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Labor & Employment Law

The US Supreme Court Affirms A Ministerial Exception to Employment Lawsuits

By: Nancy Richards-Stower and Debra Weiss Ford

Editor's note: This is the tenth Bar News "Debate" between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate), both Fellows of the College of Labor and Employment Lawyers.

Here they discuss the January 11, 2012 United States Supreme Court First Amendment Freedom of Religion case, Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, where the court held that the First Amendment prohibited the courts from hearing cases involving a denomination's hiring and firing of its ministers, including under the Americans with Disabilities Act. Justice Roberts wrote the unanimous opinion with separate concurring opinions by Justices Thomas and Alito (who was joined by Justice Kagan).*

Nancy: Okay. Deb, let me first pick my favorite lines from the decision, you know,to draw in the readers.

Deb: Nance, I hesitate to ask.

Nancy: Actually, I had a hard time choosing, but this is my number one: [A] church's selection of its ministers is unlike an individual's ingestion of peyote."

Deb: What's number two?

Nancy: "The issue before us, however, is not one that can be resolved by a stopwatch."

Deb: Well, we'd best explain! In this case, the Supreme Court recognized for the first time the "ministerial exception" to employment law, after some 40 years of its development and recognition by the lower courts. It was recognized under the First Amendment's Religious clauses, although the EEOC argued that a denomination's defense arose under the freedom of association protection of the First Amendment. The court rejected that argument: "We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers. "

Nancy: Simply put, the decisions of a religious denomination to hire, discipline and/or fire a minister are protected by both of the First Amendment's religious safeguards: the establishment clause and the free exercise clause. And, while I think this was a really, really stupid case to bring, I'm glad it was, because the court was able to narrow some of the confusion in the lower courts.

Deb: The facts were fairly simple. A Lutheran church hired Cheryl Perich, a lay teacher, to teach kindergarten and, later, fourth-grade subjects, including math, language, social studies, gym, art and music, as well as a religion class four days a week in its church school. Over a six-year period, Perich took religious training courses and became a "called (by God)" teacher. Lay and called teachers performed the same duties, but lay teachers were hired only when there weren't any available called teachers. Perich was designated a commissioned minister, and in addition to teaching, she led prayers and devotional exercises and took her students to chapel, and twice a year, led the chapel services.

Nancy: Then she developed narcolepsy (the sleep disorder) and went out on disability leave during the 2004-5 academic year. When she reported her intent to return in January 2005, the principal said that her slot was filled, and, anyway, he wasn't sure she was ready to return.

Deb: Perich refused to resign or accept a settlement of health insurance premiums, demanded a letter to confirm she had reported to work and disclosed that she and her attorney intended to press her legal rights.

Nancy: That miffed the (earthly) powers-that-be and she was fired for "insubordination and disruptive behavior" and for damaging the working relationship with the School by threatening to take legal action. Legal action (or its threat) violated the Lutheran Church's asserted doctrine of internal dispute resolution. Accordingly, Perich filed with the EEOC, which, inexplicably, used one of its rarely filed agency lawsuits to press her cause, suing under the retaliation provisions of the Americans With Disabilities Act. The facts of the case were weak. It's odd that the EEOC didn't

pick a better case. I wish I could get the EEOC to co-litigate some of my much stronger cases! Having the US government as co-counsel has its benefits.

Deb: I'm glad you've not teamed up with the government in our cases together, Nance! Anyway, I agree that this was a weak case. The District Court granted summary judgment to the School based on the ministerial exception, but the Sixth Circuit vacated and remanded. It noted that many parochial school cases did not apply the ministerial exception to teachers who taught mostly lay subjects, thus focusing on her teaching duties and not Perich's title and calling as "minister." The School's personnel policies included anti-discrimination protections, and the Sixth Circuit ruled that these and the ADA applied to Perich, despite her title. The Supreme Court reversed, supporting the right of a denomination to hire and fire its ministers, regardless of their duties.

Nancy: Before assessing the "is she a minister?" factors, the Supreme Court wandered down the history of church and state, from the Magna Carta in England to the writings of James Madison. In between, there was discussion of the Puritans coming to America to avoid persecution.(I actually visited the prison-now-museum in London known as "The Clink" where the minister who founded my church in Scituate in 1634 had earlier languished for years. That dank, dark dungeon with torture devices, and today's televised and reported horrors of killing and maiming in the name of religion in Africa and the Middle East –and all underscore for me how lucky we are to have this "Freedom of Religion".)

Deb: Yes, and that brings up the "stopwatch" quote.

Nancy: No, let's first talk about the peyote quote!

Deb: O.K. But it was not a tribute to the 60's! Instead, it wasp art of the court's discussion differentiating its prior upholding of a ban on drugs, denying Native Americans immunity from termination in Employment Div., Dept. of Human Resources of Oregon v. Smith. There, the Supreme Court upheld the right of Oregon to deny state unemployment benefits to two members of the Native American Church after it was determined that they had been fired for ingesting peyote, a crime under Oregon law. The courts aid that this did not violate the Free Exercise Clause even thought he peyote had been ingested "for sacramental purposes."

Nancy: That seems hash. I mean harsh. I mean, mean!

Deb: Very funny. The court explained it this way:"[T]his [peyote ban] did not violate the Free Exercise Clause even though the peyote had been ingested for sacramental purposes because the 'right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religious prescribes (or proscribes)'."

Nancy: Then the court noted that while the ADA's prohibition on retaliation was also a valid and neutral law, "a church's selection of its ministers is unlike an individual's ingestion of peyote...Smith involved...regulation of only outward physical acts" whereas this case involves government "interference with an internal church decision that affects the faith and mission of the church itself."

Deb: So what about the stopwatch? The court dashed the EEOC's argument that since Perich spent only a small part of each day (45 minutes) on religious matters, she should not qualify as a minister under the minister's exception:"The issue before us, however, is not one that can be resolved by a stopwatch." The Court's decision addresses only suits brought by ministers and should not be read to include workers who cannot be considered ministers. The decision does not establish a specific framework for identifying who qualifies as a minister. Those determinations will be made on a case-by-case basis.

Nancy: Yup, kind of "we'll know it when we see it", sort of like its test on obscenity, admittedly a strange analogy.(Now, about the "stopwatch", I chuckled when the court acknowledged that a minister does a lot more than just ministry! Over the past 20 years my Unitarian Universalist minister husband has done dump duty, lawn mowing, vacuuming, tree trimming, holiday decorating, Pilgrim-acting, history writing and a myriad of other "lay" tasks, all in addition to his religious responsibilities.) But, lay duties aside, in this case, whether or not Perich should come under the penumbra of "minister" wasn't even close: Perich was held out to be a minister, she was "called" by the congregation as a" Minister of Religion, Commissioned," she worked "according to the word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures", she had to complete college level courses in ministry and pass an oral exam by faculty at a Lutheran College. It took her six years to complete the course work and, the court went on for pages about the religious nature of her job. My favorite? Perich took a housing deduction on her taxes available only to ministers! Taxes, taxes, taxes. They begat an American revolution, helped round up Mafia gangsters and now they help define the

church/state borders. And Oh, they have focused the race to the White House, but I digress...

Deb: Yes, but it is interesting how taxation and its progeny keep popping up in and around the First Amendment. I agree that it is a mystery why the EEOC chose this case to test ADA rights for employees of religious organizations. But it is a good read, and the concurring opinion of Justice Thomas urged that the First Amendment required courts to defer to the religious organization's determination as to who is a minister; and the concurring opinion written by Justice Alito (joined by Justice Kagan) noted that with the diversity of religious groups in the United States, calling this rule a "ministerial exception" is a misnomer. There are no ministers in the Catholic Church or the Jewish religion or the Muslim, Buddhist or Hindu faiths, but their religious leaders would similarly be barred from challenging their dismissals in courts.

Nancy: One related practice pointer for New Hampshire. Our state law, unlike the ADA, Title VII and the ADEA, specifically exempts religious organizations and all their employees, not just the head honchos. See RSA 354-A:2(VII):"Employer'' does not include ...[a] religious association or corporation, if such ...is not organized for private profit, as evidenced by declarations filed with the Internal Revenue Service or for those not recognized by the Internal Revenue Service, those organizations recognized by the New Hampshire secretary of state. 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..."So, for example, by asserting itself to be a religious organization, a Catholic hospital escapes state discrimination claims by its nurses; and religious-affiliated colleges can ban employment of members of the GBLT community (Gay, Bisexual, Lesbian, Transgendered), even though their position descriptions have zero to do with religious doctrine. Further, as GBLT claims are not yet statutorily included in any of the federal laws applicable to private employers, that leaves a big gap in civil rights protection.

Deb: And should that gap be filled by anticipated amendments to Title VII, the ADA and ADEA, it is likely that the prejudice faced by the GBLT community will spark the Supreme Court to revisit the breadth of the First Amendment as it pertains to the protection of the anti-discrimination laws to "lay" employees, especially as the status of even being a member of the GBLT community is forbidden by some religious groups.

Nancy: Regarding future litigation on "who is a minister?", I'll bet that Justice Thomas' viewpoint will prevail, and civil courts will defer to a religious organization's determination.

Deb: Although, Justice Thomas left wiggle room, when he qualified that deference by limiting it to a denomination's "good-faith understanding of who qualifies as its minister."

Nancy: I guess we'll know it when we see it.

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