# *Free to Discriminate?*

## The Intersection of Law and Religion within Religious Institutions

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**In this #MeToo era, employers of all types are facing employment discrimination, harassment, and retaliation claims that come with the potential for high jury awards and thousands of dollars in legal fees.**

Indeed, many religious institutions have been swept up in the #MeToo movement with employees, both former and current, asserting claims of discrimination, harassment, and retaliation. The legal question that arises in many such cases is whether the defendant religious institution should be exempted from such claims pursuant to constitutional principles dictating the separation of church and state.

As a general matter, anti-discrimination laws, such as Title VII of the Civil Rights Act (Title VII) and the New Jersey Law Against Discrimination (NJLAD), are broadly construed by federal and state courts alike due to the strong public interest in preventing discrimination, harassment, and retaliation in the workplace based on legally protected characteristics such as sex, race, ethnicity, religion, and sexual orientation.[1] Many religious institutions, however, espouse ideologies that are either not accepting of certain members of protected categories, express preference toward certain categories of individuals, or limit the conduct of employees. However, pursuant to the free exercise and establishment clauses of the First Amendment to the United States Constitution, individuals are free to exercise their religious beliefs and the government is prohibited from promoting any religion or becoming too entangled in religious affairs.

In the employment context, the law has developed to account for the dueling notions of free exercise of religion (and the general absence of government involvement in church affairs) and promoting discrimination-, harassment-, and retaliation-free workplaces. In 2012, in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, the United States Supreme Court promulgated the "ministerial exception," which, in certain circumstances, precludes the application of legislation to employment claims between a religious institution and its ministers.[2] Additionally, the New Jersey Supreme Court also adopted the ministerial exception many years before the *Hosanna-Tabor* decision.[3]

Pursuant to *Hosanna-Tabor* and its progeny,[4] the ministerial exception applies only when the claim would require the court to decide upon questions of ecclesiastical polity. Significantly, recent case law suggests that New Jersey state courts may not shield religious institutions from liability, even in cases dealing with adverse employment actions that were taken for reasons related to religious policy.

### The *Hosanna-Tabor* Decision

In this 2012 seminal decision, the United States Supreme Court engaged in an analysis of constitutional principles in determining whether to recognize the ministerial exception, which had previously been adopted in various jurisdictions. The employee in that case, Cheryl Perich, served as a 'called' teacher for the church, whom the congregation regarded as having been called by God to teach. The employee taught many secular classes to her students, as well as a religion class. After taking a medical leave of absence, Perich attempted to return to work, but was denied reinstatement despite her fitness for duty. The Equal Employment Opportunity Commission (EEOC) filed suit against the church for alleged retaliation. The church filed for summary judgment, arguing the claims were barred by the ministerial exception because the suit concerned the church's employment relationship with one of its ministers.

The establishment clause and the free exercise clause of the First Amendment provide that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Court noted that the "Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[5] In applying these First Amendment principles to the employment discrimination context, the Court recognized the ministerial exception, which often bars Title VII employment claims between religious institutions and its ministers. The Court reasoned that punishing a religious institution for terminating an unwanted minister "interferes with the internal governance of the church, depriving the church of control over the selection of

those who will personify its beliefs."[6] Indeed, the Court noted that the free exercise clause protects a religious institution's right to administer and influence its own faith through its appointment of ministers, and the establishment clause prohibits government intervention in ecclesiastical decisions.

For the ministerial exception to apply, the employee at issue must be considered a 'minister' of the religious institution. While the Court refused to adopt a "rigid formula" in determining when an employee qualifies as a minister, the Court considered various factors, such as the employee's job title, qualifications, job duties, and how the employee described his or her job with the church to others. In applying these factors to the employee at issue, the Court recognized her job title as a called teacher conveyed the religious qualities of her job, that her job title required a significant amount of religious training, and that she held herself out as a minister. Additionally, the Court found the employee's job duties reflected that she played a role in carrying out the church's mission because she taught religious classes four days per week, led her students in prayer three times per week, and took her students to chapel service once per week. Overall, the Court found the employee to be a minister, and held that the claims at issue were precluded by the ministerial exception.

Significantly, in coming to the conclusion described above, the Court rejected the EEOC's argument that the ministerial exception should apply only to employees that *exclusively* perform religious functions, because ministers often perform both religious and secular job duties. The Court also found it immaterial that the employee was no longer seeking reinstatement, because no matter whether an employee seeks reinstatement or monetary damages the First Amendment principles underlying the ministerial exception preclude judicial involvement in claims between religious institutions and their ministers concerning ecclesiastical matters.

## Decisions Applying the Ministerial Exception

In many instances both before and after the *Hosanna-Tabor* decision, courts have dismissed Title VII and LAD claims due to the ministerial exception. As reflected by the decisions below, courts will apply the ministerial exception where the claims at issue require the courts to opine upon church doctrine or matters of internal church governance.

In *Melendez v. Kourounis*,[7] in 2017, the Appellate Division affirmed the trial court's decision to grant summary judgment in favor of the church based on the ministerial exception. The employee (a priest) founded a chapel within the defendant church's governance that was specifically dedicated to serve the local Hispanic community. Shortly thereafter, the bishop of the church disseminated a letter to all clergy and lay members denouncing the priest's establishment of the chapel. In response, the priest brought suit for defamation and racial discrimination under NJLAD. In deciding whether the trial court properly applied the ministerial exception to the priest's race discrimination claim, the Appellate Division noted that a religious institution's employment decisions concerning a minister are exempt under NJLAD. The court stated that even if the priest sufficiently pled an NJLAD claim, the allegations at issue did not constitute a valid claim because the priest was a minister, the offending correspondence was a matter of internal church governance, and the dispute could not be adjudicated on a purely secular basis.

More recently, in 2018, the Third Circuit in *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh* considered the application of the ministerial exception in a breach of contract case where a pastor was discharged from his employment with the church.[8] While the pastor did not bring a discrimination claim under Title VII or NJLAD against his former employer, the decision is illustrative of how the Third Circuit would apply the ministerial exception in a Title VII or NJLAD case. In this case, the church asserted that it terminated the pastor's employment because the pastor materially breached his employment agreement by failing to provide sufficient spiritual leadership, as evidenced by decreased church attendance. The court found that the ministerial exception applied to the dispute, and thus affirmed the lower court's entry of summary judgment, because an inquiry into the validity of the church's purported reason for terminating the pastor would require consideration of church doctrine and what constitutes adequate spiritual leadership. Notably, the court stated the application of the ministerial exception also prevents it from determining whether the proffered reason for termination was mere pretext.

## Cases Where the Ministerial Exception Did Not Apply to the Employment-Related Dispute

Importantly, the ministerial exception does not serve as an automatic shield for religious institutions from liability for discrimination, harassment, and retaliation claims asserted by their former employees. As noted above, the exception only applies to ministers and, therefore, an employee that truly serves no religious purpose generally may assert employment-related claims against his or her employer, because matters of religious policy are less likely to be at issue. Furthermore, even when an employee is a minister under the law, he or she is permitted to sue the religious institution for employment claims when the dispute is purely secular and does not require the court to inquire into the propriety of the religious institution's decision on an ecclesiastical matter.

In *Gallo v. Salesian Society, Inc.*, in 1996, the Appellate Division considered whether the ministerial exception applied to a lay teacher who taught at a private parochial school.[9] The employee filed a complaint against the school for age and sex discrimination under NJLAD. The court noted that the school did not require teachers to be Catholic, the courses the employee taught had no religious content, and the school asserted that the employee was terminated for secular reasons (*i.e.*, budgetary issues). Despite the fact that the employee's contract stated she should "exemplify Christian principles and ideals" in performing her job duties, the court stated the mere fact that a faculty member serves as a Christian role model does not automatically render the employee's duties ministerial.[10] Overall, the court found that enforcing the anti-discrimination provision of NJLAD would have no impact on church doctrine or governance, and affirmed the jury award in favor of the lay employee.

In 2002, the New Jersey Supreme Court, in *McKelvey v. Pierce,* considered the appropriateness of the dismissal of a harassment complaint asserted by a former seminarian.[11] There, the seminarian (who undisputedly qualified as a minister) claimed he was forced to discontinue his religious education with the defendant church due to unwanted homosexual advances, allegedly made by various priests within the church. While acknowledging that the First Amendment prohibits government involvement in ecclesiastical matters, including, but not limited to the hiring and firing of ministers, the Court noted that the ministerial exception "cannot be applied blindly to all disputes involving church conduct or decisions."[12] The Court reasoned that "[t]he critical factor in the application of the ministerial exception to a given cause of action must be that resolution of the claim requires an impermissible inquiry into the propriety of a decision of core ecclesiastical concern[.]"[13] The Court thereby stated that each claim must first be analyzed to determine whether resolution of the claim can be done in a wholly secular fashion.[14] Secondly, courts must examine the remedies sought by the minister employee to decide whether enforcement of a judgment may require excessive interference with church governance.[15] If the matter can be resolved on purely secular grounds and without affecting any internal governance rights, the ministerial exception will not apply as a shield from liability.

Ultimately, the New Jersey Supreme Court overturned the trial court's dismissal of the seminarian's complaint. Despite the fact that the seminarian was a minister, the Court found the ministerial exception did not apply because sexual harassment is not a religious principle or inherent to church administration. Notably, however, the Court found the seminarian could not rely upon any church teachings on sexual conduct to establish his claims.

Similar to the *Gallo* decision, the lay teacher in the recent 2018 *Crisitello v. St. Theresa School* opinion was not a minister for purposes of the ministerial exception.[16] Despite the employee's lay status, the defendant school still asserted that her NJLAD claims were barred by First Amendment principles. Namely, the school asserted the employee was terminated for violating its ethics code and policies for engaging in premarital sex (which the employee did not dispute). The trial court granted the defendant's motion for summary judgment based on the "religious exemption" under NJLAD, which provides that "it shall not be an unlawful practice…[for a religious organization] in following the tenets of its religion in establishing and utilizing criteria for employment of an employee."[17] The Appellate Division overturned this decision because the employee did not challenge the propriety of the school's religious doctrine, but instead asserted she was singled out by the school in applying its ethics code. As such, the court held that the First Amendment did not preclude the employee's suit because she was not a minister, and the dispute did not require the court to opine on religious matters.

Notably, while the ministerial exception did not apply in this case, *Crisitello* reflects a fine balance of First Amendment principles and what a court is required to examine in the context of an employee termination within a religious institution. The employee in that case was undisputedly terminated for violating a religious tenet, but the court nevertheless permitted her to litigate her discrimination claims because she asserted the church was treating her differently than other unmarried employees who violated the church's code of

ethics, which the court found to be purely a secular issue. Therefore, pursuant to this case, the mere fact that a religious institution terminates an employee for reasons relating to ecclesiastical matters may not be sufficient to avoid liability for discrimination. Indeed, *Crisitello* and *McKelvey* indicate that a court may not apply the ministerial exception, even in a case involving a minister, when purely secular issues are involved and the propriety of the church's decision-making process is not under any scrutiny.

## Conclusion

Overall, the ministerial exception protects religious institutions from discrimination suits *in some circumstances*. The religion clauses of the First Amendment provide religious institutions with unfettered discretion in deciding ecclesiastical matters, prohibiting courts from getting too entangled in religious questions. Indeed, religious institutions are afforded authority to choose their ministers, and courts may not require reinstatement of a former minister. Therefore, religious institutions are free to discriminate when hiring or firing their ministers, which may include a lay employee with some religious-based job duties, so long as the case cannot be adjudicated on a purely secular basis.

That being said, however, religious institutions do not enjoy blanket immunity. As an initial matter, the ministerial exception only applies to employees classified as ministers. While the courts have not adopted a rigid formula to determine who is a minister, ministers must generally serve some religious purpose to the religious institution. Further, as reflected by the decisions described above, a court is permitted to adjudicate an employment claim involving religious institutions and its employees when the claim does not "require an impermissible inquiry into the propriety of a decision of core ecclesiastical concern, a decision, in other words, where the dispute is truly religious."[18] Importantly, based on recent case law, it is unlikely a religious institution would enjoy legal immunity in defending against a Title VII or NJLAD harassment claim brought by a minister, because presumably the religious ideology at issue offers no religious justification for harassment.[19] Recent case law also suggests that terminating an individual for violating religious tenets may not automatically shield the religious institution from potential liability.[20]

In sum, the application of the ministerial exception is a fact-sensitive inquiry and depends upon the nature of the claims asserted by the employee and the existence of any underlying ecclesiastical issues. ⚖

## Endnotes

1. While many federal courts and states have held sexual orientation to be a protected characteristic under Title VII and similar state law, this issue is not yet settled in all jurisdictions, particularly in light of the Department of Justice's recent stance that sexual orientation is not protected by Title VII. On April 22 of this year, the United States Supreme Court announced that it will consider this issue in *Bostock v. Clayton County, Georgia; R.G. & G.R. Harris Funeral Homes v. E.E.O.C.*; and *Altitude Express, Inc. v. Zarda*.
2. 565 U.S. 171, 188 (2012).
3. *See McKelvey v. Pierce* 173 N.J. 26 (2002). Pursuant to NJLAD, "it shall not be an unlawful practice...[for a religious organization] in following the tenets of its religion in establishing and utilizing criteria for employment of an employee[.]" N.J.S.A. 10:5-12(1)(a).
4. The scope of this article is limited to federal and state law applicable to the state of New Jersey.
5. 565 U.S. at 184.
6. *Id.* at 188.
7. Docket No. A-0744-16T1, 2017 WL 6347622 (App. Div. Dec. 13, 2017).
8. 903 F.3d 113 (3d Cir. 2018).
9. 290 N.J. Super. 616 (App. Div. 1996).
10. *Id.* at 637.
11. 173 N.J. 26 (2002). Instead of asserting a sexual harassment claim under Title VII, the seminarian instead asserted the alleged harassment constituted a breach of his contract with the church regarding his seminary education. The Court noted that while the matter differed in form from a Title VII action, the alleged underlying conduct was the same. *Id.* at 55. Thus, the same analysis described above would apply to a Title VII sexual harassment claim.
12. *Id.* at 45.
13. *Id.* at 54.
14. *Id.* at 51-52.
15. *Id.*
16. Docket No. A-1294-16T4, 2018 WL 3542871 (App. Div. July 24, 2018).
17. N.J.S.A. 10:5-12(1)(a).
18. *Id.* at 54 (emphasis in original removed).
19. *See generally id.*
20. *Crisitello*, 2014 WL 3542871, at *4-5.