegal discrimination.

The second exception to the rules against discrimination in employment is the "ministerial exception." This exception is based on the Free Exercise Clause of the First Amendment to the U.S. Constitution, on the principle that the government should not interfere with the internal affairs of the church. Employees who fall under this exception cannot bring a claim based on Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Equal Pay Act, or the Americans with Disabilities Act. This exception is known as the "ministerial" exception because it has long been held to apply to ministers and other members of the clergy. The unanswered question is, to what extent does this exception apply to other employees of religious organizations, such as teachers in Christian schools, who provide instruction on religious subjects?

In October 2011, the United States Supreme Court heard oral arguments in a case presenting just this question. The Hosanna-Tabor Evangelical Lutheran School had a teacher who was discharged, and alleged that she was discriminated against.5 The school asserted that since the teacher gave instruction on religious as well as secular subjects, the ministerial exception applied. The Sixth Circuit Court of Appeals ruled in favor of the teacher and the EEOC, but the Supreme Court agreed to hear the case on appeal. Lord willing, we will look more closely at this case, the arguments on both sides, and the Court's decision in a future article after the Court's decision is rendered.

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*1 **Hall v. Baptist Mem. Health Care Corp.**, 215 F.3d 618, 624-25 (6th Cir. 2000) (college of health sciences qualified as a religious institution under Title VII because it was an affiliated institution of a church-affiliated hospital, had direct relationship with the Baptist church, and the college atmosphere was permeated with religious overtones).*

2 EEOC Compliance Manual Section 12-I (C)(1).

3 Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011).

4 Spencer v. World Vision, Inc., Sup. Ct. Docket No. 10-1316, (Petition for Cert. denied Oct. 3, 2011).

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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.

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In two previous articles under this rubric, we examined some issues in employment law relating to discrimination claims as they protect individuals from religious discrimination and as our schools and churches can be affected by claims of discrimination. We also looked at some recent United States Supreme Court rulings that apply to religious organizations that act as employers. In this issue, we will look at the factors that impact such cases and the measures that can be taken to preserve religious freedom in this area.

We have looked at three ways the law protects our religious freedoms. First, individuals as employees have freedom from discrimination based on religious beliefs. Second, religious organizations have the freedom to hire employees of their own religion if the "purpose and character of the organization are primarily religious." Finally, the ministerial exception allows religious organizations freedom from government interference in employment decisions for employees who instruct in religious doctrines. In order to use these legal protections, a person or organization needs to be able to provide evidence that they are entitled to such protection. We will look at each type of protection and the evidence that can be used.

First, an individual claiming protection against religious discrimination must be able to show that his claim is based on a "sincerely held" belief. Obviously, whether a person sincerely holds a belief is a somewhat subjective inquiry. However, a person's beliefs are easier to demonstrate if he is a member of a church that clearly holds a position. Let's use the example of Sabbath Day observance. It is easier to demonstrate that an employee believes that Sunday is a day of rest if that is the clear position of the church where he has his membership. The church's position may

be evident from published writings, but will be even more firmly established by statements of official positions and decisions of ecclesiastical assemblies such as a classis or synod. If the employee's church holds firmly to a position, the employee can use that as evidence of his sincerely held belief.

This does not mean we should start making declarations or decisions by our ecclesiastical assemblies just for the purpose of establishing our positions for use in legal matters. The rule with our ecclesiastical assemblies has generally been that they address issues only when there is a current case in controversy. This is a wise rule, and the appellate courts of our land generally follow the same rule. When there is a genuine case in controversy, all aspects of the issue are more fully presented, and it is less likely that a decision is rendered that is overbroad or that inadvertently affects other cases. However, we should be clear and unequivocal in addressing issues when given the opportunity. This is obviously true for doctrinal reasons, but it also affects individual members and our organizations as well.

To illustrate, let's look at the example of a church that does not take a firm stand for the truth. Let's say this church does not discipline members who violate the Sabbath Day. Maybe cases even go to ecclesiastical assemblies but no disciplinary action is taken. If an individual member of that church objects to working on the Sabbath Day, he may still be able to argue that it is his own personal sincerely held religious belief, but he certainly cannot point to the practice of his church and fellow members. Allowing one member of the church to work on Sunday could adversely impact another member's ability to refuse to work on Sunday, especially if "sincerely held beliefs" are scrutinized more closely in the future. As individuals, we bear in mind that what we do may affect our fellow members.

The legal difficulty is even more pronounced under other legal protections, such as the religious organization exception. Under this exception, a religious organization can discriminate and hire only those who have the same religious beliefs, or fire employees who do not.[1] However, this becomes difficult if religious beliefs are not clearly stated. For example, a small Christian school could have a local constituency that holds firmly to a six-day creation, but a teacher begins teaching evolution. If the school is affiliated with a denomination that refuses to condemn the teaching of evolution or discipline those that teach evolution, the school would have a difficult time terminating the teacher for his teaching under the religious organization exemption.

As stated previously, the religious organization exemption applies if the "purpose and character of the organization are primarily religious." Our schools can arguably come under this exemption because our primary purpose in creating them is to incorporate our religious beliefs into every aspect of teaching, and the teachers stand in place of the parents in this regard. To avail ourselves of this protection, we should make this purpose clear in the legal documents that govern our schools, such as the Articles of Incorporation and Bylaws or Constitution. The courts have established a four-part test to determine whether an organization is a "religious organization": 1) Do the Articles of Incorporation state a religious purpose? 2) Is the day-to-day operation religious? 3) Is it a non-profit organization? and 4) Is it affiliated with a church or other religious organization?

The Articles of Incorporation, rather than simply stating a purpose to educate our children, can state our purpose to educate our children in our doctrines by incorporating our religious beliefs into every subject taught. Incorporating the denominational name in the Articles can also help to

show the affiliation with the church. Often these Articles simply recite the language required by the Internal Revenue Service for recognition as a tax-exempt charitable entity, but care should be used to expand them to state fully the real purpose. If not in the Articles, this purpose should at least be stated in the Bylaws.

With regard to the issue of whether our schools are affiliated with our churches, we often shy away from the concept of affiliation because we want to stress that our schools are parental, rather than parochial schools controlled by the churches. While that may be true, they are still affiliated with our churches in the legal sense. The churches and schools have overlapping constituencies, the schools are supported by the churches, and the schools are established so that the instruction students receive is in agreement with, and a continuation of, the doctrine of those churches. The Bylaws or Constitution of the school can establish this legal affiliation by requiring that the same religious doctrines of the society member parents be incorporated into the school and every subject taught in the school.

Finally, as discussed in the last article in this series, the United States Supreme Court recently extended the "ministerial exception" to a teacher in a Lutheran school.[2] This exception traditionally applied only to ministers and is based on the principle that courts will not interfere in the decisions of churches or religious organizations in employing individuals to give religious instruction. The majority opinion made much of the fact that the teacher in this case was considered a "minister" who was called by the church to teach. However, the concurring opinions suggested that the decision should not be limited to ministers in the traditional sense.

While we do not know whether the court would apply the same exception to a teacher in our covenant schools, it could be argued that the exception is even more applicable to our teachers. The court in the *Hosanna-Tabor* case discussed the fact that the teacher taught religious subjects in addition to what the school considered "secular" subjects. In our schools, we ask that our teachers incorporate our beliefs into every subject. Even a "secular" subject like math is taught from the perspective that God is an orderly God who created all things and incorporated that order into His creation.

The court in the *Hosanna-Tabor* case relied extensively on the documentation produced to determine the legal clarification of the teacher, including the school's policy manuals and handbooks, and even the tax forms used by the teacher in filing her tax returns. We should also take care that our documentation confirms that our churches and schools are institutions where our religious doctrines are taught. The Bylaws of the school should incorporate the idea that the teacher is standing in the place of the parent in providing religious instruction to the children in all subject areas. The Bylaws or other policy documents should also clarify that we do not believe that any subject is untouched by our religious beliefs.

Incidentally, it does make a difference which document such ideas are incorporated into. In the law there is something of a hierarchy of documents, depending on which documents are most easily adopted and amended. Because of this, Articles of Incorporation generally carry more weight than Bylaws, Bylaws carry more weight than Board policy manuals, and so forth.

Obviously, space is too limited in this article to give an exhaustive list of the topics that could be included in governing legal documents to increase the protection for religious liberty to our churches and other organizations. In this article we have examined the need to have clear,

consistent practices as well as clear documentation of our beliefs and the role our schools have in teaching those doctrines. As the times change, the world around us seeks more and more to restrict our speech regarding our beliefs. Our condemnation of sin in the world around us is seen as intolerant and hateful. The focus of this article has been the context of employment discrimination, but in the future, just to use the Freedom of Religion embodied in the Constitution, we may need to show that what we teach is our "sincerely held" belief. This includes having clearly articulated statements of our beliefs, and having practices consistent with those statements. Article 28 of the Church Order requires that legal measures be taken so that the church can claim the protection of the authorities. As shown above, both our churches and schools benefit when our governing documents reference our beliefs and the methods we use to teach them.

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1 See, e.g., *Spencer v. World Vision, Inc.,* 633 F.3d 723 (9th Cir. 2011).

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