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Religious entities and communities of faith and their insurance carriers can take heart in pursuing defense judgments after the U.S. Supreme Court acted swiftly and unanimously in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. _____ (2012), affirming the vitality of the religion clauses of the U.S. Constitution.

On Jan. 12, 2012, Chief Justice Roberts issued a unanimous decision recognizing that the First Amendment of the U.S. Constitution requires a "ministerial exception" to employment discrimination suits against a religious entity by that entity's "ministers."

While offering significant protection for employment decisions of religious entities, the decision also leaves room for individual court discretion in applying this defense on the merits. Practitioners seeking the greatest chance of prevailing on this defense on the merits should look to the specific fact circumstances that the Supreme Court cited with approval.

When Is a Teacher a Minister?

Hosanna-Tabor Evangelical Lutheran School hired Cheryl Perich to teach kindergarten as a contract teacher in 1999. The next year, she completed the required theological and religious studies to qualify as a "called" teacher.

Called teachers are regarded by the congregation as having received a vocational call from God, and carry the title of “Minister of Religion, Commissioned.” Such a teacher must affirmatively accept the “call” of the congregation and is hired in preference to lay, or secular, teachers.

Perich taught math, language arts, social studies, science, gym, art, and music using non-religious textbooks. Non-called, lay teachers at the school similarly taught these subjects. However, four days a week for 30 minutes Perich taught a religion class, and she attended chapel with her class once a week for 30 minutes. She led her class in prayer three times a day, and her class engaged in a brief devotional activity each day. Twice a year, she took her turn—with all teachers, lay or called—in leading chapel services.

In June 2004, Perich was diagnosed with narcolepsy and took a leave for the following school year. In January 2005, she told the school she would be cleared to return to work in February. The school, however, decided that her health would not permit her return and notified her that a replacement had already been hired.

Perich and school leaders argued and she threatened to sue, claiming the school would be charged with violating the Americans with Disabilities Act (ADA). Shortly thereafter the congregation rescinded her call and fired her for threatening to sue, which violated a Lutheran religious tenet that members of the faith should resolve their disagreements internally.

Perich filed charges with the Equal Employment Opportunity Commission (EEOC), claiming retaliation under the ADA. A district court ruled that her claim was barred by the “ministerial exception” to federal workplace discrimination law. The Sixth Circuit Court of Appeals, consistent with all other federal courts, recognized the existence of the exception but ruled that Perich could not be treated as a “minister” under that exception because her duties were not primarily involved in the teaching of the faith, and that she had no role in spreading the faith or in church government. The Supreme Court reversed.

Claims and Risk Implications

Analysis of the *Hosanna-Tabor* decision reveals three key points relevant to claims management and risk analysis.

First is a strong affirmation that the Free Exercise and Establishment clauses of the First Amendment still hold vitality in our increasingly secular world. Second, the facts approved of in the decision indicate that the more theologically based an internal decision or action is, the greater the likelihood for a judicial deference to the internal determination. Third, there is likely significant disagreement as to the scope of what a religious employment decision is.

The “ministerial exception” is a doctrine whereby religious institutions are protected from civil interference in decisions regarding the retention of their “ministers.” More specifically, that the government cannot, by virtue of discrimination laws, foist an unwanted minister upon a religious body.

Every lower court examining the issue in the last several decades has accepted the existence of the doctrine in some form. However, numerous conflicts and inconsistencies abound in the variety of decisions and raise many questions: What is a religious entity? Who is a minister? What is the appropriate inquiry to determine these questions? How far can such protection go, and is the basis for the doctrine Constitutional, or statutory?

The Supreme Court answered some of these questions, but by no means all. It left a wide path for years of continued litigation about the appropriate factual circumstances and appropriate degree of deference to religious bodies needed to invoke this protection.

Protecting Religious Decisions

Given what some religious bodies consider an antagonistic view of religious rights by the judiciary, some feared bringing such an issue forward to the Supreme Court. Indeed, the EEOC argued strenuously that the Free Exercise and Establishment clauses could play no role in religious freedom questions once a religious entity “leaves the cloister,” or engages in any way in the secular world, such as by hiring employees. Protection, if any, would have to be found in the Freedom of Association clause.

Clearly, any recognition of such a theory would have signaled weakening protection for any religious question coming before a civil court. However, the Supreme Court unanimously and emphatically affirmed that the religious clauses of the First Amendment “give[s] special solicitude to the rights of religious organizations.”

With the unanimous rejection of this position, as well as the lengthy recitation of the history of religious freedom, this decision can offer comfort to all religious entities that the Supreme Court continues to view religious freedom as a key and central aspect of American jurisprudence, and can offer some continued defense ground in litigation involving claims against religious entities.

It is important to note that the Supreme Court clearly distinguished protection available for internal decisions and outward physical conduct. The Supreme Court cited with approval *Employment Div., Dept. of Human resources of Ore. v. Smith*, 494 U.S. 872 (1990), providing that enforcement of valid and neutral laws of general application does not violate the First Amendment even where they interfere with the exercise of a religious belief or practice (plaintiffs alleged their religious rights were violated when they were discharged for ingesting peyote in a religious ceremony). Thus, practitioners would be wise to examine any potential motions to characterize properly the decision at issue as an internal one.

Emphasizing the inability to impose its judgment of proper ministry on a religious entity, the Supreme Court held that such protection is not limited to reinstatement but to suits for money damages as well, recognizing that a monetary award would operate as a penalty for the termination of an unwanted minister.

Seeking Dismissal of Employment Claims

Litigators and claims managers will note that the Supreme Court identified the ministerial exception as a defense on the merits, not a jurisdictional bar. Thus, a religious defendant seeking to invoke its protections will be required to show some level of evidence to establish that the plaintiff meets the criteria of a minister, given that a minister is not restricted to those who are ordained or whose functions are strictly limited to religious duties. Once this is established, the inquiry is at an end.

But how deep can such an inquiry go before a court entangles itself in the type of doctrinal inquiry the ministerial exception itself is intended to avoid? Given that the Supreme Court chose not to adopt Justice Thomas' concurrence opinion that a religious entity establishing an internally accepted "sincere belief" that the plaintiff is a minister is sufficient, we can expect that the lower courts will exercise their discretion in determining the depth of inquiry, and resulting inconsistencies will abound. Indeed, it is the progeny of *Hosanna-Tabor* that will test this question.

And what are the criteria for determining whether a plaintiff is a minister? The Supreme Court declined to adopt a "rigid formula" to answer this question, once again leaving open significant lower court discretion in filling out the contours of this issue.

Minister Determinations

In the meantime, practitioners and claims professionals are best served by examining the type of factual circumstances the Supreme Court found persuasive in determining that Perich was a minister as well as the factors and reasoning of the Sixth Circuit that the Supreme Court specifically rejected.

The Supreme Court looked to four sets of circumstances in determining that Perich was a minister.

First, the Supreme Court looked to Perich's formal title as a "Minister of Religion, Commissioned," a title conferred after specific training, education, and other requirements. The Supreme Court found this highly persuasive, though not necessarily dispositive in isolation. However, practitioners will certainly want to emphasize any official title within the community of faith that the plaintiff may have.

Second, the Supreme Court looked to the substance of that title and its function within the Lutheran congregation. Factual support that the plaintiff's title has meaning is vital, but functioning in a religiously based duty without such a title may be sufficient.

Third, the Supreme Court looked to Perich's own use of the title, holding herself out as a minister, and availing herself of tax benefits associated with such a position.

Finally, the Supreme Court relied on her position in conveying the church's message as part of the religious education duties she fulfilled. The Supreme Court noted that "as a source of religious instruction, Perich performed an important role in transmitting Lutheran faith to the next generation."

It is this factor that is most likely to be tested out in lower courts, as all teachers in religious schools—and many other types of workers within the faith community, to some degree—play an important role in transmitting faith to the faithful and next generation.

Elephant in the Room

Perhaps the largest hanging chad in the Supreme Court's decision, however, is deliberately avoiding the question of whether the ministerial exception can extend beyond issues of alleged discrimination. The Supreme Court specifically asserted that it need not and was not addressing the issue of applicability to such issues as breach of contract or other tort issues, which certainly means negligent supervision.

If the prospect of a monetary award cannot be allowed to interfere with a ministry decision, can one logically say that a church can face tort liability for its ministry decisions that resulted in harm to third parties?

Addressing this controversial question would clearly fracture the unanimity of the Supreme Court's decision. And indeed, any practitioner in this area is aware of the enormous pressure and weight of opinion that accompanies the issues of negligent supervision in the church. Nonetheless, practitioners may well look to the facts of their individual cases in determining whether such a run could pay off in a defense decision.

Certainly the nagging question of what comprises a "minister" and the level of inquiry and evidentiary proof required to establish that will continue to invite ongoing litigation for the foreseeable future. However, religious entities can be reassured that the protection of their internal processes has not been entirely abandoned in our increasingly secular world.

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Rejecting the Sixth Circuit

In its ruling, the Supreme Court specifically rejected the reasoning of the Sixth Circuit Court of Appeals in the following ways:

K Its finding that Cheryl Perich was not a minister.

K Its failure to consider Perich's title and its functions.

K The fact that lay teachers also performed Perich's functions as being dispositive, when what was more important was the fact that the Church used lay employees only in the absence of called teachers.

K Its overemphasis on the secular duties of Perich, when the issue was really the importance and centrality of her religious functions because even the mostly highly placed minister will perform some secular function.

The lesson here is that practitioners should look to the religious functions the plaintiff actually fulfills, not the additional secular duties that the person may perform.