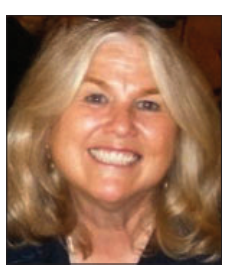
The Ministerial Exception Expands

By Nancy Richards-Stower and Debra Weiss Ford

Editor's note: *This is the 18th N.H. Bar News article co-written by employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). Here they discuss this summer's two U.S. Supreme Court decisions appealed from the Ninth Circuit* (Our Lady of Guadalupe School v. Morrissey-Berru, *and* St. James School v. Biel, as Personal Representative of the Estate of Biel*) consolidated under the name* Our Lady of Guadalupe School v. Morrissey-Berru, *591 U.S. (2020) which expanded the scope of the "ministerial exception" in employment discrimination cases.*



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Nancy: Deb, the "ministerial exception" of *Our Lady of Guadalupe* has zero effect on New Hampshire's anti-discrimination laws because RSA 354-A (already) totally exempts employers with religious affiliations:

Employer "does not include ... [any non-profit] religious association or corporation... Entities claiming to be religious organizations, including religious educational entities, may file a good faith declaration with the human rights commission that the organization is an organization affiliated with, or its operations are in accordance with the doctrine and teaching of a recognized and organized religion to provide evidence of their religious status. (RSA 354-A:2(VII)).

Debra: However, employees of those same New Hampshire religiously-affiliated employers (assuming the threshold number of employees) *are* covered by federal discrimination law unless they fall within the "ministerial exception" expanded by this decision, which involved the claims of two teachers employed by different private Catholic schools in Los Angeles. Morrissey-Berru sued under the Age Discrimination in Employment Act (ADEA); and Biel sued under the Americans with Disabilities Act (ADA). Both teachers had similar contracts which required them to "model and promote" the Catholic "faith and morals." Both taught religion and both prayed with their students. Both taught regular academic courses. Neither was deemed "a minister."

Nancy: Morrissey-Berru taught 5th and 6th grades and all subjects, including religion. She was expected to attend faculty prayer services; she *"was informed that the hiring and retention decisions would be guided by the Catholic mission."* She taught prayers, and was evaluated on whether Catholic values were "infused" through all subject areas. The employer refused to renew her contract, claiming she had difficulty administering new reading/writing programs.

Debra: Biel worked as a 5th grade teacher and her contract was similar, requiring her to teach Catholic religious doctrines and sacraments, and she also prayed with her students. Her employer declined to renew her contract, alleging poor performance after she requested a leave of absence to treat the breast cancer that eventually caused her death.

Nancy: In ruling the teachers could proceed, the Ninth Circuit applied the "ministerial exception" factors of *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012).

Debra: Nance, we wrote all about that in the April 13, 2012 *Bar News*: "The U.S. Supreme Court Affirms a Ministerial Exception to Employment Lawsuits." In brief, the 2012 *Hosanna-Tabor* decision held that the government could not interfere with the hiring, discipline or firing of a minister without impermissible entanglement under both religion clauses of the First Amendment of the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...

Nancy: That *Hosanna-Tabor* plaintiff suf-

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Paul McEachern's Tireless Fight for Equity and Justice

By Susannah Colt

During two out of the four times Paul McEachern ran for governor of New Hampshire, he steadfastly refused to take the pledge of no new taxes. He felt the total reliance on property taxes was an unfair tax system and that it really amounted to an income tax in disguise. "Our homes don't earn money so we have to pay our property taxes from our income," he said during his 2004 campaign.

Paul, who died on August 18 at 82, acknowledged that running for governor without taking the pledge was not a logical decision. "It's an emotional decision," he admitted. "We're pitting town against town again. It's the lowest common denominator of a democracy when government preys on those least able to respond. It makes the entire educational funding system a farce."

Paul's tireless effort to create a more equitable tax system in New Hampshire

will be one of his many legacies.

For me, however, making me into the lawyer I became will be his legacy. In 1989, I was a law school graduate from the University of Dayton who canvassed the state of New Hampshire with my resume because I desperately wanted to move to this beautiful and pristine state. I received a call from Shaines & McEachern in Portsmouth inviting me to interview. I don't know why I got the job, but I am eternally grateful to Paul McEachern and Robert Shaines for taking a chance on me.

Paul took me under his wing and taught me that putting your heart and soul in whatever you do makes you the best person you can be. He had a strong devotion to the law, always guiding me to the statutes and the case law as my guide.

Seven months after I arrived in New Hampshire, I successfully passed the bar and was admitted to the New Hampshire Bar. I went to the swearing-in ceremony in Concord and upon my return I was greeted at the door by Paul and one of our clients, who handed me a bouquet of 12 red roses.

Paul had me working on the rose-

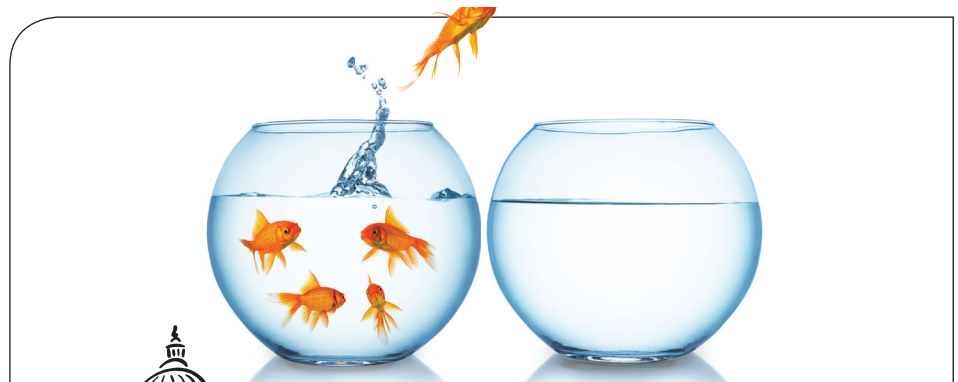
McEACHERN *continued on page 9*

Letter to the Editor

I really enjoyed Attorney Rufro's Letter to the Editor in the *Bar News* August 19, 2020. He made his point very well without rancor, but with great tongue-in-cheek aplomb and excellently researched historical facts.

My only small "disagreement" with said letter was when Attorney Rufro said, "…equal justice under the law…is seen … not in terms of social class (in the USA)." I would remind him and your readers that "social class" is a Marxist concept. In the U.S, we are all of the same "social class" and the "equality under the law" we strive for is equal opportunity-not equal outcome. But that is an argument for another day. Again. An excellent "OP/ED". Thank you.

Robert H. Fryer



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effectiveness of your presentation. It can be distracting when a lawyer is positioned with a bright light or window directly behind the individual. The glare naturally attracts the judge's attention away from the lawyer and toward the light.

4. **Sound matters:** No judge would tolerate audible text alerts in court. No lawyer in the courtroom would think it acceptable to loudly crinkle paper while opposing counsel is making her argument. Yet video presentations commonly include distracting noise: the bing of email or text notifications, a ringing phone, the click of computer keys, a barking dog, the hum of an air conditioner, and the shuffling of paper all occur regularly during hearings. Every video conferencing program has a mute feature. If your space is limited, you need to sort pleadings or other documents near your computer microphone, or there is risk of background noise, use the mute function.
5. **Don't multi-task:** Just because video conferencing allows you to multi-task, it does not mean you should. If you are answering an email during a hearing, you are not paying attention to what your opponent is saying. The best practice for video hearings is—just as in the courtroom—to sit quietly and listen respectfully to your opponent's argument. This minimizes the chance of creating distracting, extraneous noise and keeps you focused on what is happening in your case.

"Just because video conferencing alows you to multi-task, it does not mean you should. If you are answering an email during a hearing, you are not paying attention to what your opponent is saying."

Many lawyers and most judges are eager to return to the regular court operations with live hearings. It is likely, however, that video hearings will continue to have a place in court even after the current crisis passes. Developing some basic etiquette will make you a better lawyer and more effective advocate in our increasingly online world.

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fered from narcolepsy and was a "called teacher," one trained in the religion of her employer, the Lutheran Church-Missouri Synod. She took theological courses, passed oral exams and obtained the endorsement of her local Synod district. Once "called," she received the formal title of "Minister of Religion," even though most of her time was spent on non-religious matters. In contrast, "lay teachers" were not required to have the special training, nor even to be members of the Lutheran Church, even as they shared the same basic duties as the "called teachers". The court limited its ruling to the hiring and firing of the religious leaders and did not *"express [a] view on whether the exception bars other types of suits..."*

Debra: *Hosanna-Tabor* was an easy call. The plaintiff's special training and acceptance by her local Synod was a six-year process; her congregation had to elect her to become a commissioned minister and provided her with a special housing allowance. She taught religion four days a week and led prayers three times a day. She took her students to chapel services and led two services, choosing the liturgy, music and giving a short message based on Bible verses. That most of plaintiff's day was spent on non-religious matters and lay teachers performed the same religious and non-religious tasks she did were not determinative. In the end, it was a case of a minister bringing a discrimination suit upon the church's decision to fire her.

Nancy: The result? The teachers lost because the court found they were covered by the "ministerial exception," even though they were not called ministers, did not consider themselves to be ministers, nor were they trained as ministers. The hook? They were required to carry out important religious duties:

[*W]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.* (Slip. Op., 27-28)

Debra: Subsequently, "who is a minister" produced more litigation, and there likely will be even more, since the 7-2 decision in Our Lady of Guadalupe School held that the "ministerial exception" is broader than the *Hosanna-Tabor* factors. Justice Sotomayor, in her dissent, warned that "thousands of Catholic teachers may lose employment-law protections because of today's outcome."

"The teachers lost because the court found they were covered by the 'ministerial exception,' even though they were not called ministers, did not consider themselves to be ministers, nor were they trained as ministers.