

SUPREME COURT MINISTERIAL EXCEPTION DECISION

By Lee Hornberger, Esq.

INTRODUCTION

This article is a brief review of the United States Supreme Court decision of *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*, 565 US ___ (2012).

The issue in *Hosanna-Tabor* was whether the Establishment and Free Exercise Clauses of the First Amendment, US Const, Am I, bar an employment discrimination lawsuit by a terminated employee or the EEOC when the employer is a religious organization and the employee is one of the group's ministers.

BACKGROUND

Hosanna-Tabor operated a small school offering a "Christ centered education" to kindergarten through eighth grade students. Perich accepted the call to be a teacher at the school. She received a "diploma of vocation" to be a commissioned minister. Perich was listed as a commissioned minister by the Lutheran Church-Missouri Synod. Called teachers can claim a special housing allowance on their income taxes provided they are conducting activities "in the exercise of ministry." A call could be rescinded only for cause and by a supermajority vote of the congregation.

Perich had some medical and disability issues which she requested the school accommodate. After she was not satisfied with the school's response, she threatened to take legal action. In response to this threat the school ultimately voted to rescind Perich's call and discharge Perich.

As grounds for the discharge, the school cited Perich's alleged insubordination and disruptive behavior, as well as the damage she had done

to her working relationship with the school by threatening to take legal action.

DISTRICT COURT

The EEOC sued Hosanna-Tabor. The suit alleged that Perich had been fired in retaliation for threatening to file an ADA lawsuit. The lawsuit sought reinstatement (or front-pay in lieu of reinstatement), and back-pay, compensatory and punitive damages, attorney's fees, and other injunctive relief. Perich intervened in the lawsuit, claiming unlawful retaliation under both the ADA and the Michigan Persons with Disabilities Civil Rights Act, MCL 37.1602(a). The ADA retaliation provision prohibits covered employers from "discriminat[ing] against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge ... under [the ADA]." 42 USC 12203(a).

Hosanna-Tabor moved for summary judgment. Hosanna-Tabor raised the ministerial exception. The ministerial exception is an exception to the application of employment discrimination statutes to religious organizations and their "ministerial" employees.

The Church argued that the lawsuit was barred by the First Amendment. According to the Church, the claims concerned the employment relationship between a religious institution and one of its ministers. Perich was a minister. She had been discharged for a religious reason, i.e. Perich's threat to pursue legal action was inconsistent with the Lutheran Church-Missouri Synod's belief that Christians should not sue Christians in secular courts.

The District Court agreed and granted summary judgment in the Church's favor. 582 F Supp2d 881 (ED Mich 2008). The District Court indicated that "Hosanna-Tabor treated Perich like a minister and held her out to the world as such long before this litigation began." *Id.*

COURT OF APPEALS

The District Court's dismissal of the case was appealed to the Court of Appeals for the Sixth Circuit. Whether or not a sectarian school teacher is properly characterized as a ministerial employee was an issue of first impression before the Sixth Circuit in this case.

The Court of Appeals vacated and remanded, directing the District Court to proceed to the merits of Perich's retaliation claims. 597 F.3d 769 (2010). The Supreme Court granted certiorari. 563 US ___ (2011).

SUPREME COURT

CHIEF JUSTICE ROBERTS UNANIMOUS DECISION

Chief Justice Roberts issued a unanimous decision in *Hosanna-Tabor*. *Hosanna-Tabor* was the Supreme Court's first consideration of the ministerial exception.

The Supreme Court reviewed the history of the Religion Clauses of the First Amendment. The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." US Const, Am I. Both Religion Clauses bar the government from interfering with the decision of a religious group to discharge one of its ministers.

This review started with the Magna Carta in 1215. The first clause of Magna Carta stated that "the English church shall be free, and shall have its rights undiminished

and its liberties unimpaired.”

Based on the history that led to the First Amendment, the Supreme Court stated that the Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious organizations to select their own ministers.

The Court reviewed its First Amendment decisions. The Court’s First Amendment decisions confirm that it is impermissible for the government to contradict a church’s determination of who can act as its ministers.

In *Watson v Jones*, 13 Wall 679 (1872), the Court considered a dispute between antislavery and proslavery factions over who controlled the property of a Presbyterian Church in Kentucky. The General Assembly of the Church had recognized the antislavery faction, and the Supreme Court, applying not the Constitution but a “broad and sound view of the relations of church and state under our system of laws,” declined to question that determination.

In *Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church in N Am*, 344 US 94 (1952), the issue concerned the right to use an Orthodox cathedral. In *Kedroff* the Court held that the issue over the right to use the cathedral was strictly a matter of ecclesiastical government.

Serbian E Orthodox Diocese for United States and Can v Milivojevich, 426 U. S 696 (1976), was a case involving a dispute over control of a Diocese of the Serbian Orthodox Church, including its property and assets. A lawsuit was brought arguing that the Church had not followed its own internal resolution procedures. The Supreme Court held that by inquiring into whether the Church had followed its own procedures, the State

Supreme Court had unconstitutionally undertaken the resolution of religious controversies whose resolution the First Amendment commits exclusively to the ecclesiastical tribunals of the Church.

In *Hosanna-Tabor*, the Supreme Court had the first occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging employment discrimination. The Courts of Appeals had previously had extensive experience with this issue. Since the passage of Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq*, and other employment discrimination laws, the Courts of Appeals had consistently recognized the existence of a “ministerial exception,” grounded in the First Amendment. *E.g. Hollins v Methodist Healthcare, Inc*, 474 F3d 223 (6th Cir 2007). In addition, the Michigan Court of Appeals had previously indicated that the ministerial exception applies to discrimination claims against religious employers in Michigan. *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150; 756 NW2d 483 (2008).

The ministerial exception precludes application of employment discrimination legislation to claims concerning the employment relationship between a religious institution and its ministers. In *Hosanna-Tabor*, the Supreme Court agreed that there is a ministerial exception.

According to Chief Justice Roberts, the *Hosanna-Tabor* case concerned government interference with an internal church decision that affected the faith and mission of the church itself.

The Court held that the ministerial exception is grounded in the Religion Clauses of the First Amendment. The Court then held that the ministerial exception applies in the *Hosanna-Tabor* case.

The Court considered a number of factors. These factors included the formal title given Perich by the Church, the substance reflected in that title, Perich's own use of that title, and the important religious functions she performed for the Church. Based on these factors the Court concluded that Perich was a minister covered by the ministerial exception.

According to the Court, because Perich was a minister within the meaning of the exception, the First Amendment required dismissal of her employment discrimination suit against her religious employer. Requiring the Church to reinstate a minister it did not want would violate the Church's freedom under the Religion Clauses to select its own ministers.

The Court held that the ministerial exception foreclosed an employment discrimination suit brought on behalf of a minister challenging her church's decision to discharge her. The Court expressed no view on whether the ministerial exception bars other types of suits, such as actions by employees alleging breach of contract or tortious conduct by their religious employers.

JUSTICE THOMAS CONCURRENCE

Justice Thomas concurred in the Court's opinion but wrote separately to note that the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister.

JUSTICE ALITO AND KAGAN CONCURRENCE

Justice Alito, with Justice Kagan joining, joined the Court's opinion, but wrote separately to clarify their understanding of the significance of formal ordination and designation as a "minister" in determining whether a religious organization employee

falls within the ministerial exception. According to Justices Alito and Kagan, what matters is that *Hosanna-Tabor* believed that the religious function that the employee performed made it essential that the employee abide by the doctrine of internal dispute resolution, and the civil courts are not in a position to second-guess that assessment. This conclusion rests not on the employee's ordination status or title, but rather on the employee's functional status as the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty guaranteed by the First Amendment.

CONCLUSION

In conclusion, *Hosanna-Tabor* clearly establishes that the ministerial exception is required by the First Amendment. It also establishes that the ministerial exception is to be broadly interpreted to include groups of religious organization employees in addition to ministers and religion teachers. Possibly in order to put together a unanimous decision, *Hosanna-Tabor* does not clarify every aspect of the sweeping First Amendment issues. These unclarified situations include employee actions alleging breach of contract or tortious conduct by their religious employers. Could Perich have brought a *Toussaint* contractual case against the school? Why would a contractual case not be constitutionally foreclosed when a Federal statutory retaliation claim is foreclosed?

Of what "tortious conduct" was the Supreme Court alluding to? Defamation? Assault and battery? Only time will tell. Furthermore, would the tort claim continue but the wrongful discharge claim for being discharged in retaliation for bringing the tort claim not be allowed? In addition, is the discharge of a purely lay secular employee by a religious organization protected by the ministerial exception? What about a teacher who

teaches only purely secular subjects but leads the class in grace before lunch? These are issues to be resolved by future cases.

Lastly, what effect does *Hosanna-Tabor* have on *Ohio Civil Rights Comm'n v Dayton Christian Schools*, 477 US 619 (1986)? In *Ohio Civil Rights Comm'n* the Supreme Court held that although the religious school's First Amendment constitutional claim should eventually be decided on the merits, the Ohio Civil Rights Commission did not violate the school's constitutional rights by investigating the circumstances of the teacher's discharge, "if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Id* at 628.

About the Author

Lee Hornberger is an arbitrator and mediator in Traverse City Michigan. He is a member of the Representative Assembly of the State Bar of Michigan, Chair of the ADR Committee of the Grand Traverse-Leelanau-Antrim Bar Association, and a former President of the Grand Traverse-Leelanau-Antrim Bar Association. He is an arbitrator with AAA, FMCS, FINRA, MERC, NAF, and NFA.

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