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Discrimination

High Court's Discrimination Law Exception Expected to Have Little Effect on Providers

Faith-based health care providers may be able to dodge employment discrimination lawsuits under a recent U.S. Supreme Court ruling that the First Amendment bars a fired ministerial employee from recovering on a claim that her termination was discriminatory.

Employment lawyers contacted by Bloomberg BNA, however, cautioned that employers should not be too quick to invoke the ruling in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, U.S., No. 10-553, 1/11/12 (80 U.S.L.W. 950, 1/17/12), as a defense in discrimination cases.

Robert M. Wolff, a shareholder in Littler's Cleveland office, called the ''ministerial exception'' to employment discrimination laws recognized in the case ''a panacea for very little.'' And Donna Ballman, a plaintiffs' attorney in Fort Lauderdale, Fla., said most employees of religiously affiliated health care organizations ''won't be affected'' by the ruling.

Health care employment attorneys nevertheless should familiarize themselves with the decision and the issues it raises, as there are hundreds of hospitals and senior care centers across the United States operated by Roman Catholics, Lutherans, Seventh-day Adventists, and Jewish organizations.

According to the Catholic Health Association website, there are 56 Catholic health care systems in the country, and they employ more than 530,000 full-time and 230,000 part-time workers. Wolff told Bloomberg BNA that medical and nursing schools operated by faith-based organizations also could be affected by the ruling.

First Amendment Right to Fire. In *Hosanna-Tabor*, the Supreme Court held that the First Amendment's free exercise and establishment clauses bar the government from interfering with a religious organization's decision to fire a minister. At issue were discrimination claims filed by the Equal Employment Opportunity Commission (EEOC) on behalf of a teacher, Cheryl Perich, who was terminated from her position at Hosanna-Tabor's school. EEOC argued that Perich was fired in retaliation for threatening to file a discrimination lawsuit against the school under the Americans with Disabilities Act (ADA). Hosanna-Tabor said Perich was a ministerial employee and that she was fired for taking the matter outside the church, which was contrary to church doctrine.

Chief Justice John G. Roberts Jr., who wrote the opinion for the court, explained that, although the court's past decisions have made clear that ''it is impermissible for the government to contradict a church's determination of who can act as its ministers,'' the court had not before ''had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment.''

In contrast, the courts of appeals ''have had extensive experience with this issue,'' Roberts noted. They have ''uniformly recognized the existence of a ministerial exception'' to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other employment discrimination laws, he said. This exception prohibits the application of discrimination laws to claims concerning the employment relationship between a religious institution and its ministers.

The Supreme Court for the first time recognized a constitutional basis for excepting religiously affiliated employers from federal discrimination laws.

The Supreme Court found ''that there is such a ministerial exception, grounded in the First Amendment.'' It said that ''[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision.'' It interferes with a church's internal governance and thus infringes on a church's right to determine who will deliver its message, the court said.

'Unexpected Leap.' The result is consistent with decisions of the appeals courts recognizing a ministerial exception in Title VII cases, Wolff said. In those cases, he said, courts have allowed organizations that were owned, controlled, or operated by religious organizations to limit their hiring, at least as to ministerial employees, to individuals who shared their religious beliefs.

In *Hosanna-Tabor*, however, the court for the first time recognized a constitutional basis for excepting religiously affiliated employers from federal discrimination laws, he said.

The decision creates an ''absolute affirmative defense against a discrimination claim'' brought by an employee who was a religious leader or messenger where the dis-

missal was based the employee's failure to abide by the organization's religious tenets, Wolff said.

Ballman called the decision an ''unexpected leap.'' The state of the law went from ''it's ok [for employers] to prefer to hire'' members of the same religion to an ''absolute right to discriminate'' against ministerial employees on grounds that otherwise would be prohibited by federal law, she said.

Both attorneys, however, said the decision appears to be very narrow, and likely will be further limited and refined by lower courts in the years to come, as it leaves many open questions.

For now, Ballman said, ''don't panic.'' Employees of faith-based health care providers should proceed as usual when they believe the employer has overstepped, and Wolff said the employer should not be ''too bullish'' about raising the exception as a defense to a discrimination claim. It likely will be some time, they said, before the parameters of the ministerial exception are set.

Who Is 'Ministerial Employee'? One of the biggest issues at this point, Wolff and Ballman said, involves determining who is a ministerial employee. Even the Supreme Court justices disagreed on this issue.

Overruling the U.S. Court of Appeals for the Sixth Circuit, the justices agreed that Perich was a ministerial employee because she had been ''called'' to be a teacher of the faith, she had the title of ''minister,'' and she held herself out to be a minister by, for example, taking a deduction on her federal income tax return available only to ministers. The fact that Perich performed secular duties as a teacher was relevant, but not dispositive, the court said.

In a concurring opinion, Justice Clarence Thomas argued that courts ''should defer to a religious organization's good-faith understanding of who qualifies as its minister'' and apply the ministerial exception to any such employee. This definition, which would not question an employer's claim that an employee was a minister, ''opens the door for a lot of different scenarios,'' Wolff said.

Justice Samuel A. Alito Jr., joined by Justice Elena Kagan, advocated a different approach. Alito said ''it would be a mistake'' to tie the definition of a ministerial employee to the title of ''minister'' or the concept of ordination. Rather, he said, the exception should apply to any employee ''who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.''

Courts using this definition, Wolff said, likely would apply the ministerial exception when the employee bringing the discrimination suit served as an important ''instrument'' or ''messenger'' of the faith for the employer. Wolff said he would expect courts to look at the employee's ''mission'' to determine whether he or she held that role.

Within a faith-based hospital, for example, a ''good argument'' could be made that the exception would apply to hospital employees who have very faith-centered roles, such as hospital chaplains, he said. Nurses and employed physicians could be considered ministers for the purpose of the exception if they acted as messengers for the faith or their regular duties included praying with or counseling patients on faith-based matters, he said.

The exception more likely would apply in an educational setting such as a nursing or medical school, Wolff said, where the employer filled a faith-based role as well as a secular one. A school in which the education provided is intertwined with a religious purpose may be more likely to be able to invoke the ministerial exception, he said.

'Vague' Definition. Ballman told Bloomberg BNA that the term ''ministerial employee'' could be construed broadly to include any employee who could ''vaguely be said to be performing ministerial duties.''

Ballman said she sees issues arising over whether an employee could be ''involuntarily designated'' to be a minister. That is, she said, could the employer raise the ministerial employee defense in a lawsuit brought by an employee who never considered himself to be a ''minister?''

Ballman also questioned whether the exception would apply to a person whose ''extracurricular'' activities included faith-based conduct, such as an employee who led a prayer group either on or off the employer's premises. An employee called on to advise patients on religious matters, though not technically a minister, also could fall within the exception depending on how broadly a court chose to define ''ministerial employee,'' she said.

What Is 'Religious Organization'? Another issue left for future cases is whether the employer qualifies as a religious organization entitled to raise the ministerial employee defense. Here, the lower courts can take guidance from cases construing Title VII's ministerial exception, Wolff said.

Section 702 of Title VII, 24 U.S.C. § 2000e-1(a), provides that ''religious organizations'' can lawfully prefer co-religionists in hiring and other employment decisions. Case law construing this section, Wolff said, holds that it applies only to organizations whose ''purpose and character are primarily religious.''

EEOC guidelines list factors that are relevant to determining whether an employer is a religious organization for purposes of the Title VII exception, Wolff said. These factors include:

- whether the employer has tax-exempt or nonprofit status;
- whether the employer's day-to-day operations are religious;
- whether the employer is owned, affiliated with, or financially supported by a formally religious entity, such as a church;
- whether members of a formally religious entity serve on the employer's board of directors; and
- whether the employer regularly includes prayer or other forms of worship in its activities.

Wolff said courts have held that employers ''permeated with religious overtones'' qualified for Title VII's ministerial exception.

Wolff and Ballman both said they think it unlikely, but possible, that faith-based hospitals would be categorized as religious organizations based on these factors. Hospitals tend to be run the same way as other big corporations, Ballman said. She added, however, that it ''absolutely could happen'' that a faith-based hospital would try to take advantage of the ministerial excep-

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tion. Wolff agreed, saying that he did not ''think we'll see too many hospitals able to take advantage of the exception.'' On the other hand, he said, it depends on how broadly lower courts interpret the exception.

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The Supreme Court's opinion in the Hosanna-Tabor case is at http://op.bna.com/hl.nsf/r?Open=mapi-8rwlw3.